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THE FOREIGN CORRUPT PRACTICES ACT OF 1977: A PRIVATE RIGHT OF ACTION?

I. INTRODUCTION

The Foreign Corrupt Practices Act of 1977[1] (the Act) was passed as a consequence of revelations of foreign and domestic bribes, kickbacks, political payoffs and other questionable financial practices by corporations throughout the past several years.[2] The Act requires issuers of securities subject to the registration and reporting provisions of the Securities Exchange Act of 1934 to comply with specific accounting standards.[3] In addition, the Act provides for civil and criminal liability when an issuer[4] or any domestic concern[5] not an issuer[6] uses the mails or any instrumentality of interstate commerce in furtherance of certain payments to foreign officials.

The Act, at the request of the Securities and Exchange Commission, contains controversial standards[7] similar to regulations previously proposed by the Commission.[8] The accounting provision requires issuers, but not domestic concerns, to keep books, records, and accounts which accurately reflect the transactions and dispositions of the issuer's assets. The issuer is also required to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances of the following: (1) that transactions are executed in accordance with management's authoriza-

1. 15 U.S.C. §§ 78n, 78dd, 78dd-2, 78ff (Supp. I 1977) (amending scattered sections of Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976)).

2. Herlihy & Levine, *Illicit Corporate Payments,* 8 L. & POL'Y IN INT'L BUS. 547-48 (1976).

3. 15 U.S.C. § 78m (1976 & Supp. I 1977).

4. *Id.* § 78dd-1 (Supp. I 1977).

5. *Id.* § 78dd-2 (Supp. I 1977). This section reads in part: (d) As used in this section:

> (1) The term "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

6. *Id.*

7. *See* 15 U.S.C. § 78m (1976 & Supp. 1977).

8. 41 Fed. Reg. 47,300 (1976).

tion, (2) that transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets, (3) that access to assets is permitted only in accordance with management's authorization, and (4) that the recorded accountability for assets is compared with the existing assets at reasonable intervals and that appropriate action is taken with respect to any differences.

The other major provisions of the Act prohibit corporate bribery. These sections provide that issuers[9] and domestic concerns,[10] or officers, directors, employers, agents, or stockholders acting on behalf of any issuer or domestic concern, are prohibited from bribing a foreign official, a foreign political party, or an intermediary of either for purposes of influencing the official or political party in their official capacities, or inducing them to influence a foreign government in order to gain business advantage.

Responsibility for investigation and civil enforcement pertaining to issuers is assigned to the SEC;[11] when involving domestic concerns these responsibilities are assigned to the Department of Justice.[12] The Justice Department also has full responsibility for criminal prosecutions under the Act.[13]

The Act does not expressly provide for a private right of action. The SEC asserts that an implied private right of action exists. This Note will set out the opposing viewpoints and examine the general development and trend of implied private rights of action under federal law. It will also review the legislative history of the Act and the rules applicable to the construction of that legislative history.

II. THE SECURITIES AND EXCHANGE COMMISSION POSITION: AN IMPLIED PRIVATE RIGHT OF ACTION

In February of 1978, the SEC issued a notification of enactment of the Foreign Corrupt Practices Act containing the following statement: "The legislative history of the Act . . . contemplates that private rights of action properly could be implied under the Act on behalf of persons who suffer injury as a result of prohibited

9. 15 U.S.C. § 78dd-1 (Supp. I 1977).
10. *Id.* § 78dd-2 (Supp. I 1977).
11. *See id.* § 78u(d) (1976).
12. *Id.* § 78dd-2 (Supp. I 1977).
13. *See id.* § 78u(c) (1976).

corporate bribery."[14] This notification release prompted comment[15] to which the SEC responded with an opinion outlining the reasoning underlying its position.[16] The SEC opinion relies heavily on the legislative history of S. 3379, introduced in the 94th Congress,[17] from which two provisions creating private rights of action for persons injured by the payment of bribes were deleted. One provision was viewed as duplicating and possibly confusing existing remedies available to shareholders; the other was deemed meritorious but ambiguous.

In addition, the opinion cites testimony given at hearings on the Act during the 95th Congress.[18] Chairman of the SEC Harold M. Williams, who played a large role in developing the Senate version of the legislation, testified at the hearings in a manner that assumed a private right.[19] The opinion cites Supreme Court cases giving particular weight to the views of an administrative agency when the administrators participated in drafting the legislation and directly made their views known to Congress in committee hearings.[20]

In reference to the legislative history, the opinion cites a single statement in the House report in support of a private right of action.[21] The opinion dismisses as unimportant statements by Conference Committee members made on the floor of the Senate[22] and House[23] denying that such a right was intended.[24] The SEC asserts that the promoters of the bill favored a private right of action, and

14. 43 Fed. Reg. 7752 (1978).

15. Letter from R. Garcia of the Emergency Committee for American Trade to the S.E.C. (March 2, 1978).

16. [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,701.

17. S. REP. No. 1031, 94th Cong., 2d Sess. 15 (1976).

18. *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. (1977) [hereinafter cited as *Hearings*].

19. *Id.* at 198, 219, 221.

20. Zuber v. Allen, 396 U.S. 168, 192 (1969); United States v. American Trucking Assn's, Inc., 310 U.S. 534, 549 (1940).

21. H.R. REP. No. 640, 95th Cong., 1st Sess. 10 (1977).

22. 123 CONG. REC. S19401 (daily ed. Dec. 6, 1977) (remarks of Sen. Tower).

23. *Id.* at H12825 (daily ed. Dec. 7, 1977) (remarks of Rep. Devine).

24. The Commisson reasoned that the probative value of the statements was diminished by the failure of Senator John G. Tower and Congressman Samuel L. Devine to persuade the conferees to reflect their views in the Conference Report.

that the Supreme Court gives greater weight to sponsors' views than to the views of the minority.[25]

The opinion points to Supreme Court cases which recognize that private rights of action may be implied in favor of intended beneficiaries of a statute when necessary to implement the statute's underlying purposes.[26] It is the SEC's position that shareholders and competitors are among the intended beneficiaries of the Act.[27]

In addition, the opinion finds private rights of action a necessary supplement to enforcement actions in order to carry out the congressional purpose due to the limited resources of the SEC and the Department of Justice.[28]

III. OPPOSING VIEW: NO IMPLIED RIGHT OF ACTION

Assistant Counsel Howard Menell, manager of the bill for Senator Harrison Williams, one of the Act's[29] sponsors, stated that it was the Senate Committee's intent that there be no implied private right of action under the Act. The reasons given were: (1) the SEC has ample authority to enforce the Act, therefore a private right to fulfill the purposes of the Act is unnecessary; (2) it would be difficult to determine which private plaintiffs should have such a right; and (3) the Committee was worried about a possible resulting flood of litigation. For example, shareholders might allege economic harm to themselves or the corporation arising from costly lawsuits, cancellation of contracts, and lowered stock value as a result of the corporation's foreign bribery. Competitors could complain of loss of business to the bribing company or increased costs arising from efforts to gain or retain business.

Menell stated that the members who favored a private right of

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25. *See* NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 66 (1964); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288, *rehearing denied,* 351 U.S. 980 (1956).

26. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); J.I. Case Co. v. Borak, 377 U.S. 426, 426 (1964).

27. Investors because they might suffer serious adverse consequences if confidence in the financial integrity of corporations is impaired by bribery: the company's image could be damaged, costly lawsuits could result, contracts could be cancelled, and valuable overseas assets could be appropriated. Competitors because foreign corporate bribes affect the domestic climate when bribery is substituted for healthy competition: efficiency and ethical standards suffer. [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,701, at 80,806 nn. 18 & 19.

28. *Id.* at 80,806.

29. The Senate Committee on Banking, Housing and Urban Affairs introduced the Senate version of the anti-bribery legislation.

action agreed that it would have to be expressly provided for in the Act because the trend of Supreme Court cases has been to narrow the implied rights of private plaintiffs. The Committee decided not to provide a private right of action after a discussion of the section dealing with accounting controls. They found the section difficult to interpret and stated it would be misused by litigants, leading to contradictory and confusing court interpretations of the Act.

Future developments concerning the existence of a private right of action will take place in the courts. The remainder of this Note will be devoted to an examination of the bases for evaluating what the outcome might be.

IV. Development and Trend of Implied Private Rights of Action Under Federal Statutes

Corporations are creatures of state law.[30] Thus, derivative and individual actions brought by shareholders against corportions and/or their officers and directors were once brought only under state law.

The Securities Act of 1933 and the Securities Exchange Act of 1934, however, provided numerous express civil remedies to private plaintiffs.[31] In 1946, a federal district court held that there was an implied private right of action under Section 10(b) of the 1934 Act and Rule 105-5 of the Securities and Exchange Commission, signalling a shift from private suits brought under state law to wide use of the anti-fraud provisions of Rule 105-5 by private plaintiffs.[32] Twenty-five years later, the Supreme Court confirmed that such a cause of action existed.[33]

Further expansion of implied private rights of action came in 1964. The Supreme Court, in *J. I. Case Co. v. Borak,*[34] allowed private enforcement of § 14(a),[35] the proxies provision of the 1934 Act, by a shareholder in a derivative action. The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deception or inadequate disclo-

30. Cort v. Ash, 422 U.S. 66, 84 (1975).

31. *See, e.g.,* Securities Act of 1933 §§ 11, 12, 15, 15 U.S.C. §§ 77k, 771, 77n (1976); at Securities Exchange Act of 1934 §§ 9, 16, 18, 20, 15 U.S.C. §§ 78i, 78p, 78r, 78t (1976).

32. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

33. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971).

34. 377 U.S. 426 (1964).

35. 15 U.S.C. § 78n (1976).

sure in proxy solicitation.[36]

The plaintiff in *Borak* sought to undo a merger between Case and another corporation. She wished to avail herself of federal law because Wisconsin law required posting of a $75,000 bond in cases brought under state law.

One important aspect of *Borak* is that the Court allowed a private suit under federal law in a case where the shareholder's state-law court alleged a breach of the director's fiduciary duty to the stockholders—an area of corporate regulation normally subject to control by the states.[37] The Court reasoned that allowing state law to control cases involving deceptive proxy statements would nullify the federal law because the law of the state might attach no responsibility to the use of misleading proxy statements. The whole purpose of the law could thus be frustrated. The Court noted further that state courts' requirements such as separate suits and posting of bond as security for expenses might make effective relief impossible.

The Court found both private direct and derivative actions proper in order to carry out one of the 1934 Act's chief purposes—the protection of investors. The Court further found that private enforcement of the proxy rules is a necessary supplement to Commission action.

In 1970, the Supreme Court expanded *Borak* in *Mills v. Electric Auto-Lite Co.*[38] by adopting a test allowing plaintiffs to prove causation more easily. This case also involved defective proxies. The Court further encouraged private suits by awarding attorney's fees—ordinarily not recoverable as costs—because the fees were incurred for the benefit of the corporation and the other shareholders.

Other cases, however, especially recent ones, have negatively affected rights of private litigants under federal statutes. The Supreme Court, in *Blue Chip Stamps v. Manor Drug Stores,*[39] refused to expand the plaintiff class to potential purchasers, noting that their claims would be purely speculative. *Blue Chip* leaves non-shareholders who suffered harm because they decided not to pur-

36. 377 U.S. at 431.

37. "Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law . . . ." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949).

38. 396 U.S. 375 (1970).

39. 421 U.S. 723 (1975).

chase or sell because of an unduly gloomy representation or the omission of favorble material without a federal law remedy; shareholders, on the other hand, may frequently be able to circumvent the limitation through bringing a derivative action on behalf of the corporate issuer if the latter is itself a purchaser or seller of securities.

The Court's decision not to broaden the corporation's civil liability was based on policy grounds, the Court reasoning that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[40] Elaborating on that theory, the Court discussed the potential disruption of business activities by nuisance of "strike" suits and the threat of extensive discovery. In addition, the Court was concerned that bystanders using hindsight would seek to recover substantial damages based only on their own testimony as proof of harm suffered.

Blue Chip was followed in rapid succession by *Cort v. Ash*[41] and *Ernst & Ernst v. Hochfelder,*[42] both of which potentially restrict the rights of private plaintiffs in suits under federal statutes.

In *Cort v. Ash,* the issue was whether a private cause of action for damages is to be implied in favor of a corporate shareholder under § 610 of the Federal Election Campaign Act,[43] a statute making illegal a corporate contribution in connection with a Presidential election. The shareholder also invoked pendent jurisdiction for a claim under Delaware law, alleging that the expenditures of corporate funds by a corporate director were *ultra vires* and a breach of fiduciary duty to the corporation.

The Court, in holding a private cause of action unavailable under § 610, set out the following standards for determining whether a private remedy is implicit in a statute not expressly providing one.

1. Is the plaintiff one of the class for whose especial benefit the statute was enacted?
2. Is there any indication of legislative intent, explicit or implicit, either to create or deny such a remedy?
3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

40. *Id.* at 739.
41. 422 U.S. 66 (1975).
42. 425 U.S. 185 (1976).
43. Act of June 25, 1948, ch. 645, 62 Stat. 723 (repealed 1976).

> 4. Is the cause of action traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[44]

The Court, in applying the standards, first looks to the purposes of the Act and finds that intent to protect corporate shareholders was at best subsidiary—the primary purpose being the necessity for destroying the influence over elections which corporations exercised through financial control.

In step two, the Court examined the legislative history of the Campaign Act and determined that the legislature was not primarily concerned with the internal relations between the corporations and their shareholders, stating that, "in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff, . . . or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard . . . ."[45] The Court states it is dubious

> whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, [and] the fact that there is no suggestion at all that § 610 may give rise to a suit for damages or, indeed, to any civil cause of action, reinforces the conclusion that the expectation, if any, was that the relationship between corporations and their stockholders would continue to be entrusted to state law.[46]

In step three, the Court distinguished *Borak*'s mandate that courts be alert to provide such remedies as are necessary to make effective the congressional purpose, stating that the remedy sought in this instance would not aid the primary congressional goal of preventing corporate influence on a federal election. *Borak* permits federal law to intrude into areas normally reserved to state regulation of corporations only where the purpose of the federal law might be frustrated by contrary state law.

Finally, the Court relegated the plaintiff to whatever remedy is afforded by state law, noting that in addition to the *ultra vires* action, the use of corporate funds in violation of federal law, under the law of some states, may give rise to a cause of action for breach of fiduciary duty.

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44. 422 U.S. at 78.
45. *Id.* at 82.
46. *Id.* at 82-84.

In *Hochfelder,* decided soon after *Cort v. Ash,* the defendant accounting firm was charged with aiding and abetting a fraud practiced upon securities purchaser by its negligent failure to conduct an audit thorough enough to have disclosed the fraud. The Supreme Court held that a private action for damages will not lie under Section 10(b) in the absence of an allegation of intent to deceive. The Court indicated that scienter might include reckless conduct,[47] but is unknown whether courts will interpret *Hochfelder* as requiring a lesser standard than traditional intent. The Court's ruling ignored the case law trend toward a standard somewhere between negligence and intent.[48] The decision not only negatively affected private plaintiffs under Rule 10b-5, but also raised the spectre that SEC enforcement rights may have been narrowed as well; it is unclear whether injunctive actions brought by the SEC will now have to meet the tougher standard.[49]

The groundwork is now laid for an examination of the legislative history underlying the Foreign Corrupt Practices Act.

V. Legislative History

The Act arose out of the need for legislation to curb corporate bribery. The problem first became apparent in 1973 when, as a result of information uncovered by the Watergate Special Prosecutor, the SEC became aware of a pattern of corporate conduct involving illegal corporate payments, both domestic and foreign.[50]

In 1976, the 94th Congress received at least six legislative proposals addressed to the issue of improper foreign payments.[51] S. 3418, recommended by the SEC, required issuers to maintain strict accounting standards and prohibited the knowing falsification of accounting records. It was later incorporated into S. 3664, along with a criminalization provision prohibiting bribes. Neither S. 3664, nor S. 3418, provided a private right of action. S. 3379, another in the series of legislative proposals, contained disclosure provisions, provisions relating to corporate governance, and a pri-

47. 425 U.S. at 193 n.12.
48. 22 Vill. L. Rev. 1238 (1977).
49. *Id.* at 1249.
50. *Hearings, supra* note 18, at 214.
51. *Id.* at 91. These proposals were: S.3133, 94th Cong., 2d Sess. (1976); S.3418, 94th Cong., 2d Sess. (1976); S.3664, 94th Cong., 2d Sess. (1976); S.3379, 94th Cong., 2d Sess. (1976); S.3741, 94th Cong., 2d Sess. (1976); H.R. 15149, 94th Cong., 2d Sess. (1976).

vate triple damages remedy, but lacked the accounting and auditing requirements.

In its discussion of the various bills, the Senate Committee on Banking, Housing and Urban Affairs noted that S. 3379 originally had included two provisions creating new private rights of action for persons injured by the payment of bribes.[52] The Committee deleted the provision in section 9 of S. 3379 creating a new shareholder's right of action, largely because the Committee believed duplication and confusion concerning existing remedies available to the shareholders might result.

The Committee found merit in section 10, which proposed a private cause of action for any person who could establish actual damage to his business resulting from illegal payments made by a competitor, but rejected it because it "created ambiguities." The Committee further stated that its decisions concerning private causes of action for competitive damage and for violation of securities laws were not intended to affect existing law concerning private causes of action under present federal securities law.

Choosing from among the alternatives, the Committee favorably reported S. 3664, expressing its purpose as "a national policy against corporate bribery that transcends the narrower objective of adequately disclosing material information to the investor."[53]

The Committee stated that under S. 3664 responsible officials who had knowledge of bribery and approved the practice could be prosecuted under the concepts of aiding and abetting, and joint participation, in the same manner as they previously have been both in SEC enforcement actions and in private actions brought under the securities laws. The Senate, by a unanimous vote of 86-0, passed S. 3664.[54] The House Committee on Interstate and Foreign Commerce held hearings on the House counterpart of S. 3664, but the House failed to complete work on the legislation before its adjournment.

Soon after the 95th Congress convened in 1977, Senators Proxmire and Williams introduced S. 305. Title I of the bill was identical to S. 3664.[55]

In the Senate report, the Committee discussed the provision

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52. *See* note 17 *supra.*

53. *Id.* at 5.

54. S. REP. No. 114, 95th Cong., 1st Sess. 2, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4099.

55. *Id.*

(later deleted) prohibiting knowing falsificaton of accounting records, and concluded that the provision is not intended to make conduct which is merely negligent unlawful.[56] The Committee noted, however, that the knowledge required is that the defendant be aware that he is committing the act which is false—not that he know that his conduct is illegal.[56] The Commission's concern regarding the proper standard of intent is reflected in the House report as well, and it is possible that both committees' attitudes toward a private right of action were influenced by this concern, as will be discussed later.

There is no discussion of a private right of action in the legislative history of S. 305. The Committee did note the importance of an adequate system of internal accounting controls to shareholders and potential investors. To find an intent to create an implied private right of action under *Cort v. Ash,* however, it is necessary to show that the primary purpose of the Act is to protect investors. It is clear from the discussion that follows concerning the need for the legislation that such is not the case.

Commenting on the need for the legislation, the Committee pointed to the adverse effect corporate bribery has on foreign relations, the image of American democracy, confidence in the financial integrity of corporations, the efficient functioning of our capital markets, the stability of overseas business, domestic competitive climate, and ultimately, on public confidence in the integrity of the United States business system. The Committee's concern focused almost solely on fostering a favorable business climate.

H.R. 3815, the House counterpart of S. 305, was similar to S. 305 in its enforcement provisions but lacked the accounting requirements. The House report[57] on H.R. 3815 contains this reference to a private right of action:

> The Committee intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery. The recognition of such a private cause [of action] would enhance the deterrent effect of this legislation and provide a necessary supplement to the enforcement efforts of the Commission and the Department of Justice.[58]

56. *Id.* at 9, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 4107.
57. H.R. REP. No. 640, 95th Cong., 1st Sess. (1977).
58. *Id.* at 10.

The House committee viewed the legislation as necessary for generally the same reasons given by the Senate Committee. The House report made no mention of the need to protect investors.

Whereas the Senate bill included an intent standard, the House committee stated emphatically that it intended no requirement of proof of intent in a Commission enforcement action brought under this bill or under any of the federal securities laws. The committee was referring to the issue left open by *Hochfelder*—whether proof of scienter would be required in Commisson enforcement of Rule 10b-5. The problem concerning the standard of intent appeared to be of great concern to both committees. A major consideration may have been that while a negligence standard would aid SEC enforcement, it might also expose companies to an intolerable amount of private litigation. Conversely, an intent standard might inhibit SEC enforcement.

The minority members had reservations about the bill. They objected to, among other things, the split enforcement responsibility, preferring total Justice Department control. They reasoned that the investigation of illegal payoffs to foreign officials is only indirectly related to the SEC's primary responsibility—the protection of investors.

During House hearings concerning H.R. 3815,[59] testimony was received from Secretary of the Treasury Blumenthal, Chairman of the Securities and Exchange Commission Williams, public interest groups, the National Association of Manufacturers, and the bar. A committee of the New York City Bar Association submitted a lengthy statement questioning the need for the legislation.[60] The bar opposed the accounting requirements and criminal penalties, favoring, at most, a disclosure system. The bar committee viewed the disclosure approach as sufficient because both disclosure and failure to disclose foreign bribes could give rise to litigation, including shareholder suits.

The bar committee expressed grave reservations about the inclusion of accounting requirements, stating that "the guideline-like broadness of the statutory language makes it difficult to predict what civil or criminal penalties would be imposed in any given situation."[61] In addition, the bar committee noted that the accounting requirements intimate that the SEC is seeking to im-

59. *Hearings, supra* note 18.
60. *Id.* at 53.
61. *Id.* at 96.

prove internal corporate operational performance, which raises serious questions about the propriety of federal regulation in an area traditionally reserved for the states. Furthermore, it "creates the possibility that the SEC would be diverted from its traditional objectives."[62]

In its testimony, the SEC took the position that the direct prohibition against certain payments to foreign officials contained in H.R. 3815 was "designed to proscribe . . . conduct which is not supported in our society and [which] tends to erode not only ethical standards but the free, competitive and effective marketplace. . . ."[63] The SEC viewed power to enforce the prohibitions as an expansion of its mandate—at one time having expressed concern over whether it should be responsible for enforcement, even concerning its own registrants, since the prohibitions seem to arise from congressional objectives not strictly related to investor protection.

The SEC was willing to accept that mandate, but strongly urged the inclusion of corporate accounting controls similar to those in S. 305. According to the SEC, these controls would furnish the Commission and private plaintiffs in implicit actions with "potent new tools" to use against those who conceal the manner in which corporate funds have been utilized.

In reference to the accounting controls, the Commission opposed the requirement of showing that any deception of auditors or falsification of accounting records was knowingly committed. The Commisson noted that S. 305 contained an intent standard, but expressed the understanding that the Senate Banking Committee's report would clearly state that the knowledge required was merely that the defendant was aware he was committing the act—not that he knew the act was unlawful.

The SEC alone wanted a less stringent standard of proof of state of mind. The Federal Regulation of Securities Commiteee of the American Bar Association[64] opposed the accounting provisions, fearing that the guidelines specified in the bill would be unfair when applied as a standard for federal civil and criminal penalties. The Bar Committee criticized the provision as not requiring an intent to do an improper act and as giving rise to a "dangerously

62. *Id.* at 128.
63. *Id.* at 196.
64. *Id.* at 249.

broad area of potential liability with undefined boundaries . . . ."[65]

The bill reported out by the Conference Committee[66] contained two major sections under Title I: the Senate-sponsored provisions requiring issuers subject to the jurisdiction of the SEC to maintain accurate books, records and accounts, and internal accounting controls; and the provisions contained in both the Senate and House bills prohibiting certain payments to foreign officials. The accounting section was amended to delete the provision prohibiting knowing falsification of accounting records and knowing misstatements to accountants. "Although these provisions were supportive of the basic accounting section, the use of the 'knowingly' standard has become involved in an issue never intended to be raised or resolved by the Senate bill—namely, whether or not the inclusion or deletion of the word 'knowingly' would or would not affirm, expand, or overrule the decision of the Supreme Court in *Ernst & Ernst v. Hochfelder* (425 U.S. 185)."[67] Thus, the Conference Committee excised even the requirement of proof of intent to do the act.

Responsibility for enforcement of the Act was divided between the SEC and the Justice Department, with the Justice Department having full control over domestic concerns, and control over criminal prosecutions of issuers.

When the Conference Report was presented, Senator Tower stated: "The House report states it is expected that the courts will recognize implied private rights of action under the criminalization sections of the bill. This question was not considered in the Senate . . . ."[68]

In the House, Representative Staggers explained that the final bill contained a provision not in the House bill, which required companies filing with the SEC to keep accurate records and maintain accounting controls. Representative Devine informed the body that "the conferees did not intend to create a private right of action."[69] Representative Staggers, a sponsor of H.R. 3815, spoke directly after Representative Devine and made no response to that

65. *Id.* at 258.

66. H.R. REP. No. 831, 95th Cong., 1st Sess. 9, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4121.

67. *Id.* at 10.

68. *See* note 22 *supra.*

69. *See* note 23 *supra.*

statement. Both the Senate and the House agreed to the Conference Report.

VI. CONCLUSION

It is necessary to begin with *Cort v. Ash* in an attempt to determine whether Congress intended an implied private right of action under the Foreign Corrupt Practices Act. The first consideration is whether the plaintiff is one of the class for whose *"especial benefit"* the statute was enacted. (Emphasis in original.) It must be noted whether the Act was passed for the "especial benefit" of shareholders and competitors of the offending corporations. The Senate Report[70] mentioned, in passing, the value to shareholders of an adequate system of internal accounting controls. The section of the report devoted to the need for the legislation, however, does not refer to investors at all—even though it does point out the adverse effect of corporate bribery on the domestic competitive climate. Even that comment appears to fit within a framework of general concern that foreign corporate bribery blemishes the country's image and damages the United States business system.

It seems certain that exposure of illegal corporate payments would be harmful to a corporation and could conceivably result in financial loss to the corporation and its shareholders. Competitors also might suffer economic damage from losing business to the bribing corporation. Clearly, however, the Act was the expression of a broad national policy against corporate bribery, not just the narrow purpose of benefitting shareholders, competitors, and others. In passing the Act, Congress was not primarily concerned with the internal relationships between corporations and their shareholders.

A second factor to be examined is whether there is any indication of explicit or implicit legislative intent to create an implicit private right of action. The House Report[71] contains an explicit statement of intent that the courts should recognize a private right of action by those injured as a result of prohibited corporate bribery. This statement was made, however, before the controversial, Senate-sponsored accounting provisions were added by the Conference Committee. It seems significant, also, that Representative Staggers, a sponsor of the bill, did not contradict Representative De-

70. *See* note 54 *supra.*
71. *See* note 57 *supra.*

vine's disclaimer of an intent to create a private right of action when Staggers addressed the House directly after Devine's statement. Noting these statements and the surrounding circumstances, one could infer that the Committee backed away from any desire they might once have had that there be an implied private right of action—possibly because of the addition of the accounting provisions.

The Senate Committee made no reference to a private right during the course of its deliberations in the 95th Congress. Senator Tower, however, made an uncontradicted disclaimer on the Senate floor similar to Representative Devine's statement in the House.

The SEC[72] believes the statements of Senator Tower and Representative Devine have little probative value because the two men were not sponsors of the bill and did not attempt to persuade the conferees to reflect their views in the Conference Report.

Senator Tower and Representative Devine, however, may have thought it unnecessary to ask the Committee explicitly to reject a private right of action. Failure to discuss a private right should not be read as reflecting the Committee's intent that there be such a right.

In further support of its position that there is a private right, the SEC points to statements made by the Senate Committee during the 94th Congress.[73] The Committee deleted an express private right of action from S. 3379 calling it duplicative of existing remedies. Regardless of how that statement is interpreted, S. 3379 was largely a disclosure bill containing no accounting provisions; it bore little resemblance either to S. 3664, passed by the Senate during the 94th Congress, or to the Act in its final form. The legislative history of S. 3664, not being contemporaneous with the bill finally enacted, would seem to have no bearing on the determination of whether an implied private right was intended under the Act. It is logical to assume that new circumstances and understandings might arise in the course of development of a bill from one Congress to another.

In reference to testimony presented at Committee hearings during the 95th Congress, the SEC indicates that the New York City Bar Association "advocated" an implied private right of action.[74] That is not precisely correct. The Bar Committee discussed, in

72. *See* note 16 *supra*.
73. *See* note 17 *supra*.
74. *See* note 16 *supra*.

general, shareholder suits within the traditional framework, concluding that private suits should serve to redress injuries to the corporation resulting from improper foreign payments as they have for other wrongful conduct of officers and directors.[75]

The Bar Committee, however, opposed legislation making improper foreign payments illegal or imposing accounting controls, proposing instead that any anti-bribery legislation passed be limited to disclosure requirements. In discussing the accounting provisions in the Senate bill, the Bar Committee noted that they require each issuer to establish a system of internal accounting controls and that they seek to assure the truth and accuracy of statements made to auditors. The Committee was concerned that these provisions go beyond what is required to meet the problems addressed by the Act, and represent a significant increase in federal regulatory jurisdiction over the internal affairs of corporations. Thus, the Committee raises broad and important issues with respect to the appropriate extent of federal corporate regulation and concerning the appropriate relations between state and federal jurisdiction. One of the Bar Committee's concerns was the low level of proof of intent required for liability under the accounting provision. In view of the Bar Committee's opposition to Commission activity even in the area of accounting, it is highly unlikely they would advocate an implied right of action for private plaintiffs in an Act containing such a provision; and in fact they did not. Even if the Bar Committee had made statements advocating an implied private right under the Act, however, such remarks would be entitled to little weight.[76]

Chairman of the SEC, Harold M. Williams, testifying at the hearings, did advocate a private right of action and has continued to do so. For agency interpretation to be given deference, however, it must be consistent with the Congressional purpose.[77] It could be argued that Congress, in passing this legislation, was not significantly concerned with protecting individual shareholders. Commissioner Williams has testified to that effect.[78]

There are, therefore, three pieces of relevant evidence regarding explicit intent: a single statement supporting an implied private right in the House Committee report which was made before the

75. *Hearings, supra* note 18.
76. 425 U.S. at 1386 n.24.
77. Morton v. Ruiz, 415 U.S. 199, 237 (1974).
78. *Hearings, supra* note 18, at 210.

controversial accounting requirements became part of the House bill; uncontradicted floor statements by non-sponsors of the bill denying that a private right exists; and statements made at hearings.

There is little in the legislative history that infers an implicit intent for a private right. There are indications, however, that the Senate and House Committees had intended that there be no private right. The *Hochfelder* decision construing Section 10(b), handed down March 30, 1976, can be read as requiring the SEC to prove intent in its enforcement actions under Section 10(b) and Rule 10b-5.[79] This decision was mentioned with concern several times in the various Committee discussions. The House Committee, particularly, was determined that no proof of scienter should be required of the Commission for any of its enforcement activities.[80] The Senate-sponsored record falsification prohibition was deleted, therefore, because it required proof of intent.

At the same time, opponents of the bill expressed grave concern that the required proof pertinent to state of mind was so low that it would create dangerously broad liability.[81] The Committee clearly wanted the Commission to be able to enforce the Act without having to meet a high standard of proof of intent. It is logical to assume, however, that the Committees were sensitive to the concerns expressed by opponents of the bill and were wary of exposing corporations and their officers and directors to a potential avalanche of litigation brought by private plaintiffs encouraged to sue by the low burden of proof concerning intent.

The provision for divided enforcement responsibility strengthens the inference that the Committees intended no private right of action. Issuers alone are subject to both the accounting requirements and the anti-bribery provision and only they can sue under the federal securities laws. Domestic concerns are subject only to the bribery prohibition. Private plaintiffs with complaints against domestic concerns would have a cause of action, if any, only for corporate bribery, and the suits would have to be brought under state law. It seems unlikely that Congress intended that shareholders of issuers should have broader remedies under the Act than shareholders of domestic concerns. Perhaps, therefore, it can be inferred from the complexity of the Act itself that no private right

79. *See* note 48 *supra*.
80. *See* note 57 *supra*.
81. *Hearings, supra* note 18, at 95, 252, 255-56, 258.

of action was intended.

The third consideration under *Cort v. Ash* is whether an implied private right of action is consistent with the underlying purposes of the legislative scheme. The underlying purpose of the Act appears to be much broader than merely the protection of shareholders or other individuals. Both the Senate and House stressed the importance of eliminating corporate bribery in order to preserve the health of the overall business climate.[82] It could be argued that recovery of monetary damages by a private plaintiff or the corporation in a derivative suit would add little or nothing to what Commisson enforcement can accomplish toward achieving the goal of eliminating corporate bribery for the sake of business in general.

In step four, the question to be addressed is whether the cause of action is one traditionally relegated to state law in an area which is basically of state concern. If so, it would be inappropriate to infer a cause of action based solely on federal law. The Supreme Court, in enunciating this standard, firmly points private plaintiffs back toward state courts, perhaps signalling Congress that if it intends a private right of action under a federal statute it will have to provide expressly for that right in the legislation itself.

It is significant that the SEC views its role as enforcer of the prohibition against corporate bribery as an expansion of its mandate to protect shareholders.[83] Prior to passage of the Act, shareholders would almost certainly have had to seek relief in state court for harm to themselves or the corporation arising out of corporate bribery, using such theories as ultra vires acts or breach of fiduciary duty.

The New York City Bar Association takes the position that the accounting provisions seem to involve the SEC in seeking to improve internal corporate operational performance—an area of regulation traditionally reserved for the states. The issue is very similar to that in *Cort v. Ash*: whether the primary purpose of the federal law would be thwarted by allowing state law to govern. Unlike the federal proxy regulation statute in *Borak*, the anti-bribery statute considered here was not passed primarily to protect investors. Therefore, refusal of a state court to grant relief to an individual plaintiff would not nullify the federal law.

In fact, a federal district court recently ruled[84] that it is not

82. *See* notes 54 & 57 *supra*.

83. *Hearings*, *supra* note 18, at 225.

84. Abbey v. Control Data Corp., [1978-1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,721 (D.C. Minn. Dec. 7, 1978).

against the public policy underlying the Securities Exchange Act to allow directors to bar a shareholder's derivative action against other directors to recover civil and criminal penalties levied against the corporation for making illegal foreign payments. The court noted that the claim primarily appeared to involve questions of corporate waste and mismanagement—issues properly dealt with under state laws. The result in this case indicates that, under *Borak* and *Cort v. Ash,* private direct actions under federal law against those engaged in illegal foreign payments are not necessary in order to carry out the Act's chief purposes.

If one concludes, under *Cort v. Ash,* that there is no implied private right of action, it becomes unnecessary to construe the Act to determine what that implied right is. It would be a difficult task because of the split enforcement responsibility and determination of the scope of liability based on whether the defendant is an issuer or a domestic concern.

Were private plaintiffs to survive the *Cort v. Ash* analysis, however, they would have to confront the recent trend of the Supreme Court toward narrowing individual plaintiff's rights against corporations under federal laws, of which *Cort* itself is an example.

The Supreme Court's retrenchment on private rights of action has a basis in reason. The early cases, with their broadly worded opinions construing the federal securities laws in the context of private litigation, were beneficial to the SEC but carried within them the potential for frivolous litigation against deep-pocketed defendants, which raised troublesome policy questions. "There has been no dearth of such litigation."[85]

The Supreme Court has begun to narrow the rights of private plaintiffs. First, it refused to broaden the plaintiff class under Section 10(b) and Rule 10b-5,[86] partially because of the extent of monetary damages that might flow from enlarging the class to include potential purchasers. Second, it narrowed *Borak* by directing private plaintiffs to state courts when the purpose of the federal law under which they seek refuge will not be frustrated.[87] Third, the Court rules, for fear of broadening the plaintiff class, that defendants who were merely negligent are not liable to private plaintiffs under Section 10(b) and Rule 10b-5.[88]

85. Pitt, *An Insider's View of the Utility of Private Litigation Under the Federal Securities Laws,* 5 SEC. REG. L.J. 3, 4 (1977).

86. 421 U.S. 723 (1975).

87. 422 U.S. 66 (1975).

88. 425 U.S. 185 (1976).

Harvey L. Pitt, General Counsel of the SEC at the time of the hearings, finds these decisions not totally unjustified.[89] Pitt believes the Supreme Court desires to stem the increasing flow of private civil litigation clogging the dockets of federal courts by relegating private plaintiffs either to state law remedies in state courts or to no remedy at all.

Pitt also sees a genuine concern on the part of the Court for more certainty and less exposure to risk for good-faith corporate endeavors. He finds the recent Supreme Court decisions a far cry from the *Borak* case where private litigation was held to be a necessary supplement to the Commission's enforcement actions. "It no longer is a 'necessary' supplement and one fears that it may not even seem desirable to the Court in the long run."[90]

Also, Pitt, who accompanied Commissioner Williams to the House Subcommittee hearings on the Act, seems not overly concerned that there may be fewer private litigants breaking new frontiers. He notes that recent foreign payment cases suggest the SEC is successfully carrying out that task. The SEC might in fact be better off with fewer private litigants developing the law because they bring less carefully considered lawsuits with their associated risks.

The Commisson states that there is a private right of action. The Supreme Court, however, must ultimately decide the issue, and it is likely that the Court will find that Congress intended no cause of action for private litigants under the Foreign Corrupt Practices Act.

Mary Frances Lyle

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89. Pitt, *supra* note 85.
90. Pitt, *supra* note 85, at 11.