

2012

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Recommended Citation

James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 *Comp. Lab. L. & Pol'y J.* 553 (2012)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/169

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ENVISIONING ENFORCEMENT OF FREEDOM OF ASSOCIATION STANDARDS IN CORPORATE CODES: A JOURNEY FOR SINBAD OR SISYPHUS?

James J. Brudney†

I. INTRODUCTION

Since the 1970's, multinational corporations (MNCs) in large numbers have adopted codes of conduct declaring their commitment to workers' rights.¹ Pressure from unions and human rights groups helped to generate this development among MNCs, and almost all current codes promote corporate respect for the rights to freedom of association (FOA) and collective bargaining.² At the same time, the codes do not require adherence to specific labor regulations or standards in a global setting, and the MNC record on voluntary compliance has been discouraging. That record has been especially disappointing in labor-intensive industries like apparel, shoes, and toys, where a global supply chain of contractors effectively controls labor conditions.³ The persistent gap between aspiration and achievement regarding corporate codes has led to disagreement over their meaning and value.

Business supporters view codes of conduct as enhancing corporate reputations with diverse audiences. A publicly announced pledge to promote decent working conditions can help in recruiting and retaining certain types of employees, in attracting consumers or investors who prefer to engage with a socially responsible company, and in mollifying regulators who must allocate their limited resources among delinquent actors.⁴ More

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1. See generally Jill Esbenschade, *Monitoring Sweatshops: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* (2004); Rhys Jenkins, *The Political Economy of Codes of Conduct, in Corporate Responsibility And Labour Rights: Codes Of Conduct in the Global Economy* 13–22 (Rhys Jenkins et al. eds., 2002) [hereinafter *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS*].

2. See *infra* Part II.A.

3. See generally CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 97–98 (2010) and sources cited therein.

4. See generally Robert H. Montgomery & Gregory F. Maggio, *Fostering Labor Rights in Developing Countries: An Investors' Approach to Managing Labor Issues*, 87 J. BUS. ETHICS 199, 200

skeptical observers from the labor, human rights, and academic communities regard corporate codes as largely ineffective. In practical terms, the codes are not enforced rigorously from within, they are not adequately monitored for performance by an independent body, and they do not include sanctions for noncompliance.⁵ As such, they have been criticized as windowdressing or worse.

Given the self-regulatory nature of corporate codes, it is hardly surprising that they lack effective outside monitors or remedial consequences. Yet, the absence of an enforcement structure is troubling when considering the codes' possible underlying purposes. If a corporate code is meant to attract and retain customers and investors by promoting humane working conditions, or to guide and constrain supervisors in their personnel practices, one might argue that some form of enforcement is appropriate to effectuate the company's actual intent. If, on the other hand, a code is meant to pacify, deceive, or exploit unsophisticated consumers, investors, or employees, one might contend that some form of enforcement is needed to prevent what is tantamount to a fraud.

Put somewhat differently, MNCs hope to be judged on the basis of the internal systems they have established. They believe that codes and accompanying monitoring practices will generate economically profitable good will and also give rise to a legal safe harbor.⁶ In light of these ambitious corporate assumptions, it is worth asking whether the application of codes should be subject to outside challenge, and potential improvement, on behalf of putative beneficiaries.⁷

This Article examines the possibilities for enforcing corporate codes against the MNCs that draft and promulgate them. Part II provides an overview of the FOA provisions that appear in codes on corporate websites. A review of more than twenty-five corporate codes indicates divergent approaches regarding *inter alia* how much depth and force the FOA commitment contains; whether the same FOA commitment applies to a

(2008); Lutz Preuss, *Ethical Sourcing Codes of Large UK-Based Corporations: Prevalence, Content, Limitations*, 88 J. BUS. ETHICS 735, 735 (2009); *Business for Social Responsibility*, "Codes of Conduct," BSR Business Brief (October 2003), in JAMES ATLESON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY 486-88 (2008).

5. See generally ESBENSHADE, *supra* note 1, at 60-118, 145-64; Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 COMP. LAB. L. & POL'Y J. 1, 2-4 (2008); Richard M. Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards: Lessons from Nike*, 61 IND. & LAB. REL. REV. 3, 5-6, 20-21 (2007).

6. See ESTLUND, *supra* note 3, at 6-7.

7. See GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 140 (2007) (arguing that in the long run, government labor inspectors enforcing national laws will be more effective instruments for worker protection than even well-intentioned NGO monitors). As complements to corporate coregulation and monitoring, government inspection and private enforcement may be mutually reinforcing.

company's own employees and its corporate suppliers; and whether the commitment is accompanied by a disclaimer.

Part III discusses key shortcomings to the codes as self-regulatory operations. It identifies both external and internal obstacles to successful monitoring, including monitoring by independent entities. Part II recognizes that private rights of action may carry countervailing costs, but it contends they may also be an essential complement if corporate codes are to promote FOA in effective terms.

Part IV identifies eight potential causes of action to enforce corporate code provisions related to FOA. It explores a range of state and federal claims that could be asserted under U.S. law by employees, consumers, or investors. The treatment of these claims is necessarily preliminary. Although there are various obstacles to surviving motions to dismiss, several approaches appear to hold promise. Moreover, a preliminary set of analyses may be fruitful in two respects. First, they focus on the need for protection beyond voluntary corporate efforts, as MNCs continue to promote their codes in self-regulatory terms. Second, the analyses seek to deepen the conversation as to which corporate code audiences are best situated to pursue such protection in the courts.

II. DIVERSITY OF CODE FORMULATIONS ON FREEDOM OF ASSOCIATION

A. *Using Codes As a Branding Resource*

Corporate codes initially arose in response to instances of business and financial malfeasance that violated federal statutes.⁸ Subsequently, under pressure from labor and human rights groups, firms adopted labor standards codes and accepted some forms of outside monitoring devised by NGOs or public-private partnerships.⁹ In the past two decades, MNCs have applied internally developed codes—featuring voluntary creation, compliance, and enforcement – to the issue of labor standards for their global production and supply chains.¹⁰ National laws in developing countries are often weak on

8. See Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil And Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L. J. 1559, 1580–98 (1990) (discussing the development of codes in response to antitrust, foreign corrupt practice, and insider trading scandals from 1950s to 1980s).

9. See generally Richard Locke, Matthew Amengual & Ashley Mangla, *Virtue out of Necessity? Compliance, Commitment and the Improvement of Labor Conditions in Global Supply Chains*, 37 POL. & SOC'Y 319, 322 (2009); Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1, 6–11 (2003).

10. There are also external codes addressed to labor standards that are promulgated by trade associations, trade union confederations, and other nongovernmental organizations (NGOs). See SEIDMAN, *supra* note 7, at 2–10; O'Rourke, *supra* note 9, at 6–11. The Article refers to these codes on occasion, but its focus is on codes developed by individual corporations.

paper and in practice with respect to potentially exploitative conditions involving child labor, sexual discrimination, wages and hours, safety and health, and FOA. In this context, corporate codes reflect both the good intentions and the self-interest of their sponsors.

Codes serve as an important reputational asset, especially with consumers and investors.¹¹ A growing number of individual consumers, along with influential institutional players such as universities and local governments, want to do business with companies that espouse socially responsible or “sweat-free” production practices.¹² Public pension funds and socially conscious mutual funds also can create pressure on companies to declare publicly their commitment to humane working conditions.¹³ Moreover, faced with chronic underenforcement of worker protection laws due to scarce government resources, regulators may effectively decide to accept responsible corporate self-regulation as an alternative to their own top-down enforcement efforts.¹⁴

In many parts of the world, factory-level employees of MNCs or their suppliers are not in a position to choose jobs based on the social responsibility profile of their employer. Still, a commitment to promulgate and publicize a code means there will be corporate professional employees whose job it is to deliver on that commitment by facilitating transparency, enhancing communication within the company, and developing new forms of accountability. For those individuals, presumably part of a division within human resource operations, the code is both an asset that helps to recruit and retain them as employees and a tool that enables them to reinforce efforts by socially responsible consumers and investors.¹⁵

11. See Adam Lindgreen et al., *Introduction: Corporate Social Responsibility Implementation*, 85 J. BUS. ETHICS 251, 251 (2009); Jane C. Hong, Note, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations*, 19 WIS. INT'L L. J. 41, 47 (2000).

12. The Worker Rights Consortium (WRC), an independent labor rights monitoring organization, is supported by over 175 college and university affiliates. WRC focuses primarily on the workplace practices of factories producing university-related apparel, although it also has done independent monitoring on apparel factory standards for the City of Los Angeles. See generally WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org> (last visited May 31, 2012).

13. See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 35–45, 61–66 (2005); Henry L. Petersen & Harrie Vredenburg, *Morals or Economics? Institutional Investor Preferences for Social Responsibility*, 90 J. BUS. ETHICS 1, 12–13 (2009); S. Prakash Sethi, *Investing in Socially Responsible Companies Is a Must for Public Pension Funds – Because There Is No Better Alternative*, 56 J. BUS. ETHICS 99, 102–03, 114 (2005).

14. See ESTLUND, *supra* note 3, at 14–19.

15. See, e.g., Alison Maitland, *Sewing a Seam of Worker Democracy in China*, FIN. TIMES, Dec. 12, 2002, at 14 (reporting on Reebok experiment to train Chinese workers to participate in free trade union elections, under supervision of Reebok's Director of Human Rights Programmes). See generally Moses L. Pava, *Why Corporations Should Not Abandon Social Responsibility*, 83 J. BUS. ETHICS 805, 812 (2008); Ivanka Mamic, *Managing Global Supply Chain: The Sports Footwear, Apparel and Retail Sectors*, 59 J. BUS. ETHICS 81, 90–92 (2005).

For all of these reasons, MNCs have adopted and promoted codes on their corporate websites. Most codes are presented with aesthetic considerations in mind: they feature extensive graphic design work and are replete with colorful illustrations.¹⁶ They also are readily accessible through Google by typing in the corporate name and “Code of Conduct.” One may reasonably infer that these codes are meant to reach a wide audience, including both consumers and investors.

In the summer of 2011, I reviewed the web-posted codes of twenty-seven MNCs.¹⁷ My primary focus was on FOA and collective bargaining. Most posted codes include some form of commitment to recognize employee rights in this area.¹⁸ There is, however, considerable variation with regard to the specific terms of that recognition.¹⁹

B. Invoking ILO Conventions and Principles

Approximately one-fourth of the codes explicitly invoke International Labor Organization (ILO) conventions or principles covering FOA. The language closest to an unconditional embrace is found in the *Nestle Corporate Business Principles*, where Nestle declares: “We adhere to the eight fundamental Conventions of the International Labour Organisation (ILO)[.]” noting in particular Convention 87.²⁰ The same code section proclaims “We uphold the freedom of association and the effective recognition of the right to collective bargaining” and adds: “Where our own principles and regulations are stricter than local legislation, the higher standard applies[.]”²¹

16. See, e.g., Proctor & Gamble, *Our Values and Policies*; L'Oréal, *Code of Business Ethics*; Shell, *Code of Conduct*; General Electric, *The Spirit and the Letter*. Full references to these and all other MNC codes reviewed for the Article appear in the Appendix. See *infra* note 17.

17. The twenty-seven codes reviewed were promulgated by Adidas Group, American Eagle, Citigroup, Coca Cola, Deutsch Telecom Group (DTG, which owns T-Mobile), Deutsch Post DHL, General Electric, Goodyear, G4S (Wackenhutt), Hanesbrands, Heineken, IKEA, Krispy Kreme, L'Oréal, Motorola, Nestle, NIKE, Pepsico, Proctor & Gamble, Russell Athletics, Shell, Siemens, Sodexo, TESCO, Tim Hortons, Unilever, and Walt Disney. Melanie Luthern, Ohio State Univ. Moritz College of Law Class of 2012, provided outstanding assistance researching and analyzing these websites. The sites are listed individually in an Appendix. They are referenced in the footnotes to Part II.B. and the rest of the Article.

18. My sample of U.S. websites was not scientifically selected. By comparison, among large U.K. corporations, 64% of codes covering labor standards for suppliers include FOA. See Preuss, *supra* note 4, at 739.

19. Other scholars have identified variation in how FOA is covered under individual corporate codes. See *id.*; Xiaomin Yu, *From Passive Beneficiary to Active Stakeholder: Workers' Participation in CRS Movement Against Labor Abuses*, 87 J. BUS. ETHICS 233, 236 (2009) (describing variable FOA coverage in athletic footwear industry).

20. See *Human Rights and Labour Practices*, in NESTLE CORPORATE BUSINESS PRINCIPLES 9 (June 2010), <http://www.research.nestle.com/asset-libraries/Documents/Corporate-Business-Principles-EN.pdf> (emphasis added). ILO Convention 87 covers Freedom of Association.

21. *Id.* (emphasis added).

Other MNCs that invoke ILO conventions use softer language, avoiding a declaration of adherence. Thus one MNC “expects its employees, suppliers and business partners around the globe to recognize and apply particularly” core ILO conventions,²² while a second MNC declares its “support [for] the four fundamental principles in the [ILO] Declaration.”²³ And there are still weaker formulations: a code is “based on international agreements and guidelines, including” ILO conventions,²⁴ or “the principles embodied in our Code are designed to be consistent with [ILO] core conventions.”²⁵

The ILO conventions are addressed primarily to member governments and not directly to corporate actors. Nonetheless, the core conventions in particular are widely perceived as benchmarks for human rights in the global workplace.²⁶ MNCs that invoke core ILO conventions – dealing with child labor, forced labor, and nondiscrimination as well as FOA and collective bargaining – seek to create a socially responsible label that will appeal to global consumers and investors.

C. Expressing a Commitment to FOA

Almost every code reviewed includes some form of express commitment to recognize or respect FOA and collective bargaining.²⁷ The

22. SIEMENS, BUSINESS CONDUCT GUIDELINES 27 (July 2005), http://www.siemens.com/responsibility/report/07/pool/pdf/business_conduct_guidelines_e.pdf.

23. G4S BUSINESS ETHICS POLICY 8, http://www.g4s.com/en/Social%20Responsibility/Safeguarding%20our%20integrity/~media/Files/Corporate%20Files/g4s_business_ethics_policy.ashx (last visited June 5, 2012). The 1998 ILO Declaration on Fundamental Principles and Rights at Work reinforces international commitment to the four principles and associated rights considered essential for social justice: freedom of association and collective bargaining; the elimination of forced labor; the abolition of child labor; and the elimination of discrimination in employment. See RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS 93 (2009 ed.), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_108393.pdf.

24. Code of Conduct, DEUTSCHE POST DHL, http://www.dp-dhl.com/en/about_us/code_of_conduct.html (last visited June 5, 2012).

25. Code of Conduct for Manufacturers, THE WALT DISNEY COMPANY, 1, <http://corporate.disney.go.com/corporate/compliance/pdf/english.pdf> (last visited June 5, 2012). See also STATEMENT ON HUMAN RIGHTS, CITI, <http://www.citigroup.com/citi/citizen/humanrights/index.htm> (Aug. 2009) (“We . . . are guided by fundamental principles of human rights, such as those in . . . the . . . ILO Code Conventions.”).

26. See, e.g., Janice Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 INT’L J. COMP. LAB. L. & IND. REL. 269 (2001); Jill Murray, *Labour Rights/Corporate Responsibilities: The Role of ILO Labour Standards*, in CORPORATE RESPONSIBILITY AND LABOUR RIGHTS, *supra* note 1, at 31–40. For examples of ILO involvement in the monitoring of corporate compliance with labor standards, see Michael Posner & Justine Nolan, *Can Codes of Conduct Play a Role in Promoting Workers’ Rights?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 207, 223 (Robert J. Flanagan & William B. Gould eds., 2003).

27. I could not find any such reference in Shell’s Corporate Code of Conduct. Additionally, Pepsico and Unilever discuss freedom of association expectations but do not mention collective bargaining. Levi-Strauss is another MNC (not reviewed here) with a code that fails to recognize FOA or collective bargaining. See Hong, *supra* note 11, at 52. Despite the exceptions, and the fact that the twenty-seven codes examined here may not be fully representative, it is evident that corporate codes

strongest expressions are presented without deference to the constraints identified under national or local laws. Apart from Nestle's declaration discussed above, IKEA's code specifies simply that its suppliers "shall ensure that workers are not prevented from associating freely" and "shall not prevent workers from exercising collective bargaining activities."²⁸

In the great majority of instances, MNC codes link FOA recognition to what is allowable under local law. Codes recognize rights to FOA and collective bargaining "unless otherwise prohibited by law,"²⁹ "to the extent permitted by the laws of the manufacturing country,"³⁰ "in accordance with local law,"³¹ or "within the framework of respective countries' laws and regulations."³² Given that a number of countries in the developing world impose restrictions on independent trade unions and collective bargaining,³³ the commitment to recognize employee FOA rights may be substantially diluted.

Occasionally, a corporation pledges to take affirmative action in the face of local legal constraints. Goodyear recognizes employees' right to "bargain collectively through representatives of their own choosing" and adds that where FOA and collective bargaining "are restricted under law . . . the company shall facilitate open communication and direct engagement" between employees and managers.³⁴ More often, MNCs combine recognition of FOA rights as a general matter with an expression of respect for the laws of the countries in which they operate.³⁵ It is notable that the qualifier referring to what is consistent with local law occurs for FOA with

now devote substantially more attention to FOA than was true ten years earlier. See Kathryn Gordon & Maiko Miyake, *Deciphering Codes of Corporate Conduct: A Review of Their Contents* 3, 14 (Org. Econ. Co-Operation & Dev., Working Paper on Int'l Inv. No.199/2, 1999) (reporting that only 29.7% of the codes dealing with labor standards mentioned FOA).

28. *IWAY Standard: Minimum Requirements for Environmental and Social & Working Conditions When Purchasing Products, Materials and Services*, IKEA 17 (June 4, 2008), http://www.ikea.com/ms/en_US/about_ikea/pdf/SCGlobal_IWAYSTDVers4.pdf [hereinafter *IWAY Standard*]. The code also specifies that it is based on the eight core ILO Conventions. See *id.* at 1.

29. *Supplier Code of Conduct*, MOTOROLA 2, <http://responsibility.motorola.com/index.php/suppliers/scoc/> (last visited June 5, 2012).

30. NIKE, INC., CODE OF CONDUCT 1 (Aug. 2010), available at <http://nikeinc.com/pages/compliance>.

31. PROCTOR & GAMBLE, OUR WORLDWIDE BUSINESS CONDUCT MANUAL 10, http://www.pg.com/en_US/downloads/company/governance/Policy_Worldwide_Business_Conduct_Manual.pdf (last visited June 5, 2012).

32. DTG, CODE OF CONDUCT 7 (2009).

33. See, e.g., INT'L LABOUR OFFICE, REPORT OF THE DIRECTOR-GENERAL, FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED 12 (2008), http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096122.pdf (discussing history of FOA restrictions in Belarus); Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. Pa. J. Lab. & Emp't L. 283, 292 (2006) (discussing history of FOA restrictions in China, Myanmar, and Indonesia).

34. GOODYEAR, BUSINESS CONDUCT MANUAL 34-35 (May 2009), http://www.goodyear.com/investor/pdf/corp_gov/business_conduct_manual.pdf.

35. See L'ORÉAL, THE CODE OF BUSINESS ETHICS: THE WAY WE WORK 5 (2007), http://www.loreal.com/_en/_ww/html/company/pdf/code_of_ethics_us.pdf.

greater frequency than for other fundamental protections such as those involving forced labor or nondiscrimination.

One further aspect of code commitments regarding FOA is that some MNCs express respect for the right to refrain along with the right to associate. Sodexo has both a *Supplier Code of Conduct* and a *Human Rights Policy*. For its own employees, Sodexo's policy recognizes the right "to unionize or not to unionize"; by contrast, Sodexo's code simply directs suppliers to recognize their employees' rights to FOA and to collective bargaining.³⁶ Other corporations also specify a right to refrain either with respect to their suppliers' employees or for all employees including their own.³⁷

D. Prohibiting Discrimination Based on Union Activity

Almost all MNC codes prohibit discrimination against employees based on a list of specified characteristics such as gender, race, religion, national origin, age, or disability.³⁸ The list of prohibited factors sometimes includes trade union affiliation or activity.³⁹ More often, union status or conduct is omitted although it may be covered by a catchall phrase at the end of the list such as "or any other legally protected factor."⁴⁰

The tendency to omit FOA as a specified legally protectable factor is interesting for two reasons. First, the list of factors is often long enough to appear exhaustive, suggesting that FOA's omission may not be inadvertent. Given the number of countries that restrict FOA and collective bargaining rights, many MNCs may have opted for a low-profile approach. Second, the list of factors often includes characteristics or traits that are not protected against private employer discrimination under U.S. national law, such as sexual orientation, political opinion, or philosophical opinion.⁴¹ Inclusion of these factors, which are highly controversial in many

36. Compare SODEXO, POLICY ON HUMAN RIGHTS 5–6 (Jan. 2009), http://www.sodexo.usa.com/usen/Images/Human%20rights_eng_tcm87-243749.pdf [hereinafter POLICY ON HUMAN RIGHTS] with *Supplier Code of Conduct*, SODEXO, <http://www.sodexousa.com/usen/citizenship/diversity/suppliercode/suppliercode.asp> (last visited June 5, 2012). In its *Policy on Human Rights*, Sodexo discusses its "positive relationship with a large number of unions" in North America. POLICY ON HUMAN RIGHTS, *supra* at 6.

37. See *Supplier Code of Conduct*, *supra* note 29, at 2; PROCTOR & GAMBLE, *supra* note 31.

38. See, e.g., *IWAY Standard*, *supra* note 28, at 17; KRISPY KREME DOUGHNUTS, INC., CODE OF BUSINESS CONDUCT AND ETHICS 5 (Dec. 4, 2007), available at <http://investor.krispykreme.com/phoenix.zhtml?c=120929&p=irol-govconduct>; PROCTOR & GAMBLE, *supra* note 31, at 9; TIM HORTONS, STANDARDS OF BUSINESS PRACTICES 8, [http://www.timhortons.com/us/pdf/SOBP_Final_\(9\).pdf](http://www.timhortons.com/us/pdf/SOBP_Final_(9).pdf) (last visited June 5, 2012).

39. See NIKE, INC., *supra* note 30, at 1; L'ORÉAL, *supra* note 35, at 18.

40. PROCTOR & GAMBLE, *supra* note 31. See also *IWAY Standard*, *supra* note 28 ("or any other basis"); KRISPY KREME DOUGHNUTS, INC., *supra* note 38 ("or any other fact prohibited by law"); TIM HORTONS, *supra* note 38 ("or any other status protected by law").

41. All six codes in notes 38 and 39 list sexual orientation; three list political opinion; one lists philosophical opinion.

developing countries, suggests that MNCs are prepared to transcend the restrictions of national law and practice for some forms of discrimination though not others.

E. Adopting Distinct Approaches for Suppliers

Corporations address the topic of freedom of association more directly and decisively for their suppliers than they do for their own employees. Some MNCs promulgate and post codes of conduct only for their suppliers or contract factories.⁴² Many MNCs develop separate codes for suppliers and for their own workforce, addressing FOA with respect to the former group but not the latter.⁴³ Corporations with separate codes for their own workforce cover a range of business topics such as conflicts of interest, insider trading, and accounts and record keeping. But they typically also address worker protections other than FOA, including nondiscrimination, employee safety and health, and employee privacy.⁴⁴

Even corporations that address FOA protections for both suppliers and their own employees may well accord greater protection to the employees of their suppliers and contractors. As noted above, Sodexo recognizes its own employees' right to refrain from joining a union but it does not include right-to-refrain language for its suppliers.⁴⁵ Other code language more subtly distinguishes between FOA protections for supplier employees and a corporation's own workforce.⁴⁶

42. See, e.g., NIKE, INC., *supra* note 30; *Supplier Code of Conduct*, MOTOROLA, *supra* note 29; *Code of Conduct for Manufacturers*, THE WALT DISNEY COMPANY, *supra* note 25.

43. Compare e.g., TESCO CORP., CODE OF CONDUCT, http://www.tescocorp.com/data/1/rec_docs/562_TESCO%20Code%20of%20Conduct.Final.08.05.19.pdf (last visited June 5, 2012) (covering corporate employees) with *ETI Base Code*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/eti-base-code> (last visited June 5, 2012) (covering TESCO suppliers). Compare *Our Worldwide Code of Conduct*, PEPSICO, <http://www.pepsico.com/Company/Worldwide-Code-of-Conduct.html> (last visited June 5, 2012) (covering corporate employees) with *Supplier Code of Conduct*, PEPSICO, <http://www.pepsico.com/Purpose/Responsible-Sourcing/Supplier-Code-of-Conduct.html> (last visited June 5, 2012); *Code of Ethics*, AMERICAN EAGLE (covering corporate employees) with *Vendor Code of Conduct*, AMERICAN EAGLE, <http://phx.corporate-ir.net/phoenix.zhtml?c=81256&p=irol-Vendor-Conduct> (last visited June 5, 2012); *Adidas Group Code of Conduct*, http://www.adidas-group.com/en/investorrelations/corporate_governance/codeofconduct/default.aspx (last visited June 5, 2012) (covering corporate employees) with ADIDAS GROUP, WORKPLACE STANDARDS (Jan. 2007), http://www.adidas-group.com/en/sustainability/assets/workplace_standards/english_workplace%20standards.pdf (covering contractors and suppliers).

44. See, e.g., TESCO CORP., *supra* note 43, at 6 (addressing nondiscrimination and privacy); *Our Worldwide Code of Conduct*, PEPSICO, *supra* note 43, at 1–2 (addressing nondiscrimination, privacy and employee health and safety); *Code of Ethics*, AMERICAN EAGLE, *supra* note 43, at 4–5 (addressing nondiscrimination); *Adidas Group Code of Conduct*, *supra* note 43, at 3 (addressing nondiscrimination and privacy).

45. See *supra* note 36 and accompanying text.

46. Compare HANESBRAND, INC., GLOBAL CODE OF CONDUCT 8 (2011), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=200600&p=irol-govConduct> (employees' right to exercise lawful rights of FOA and collective bargaining) with HANESBRAND, INC., GLOBAL STANDARDS FOR SUPPLIERS 6 (2006) (declaring that suppliers will respect their employees right to exercise rights of FOA).

It is hardly surprising that MNCs devote a disproportionate amount of their FOA attention to the workplace practices of their suppliers and contractors. Global supply chains are located principally in developing countries, where exploitation is a greater threat. Workers in these countries are hired into low-wage, arduous positions, they have no job security, and their contractor employers rarely provide human resource counseling or support. In addition, these workers operate under a regulatory structure that too often features severely understaffed labor inspectorates and remote or dysfunctional court systems.⁴⁷

By contrast, an MNC's own employees are relatively well-paid, and they have access to established professional HR departments. MNC worksites tend to be located in Europe, the United States, or some other developed country, where strong legal systems include a longstanding and adequately funded labor regulatory structure. Enforcement may at times yield results that are less than satisfying to affected workers, but the domestic regulatory structure remains a meaningful option. For all of these reasons, effective implementation of corporate codes assumes special urgency with respect to workers employed by MNC contractors and suppliers in developing countries.

It remains somewhat puzzling, however, that many companies are unwilling to pledge the same level of FOA protection for their own employees that they invoke for suppliers and contractors. One could argue that given the hard-law restrictions on FOA confronting many suppliers in the developing world, FOA protections would be at least as explicit for MNCs' own employees located primarily in Europe and North America.⁴⁸ Once again, the diminished respect for FOA – when contrasted with corporate pledges to uphold several other workplace standards for their own employees – suggests a more pervasive level of discomfort regarding employees' rights to join a union and engage in collective bargaining.

F. Inserting Disclaimers

Because corporate codes contain high-profile commitments to a range of worker protections, one might anticipate the inclusion of prominent

and collective bargaining, with no reference to what is "lawful"). As was true for ILO standards, Nestle is an outlier: it holds suppliers to a less rigorous standard than it demands of itself. *Compare supra* notes 19–20 and accompanying text (own employees) with THE NESTLÉ SUPPLIER CODE 2 (Aug. 2010), <http://www.nestle.com/Common/NestleDocuments/Documents/Library/Documents/Suppliers/Supplier-Code-English.pdf> (stating that suppliers should grant FOA and collective bargaining rights to their employees "unless prevented by governmental policies or norms").

47. See generally, Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2010); Locke, Amengual & Mangla, *supra* note 9.

48. In this regard, see Nestlé's practices described in note 46, *supra*.

disclaimers in these documents. In fact, fewer than one-fourth of the codes reviewed here include any disclaimer at all.⁴⁹ Where disclaimers are present, most are not prominently or conspicuously displayed, and they tend to use legalese rather than straightforward language.⁵⁰ It is quite possible that these disclaimers would be ineffective as a matter of law under the fairly rigorous standards applicable in many state courts.⁵¹

Upon reflection, it is not so odd that disclaimers are either nonexistent or insufficiently conspicuous and clear. Corporate codes are aimed primarily at consumers and investors, not at employees. A prominent disclaimer might erode consumer confidence that MNCs are genuinely committed to socially responsible behavior, and it might deter investment by socially conscious mutual funds. In addition, a clear and conspicuous disclaimer would presumably attract unwanted attention from human rights groups, NGOs, or trade unions. Resulting allegations of deception or hypocrisy could lead to negative media response, influencing a broader group of investors and consumers who rely on third parties for such information.⁵²

Moreover, disclaimers may be perceived as unnecessary with respect to employees of MNCs or their contractors. The language expressing corporate commitments to decent labor standards is often sufficiently vague, soft, or conditional so as to render these “commitments” tenuous. I return to this issue in Part III.

G. Summary Observations

This Part demonstrates that MNCs rely on a broad range of different approaches when declaring support for FOA and collective bargaining in their corporate codes. Among codes reviewed here, Nestlé is the gold

49. See KRISPY KREME DOUGHNUTS, INC., *supra* note 38, at 11; TIM HORTONS, *supra* note 38, at 3; CITI, *supra* note 25, at 3; GOODYEAR, *supra* note 34, at 2; MOTOROLA MOBILITY, BUSINESS CONDUCT: OUR ETHICS, OUR CULTURE, OUR COMMITMENT, 4 (2011), available at <http://responsibility.motorola.com/index.php/overview/busconduct/cobc/>.

50. On *prominence*, Krispy Kreme's disclaimer is on page 11 of a 12-page document, using bold type face but the same font size as other sentences. Tim Horton's is on page 3 of a 41-page manual, using the same font size without bolding or underlining. Motorola's is on page 4 of a 22-page document, appearing as a sentence embedded in a more general paragraph. See *supra* note 49. On *clarity*, Krispy Kreme, Tim Horton's, and Goodyear discuss the noncreation of contractual rights, the existence of at will employment relationships, and the company's right, at its sole discretion, to change any policy or procedure to the extent permitted or required by law. See *id.* Motorola more breezily asserts: “The code is by no means a comprehensive manual or contract that addresses every situation that we may encounter around the world.” MOTOROLA MOBILITY, *supra* note 49.

51. See, e.g., *Nicosia v. Wakefern*, 643 A.2d 554 (N.J. 1994); *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986 (Wyo. 1991); *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783 (Alaska 1989).

52. Cf. Kevin Banks & Elizabeth Shilton, *Error! Main Document Only. Corporate Commitments to Freedom of Association: Is There a Role for Enforcement Under Canadian Law?*, 33 Comp. Lab. L. & Pol'y J. 493, 509–20 (2012) (discussing incentives and disincentives for a properly worded disclaimer).

standard in two key respects: a commitment to recognize FOA rights as set forth in the core ILO convention addressed to that subject, and an insistence that corporate standards trump more restrictive protections in local laws. Other codes are less assertive on both items: they refer to ILO conventions in generalized and aspirational terms, and they accept the restrictions of local laws as part of their own FOA declarations.⁵³

There are other variations among MNCs with respect to language on nondiscrimination, distinctive treatment of suppliers, and use of disclaimers. Notwithstanding such differences, one might ask how much they matter to target audiences. It is not clear that consumers or investors or even NGOs regularly distinguish between vague, feel-good declarations and commitments expressed in more precise and therefore potentially accountable terms. A related question involves what might happen if Nestlé-type language became the norm. Would a more hard-edged commitment linked explicitly to ILO standards result in greater accountability through monitoring, by corporations themselves or alternatively by NGOs? Might adoption of Nestlé-type language on a broad scale lead to meaningful enforcement actions by or on behalf of interested parties such as employees, consumers, or investors?

In seeking answers to these questions, the precise terms of FOA code formulations would seem more important than has previously been addressed. Many observers agree that codes can be effectively monitored and enforced only when workers play an active internal role, for reasons discussed in Part II below. But unless corporate suppliers make an unequivocal commitment to respect FOA, very few workers will ever play that role. Even with such an unequivocal commitment, code compliance may well also require the option of outside enforcement by other stakeholders. For employees in low-wage jobs on the bottom rungs of global supply chains, fear of reprisal is an inevitable presence. Consumers and investors occupy a more promising position as initiators because they are not burdened with the severe power imbalance of such an employment relationship.

At the same time, if options for private litigation are to be subsidiary as opposed to primary, internal monitoring and enforcement must become more effective. Worker participation – anchored in genuine respect for FOA – is a vital prerequisite to enhance this interior focus. And if FOA as a standard is to carry real weight, it must be set forth in terms that give rise to reasonably specific and accountable expectations rather than simply broadly understood principles and aspirations.

53. For an argument that companies should go beyond local law restrictions in their monitoring and compliance efforts, see Montgomery & Maggio, *supra* note 4, at 216.

Before attempting to address issues of more precise accountability and private causes of action, it is relevant to examine how MNCs are performing in practice. If self-regulation works reasonably well, then contemplating separate lawsuits seems unnecessary. As Part II explains, however, there are serious shortcomings with the self-regulatory approach to code compliance, and these shortcomings warrant recourse to a complementary strategy.

III. PROBLEMS WITH CORPORATE SELF-ENFORCEMENT

A. *Frequent FOA Noncompliance in United States*

Although the surveyed corporate codes include some form of pledge to recognize FOA and collective bargaining, such pledges reflect commitments in principle. Review of National Labor Relations Board and federal court case law from 2000–2011, along with reports from NGOs, academics, and the media, make clear that corporations often fail to comply with such commitments in the United States. A handful of examples suffice to illustrate the gap between website representation and worksite reality.

TESCO opened its first U.S. subsidiary store, Fresh & Easy, in 2007.⁵⁴ The company is a charter member of the Ethical Trading Initiative, which has a code requiring respect for FOA and collective bargaining,⁵⁵ but Fresh & Easy has committed numerous unfair labor practices directed at union activity. It maintained an unlawful no-distribution rule at one location and an unlawful rule prohibiting employees from discussing the union at another store.⁵⁶ It also unlawfully interrogated employees and engaged in unlawful retaliations resulting in at least one election being rerun.⁵⁷ The number of violations in a short time period is not altogether surprising given that the company had advertised for an employee relations director who would be responsible for “maintaining non-union status and union avoidance activities.”⁵⁸

54. See generally, HUMAN RIGHTS WATCH, A STRANGE CASE: VIOLATIONS OF WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES BY EUROPEAN MULTINATIONAL CORPORATIONS 80 (Sept. 3, 2010), available at <http://www.hrw.org/reports/2010/09/02/strange-case> [hereinafter A STRANGE CASE].

55. See *supra* note 43 and accompanying text.

56. See Fresh & Easy Neighborhood Market, Inc. and UFCW International Union, 356 NLRB No. 85, 2011 NLRB Lexis 28, at *2 (Jan. 31, 2011) (unlawful nondistribution rule); *id.* at *2, * (unlawful rule prohibiting employees from discussing union).

57. See *id.* at *51–*53 (unlawful interrogation and surveillance); *Judge Throws Out Union Vote at Fresh & Easy Supplier*, SUPERMARKET NEWS, July 21, 2010, <http://supermarketnews.com/latest-news/judge-throws-out-union-vote-fresh-easy-supplier> (reporting on unlawful firing and coercion by Fresh & Easy supplier, subsequently acquired by the company).

58. See A STRANGE CASE, *supra*, at 54 (citing *Financial Times* story from 2006).

Sodexo recognizes FOA and collective bargaining in its *Human Rights Policy* and its *Code of Conduct*.⁵⁹ Yet it too has committed multiple NLRA infractions during recent organizing campaigns. These include various threats, interrogations, and promised benefits in violation of § 8(a)(1); discharge of striking workers and other employees in violation of § 8(a)(3); disparate enforcement of its distribution and solicitation policy; and unlawful refusal to bargain.⁶⁰ In addition, Sodexo managers have engaged in conduct that is legal under the NLRA but conflicts with its Human Rights Policy statement that it “respects our employees’ right to organize or not to organize as they may so choose” as part of “Respecting international labor standards.”⁶¹ This conduct includes holding captive audience meetings, using supervisors to engage in anti-union communications with individual employees, and invoking the specter of permanent replacement for employees considering a strike.⁶²

Similar narratives exist regarding interference with FOA for other corporations discussed in Part I. The NLRB has issued numerous complaints or found violations since 2000 against Deutsche Telekom’s U.S. subsidiary (T-Mobile), against G4S’s U.S. subsidiary (Wackenhut Security), against Siemens, and against DHL.⁶³ It does not follow that these companies are “worse actors” than corporations without codes of conduct. But because the corporations described here proclaim their support for high FOA standards, and because they routinely recognize and negotiate with worker representatives as part of their European operations, the persistent and aggressive pursuit of union avoidance strategies in the United States is notable.

Concern over corporate self-regulatory efforts extends to labor standards besides FOA. One of the largest apparel companies in the United States trumpeted its private monitoring program to the media for a six-year period in the 1990s even as federal and state labor inspectors repeatedly found that its contractors violated minimum wage and overtime laws,

59. See *supra* note 36 and accompanying text.

60. See generally Sodexo Am. & Local 471, Hotel, Motel & Restaurant Emps. & Bartenders Union, 2004 NLRB Lexis 440, at *14 (Aug. 6, 2004); Commercial Linen Exchange, Div. Sodexo Corp. & UNITE, 2004 NLRB Lexis 110, at *71, *106 (Mar. 3, 2004); Sodexo Marriott Serv. & Local 79, SEIU, 335 NLRB 538, 2001 NLRB Lexis 687 (Aug. 27, 2001); A STRANGE CASE, *supra* note 54, at 61–77.

61. See POLICY ON HUMAN RIGHTS, *supra* note 36, at 6.

62. See generally A STRANGE CASE, *supra* note 54, at 60.

63. See generally JOHN LOGAN, LOWERING THE BAR OR SETTING THE STANDARD? DEUTSCHE TELEKOM’S U.S. LABOR PRACTICES (Dec. 2009), http://laborcenter.berkeley.edu/laborlaw/deutsche_telekom09.pdf; A STRANGE CASE, *supra* note 54, at 21–34 (Deutsche Telecom and T-Mobile); *id.* at 35–46 (DHL and its parent corporation, Deutsche Post); *id.* at 87–100 (Wackenhut and its parent corporation G4S); *id.* at 115–20 (Siemens).

depriving employees of millions of dollars in back wages.⁶⁴ Despite Labor Department pressure on garment retailers to develop effective private monitoring programs, there remain widespread problems detecting and remedying wage and hour violations by manufacturers and contractors.⁶⁵

In some respects, U.S. employees' experience with corporate self-regulation has less in common with self-monitoring in Europe than with the track record of voluntary compliance programs in developing countries. One recent NGO report summarized stories from five countries about workers being deprived of FOA and other workplace protections by Sodexo, a corporation with a prominently displayed code. The workers were from the Dominican Republic, Colombia, Guinea, Morocco, and the United States.⁶⁶ Moreover, U.S. unions seeking to promote negotiation of international framework agreements with MNCs are coming to view ILO standards as integral to securing FOA in a robust form.⁶⁷

The core shortcomings of corporate self-regulation, however, do not derive from U.S. experience. The U.S. regulatory landscape includes a professional labor standards bureaucracy, independent and active trade unions, an engaged cohort of scholars, and a reasonably attentive media community. The presence of these groups promotes a certain level of information flow, transparency, and critical perspective on corporate efforts at self-regulation. The more serious challenges for voluntary compliance programs arise with respect to suppliers and contractors in the developing world. Apart from workers' meager levels of compensation, and inadequate regulatory systems that undermine their willingness to speak out,⁶⁸ global supply chains operate with a far lower degree of transparency and in the context of a far thinner knowledge base about actual working conditions. These suppliers provide the proper focus to review code applications in a self-regulatory setting.

64. ESBENSHADE, *supra* note 1, at 1–3 (describing practices of GUESS? Inc., and its contractors in Los Angeles).

65. *See id.* at 85–86 (garment workers in *highly monitored* shops in Los Angeles were unlawfully deprived of \$63 million in 2000); *see also* ESTLUND, *supra* note 3, at 64–68 (discussing widespread noncompliance with and underenforcement of workplace laws regulating wages, hours, and health and safety); *see generally* David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238 (2004).

66. *See* TRANSAFRICA FORUM, VOICES FOR CHANGE: SODEXO WORKERS FROM FIVE COUNTRIES SPEAK OUT (Dec. 21, 2010), http://tulane.usas.org/files/2011/01/20110118_transafrica_report.pdf.

67. *See, e.g.,* Susan R. Hobbs, *Sodexo Agreement with Union Federation Covers 391,000 Employees Worldwide*, 26 LAB. REL. WEEK (BNA) 97 (2012) (reporting on International Framework Agreement (IFA) between Sodexo and International Union of Food Workers that covers 391,000 workers including 18,000 in United States). The IFA text includes a commitment from Sodexo to respect the ILO's 1998 Declaration on Fundamental Principles and Rights at Work (art. 3.2) and a separate article detailing the meaning of the parties' agreement on FOA (art.5).

68. *See supra* text accompanying note 47.

B. Structural Shortcomings of a Voluntary Compliance Approach

Codes of conduct require some form of meaningful monitoring to avoid becoming at best a feel-good statement of corporate hopes and at worst an outright sham. The primary approach to monitoring has been internal: MNCs create human rights departments or divisions to do some or all of the following: visit worksites, interview managers and workers, check time cards and payroll records, review regularly filed compliance reports, provide advice on compliance problems, and recommend corrective action.⁶⁹ This kind of internal monitoring, however well-intentioned, has serious flaws when applied to global suppliers.

Worksite visits tend to be announced ahead of time. Advance notice is the norm because companies wish to minimize disruptions in factory or contractor production and also to assure that authorized accountants or other experts are on site to help with review of payroll and related records. But announced visits mean that suppliers or contractors are able to prepare in advance: to modify the books, minimize or conceal worksite hazards, and assure that workers on the shop floor are “well-prepared” to meet with auditors or inspectors.⁷⁰ It is not uncommon for suppliers to maintain double sets of books so as to deceive auditors, and to hand out scripts that employees can memorize and recite when interviewed.⁷¹

With or without such worker scripts, auditors’ interviews are usually brief and likely conducted on site at the plant. They may take place in a private office or conference room rather than on the shop floor, but the identities of those interviewed are known to management. Predictably, these workers are subjected to, or they reasonably anticipate, threats and intimidation. Local laws do not protect against employer retaliation, and there is little opportunity for workers to develop a trust relationship with the auditors who in any event are unlikely to have labor standards training and expertise.⁷² Employees in these circumstances are understandably fearful to provide answers that would be most relevant regarding their day to day experiences and perceptions of working conditions. The likelihood of

69. See generally ESBENSHADE, *supra* note 1, at 70–80; Montgomery & Maggio, *supra* note 4, at 203.

70. See ESBENSHADE *supra* note 1, at 71–74; Ben Jiang, *Implementing Supplier Codes of Conduct in Global Supply Chains: Process Explanations from Theoretical and Empirical Perspectives*, 85 J. BUS. ETHICS 77, 77 (2009); Locke, Amengual & Mangla, *supra* note 9, at 328.

71. See Dexter Roberts et al., *Secrets, Lies, and Sweatshops*, BUS. WEEK, Nov. 27, 2006 (reporting on these practices at numerous Chinese factories); Jiang, *supra* note 70, at 77; *Auditing Working Conditions*, ETHICAL TRADE INITIATIVE, <http://www.ethicaltrade.org/in-action/issues/auditing-working-conditions> (last visited June 6, 2012).

72. See Mark Barenberg, *Toward a Democratic Model of Transnational Labour Monitoring?*, in *REGULATING LABOUR IN THE WAKE OF GLOBALIZATION* 37, 40 (Brian Bercusson & Cynthia Estlund eds., 2008).

cursory responses and withheld information further vitiates the monitoring process.

In addition, the MNC factory audit often suffers from a conceptual weakness. Because it tends to be modeled on company financial audits, factory monitoring relies primarily on review of myriad documentary records, not on time-consuming investigation of shop-floor processes and lengthy worker interviews.⁷³ In this regard, corporate auditors' training and orientation may be peculiarly ill-suited to identify code violations involving labor-management relations in general and FOA in particular. A recent influential study concluded that most auditors interviewed by the authors had training in HR management or in operations, and accordingly were "more likely to notice and report on blocked aisles, uncharged fire extinguishers, and irregular personnel records rather than worker or union harassment [or] illegal firings"⁷⁴

Underlying many of these weaknesses is an inherent tension between corporations' principled espousal of labor standards and their pragmatic insistence on price-driven competition among suppliers. Senior executives tend to care more about earnings and profit margins than about human rights issues. Global suppliers in apparel, footwear, handicrafts, and other labor-intensive industries understand that because corporate management negotiates primarily on price, suppliers must keep costs low in order to compete successfully for business.⁷⁵ As a result, many suppliers choose to operate outside the soft regulatory framework, to minimize attention to their approach by restricting their employees' FOA, and to conceal this arrangement from the MNCs with which they do business.⁷⁶ And many MNCs continue to do business with noncomplying suppliers, either from choice or perceived necessity.⁷⁷

These serious problems of objectivity and transparency may be alleviated to some degree if monitoring is truly independent. An outside monitoring enterprise is more likely to rely on unannounced site visits, to engage neutral experts for record review, and to interview workers away from the worksite where they should feel less intimidated. Importantly, the

73. See Locke, Amengual & Mangla, *supra* note 9, at 332.

74. *Id.* at 333.

75. See Mischa Gaus, *Students vs. Sweatshops, Round III—The Designated Supplier Program Targets College Clothing Companies*, INT'L LAB. RTS. F. (July 31, 2006), <http://www.laborrights.org/print/11153> (discussing pressures on suppliers to hold production costs down by exploiting workers); see generally Jack Nash, *Do Codes of Conduct Promote Unethical Sourcing?*, JUST-STYLE (Apr. 2, 2001), http://www.just-style.com/analysis/do-codes-of-conduct-promote-unethical-sourcing_id92610.aspx.

76. See generally Isabel Hilton, *Made in China*, 89 GRANTA, Spring 2005, at 13; Debra Cohen Maryanov, Note, *Sweatshop Liability and Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 409–10 (2010); Nash, *supra* note 75.

77. See Locke, Amengual & Mangla, *supra* note 9, at 335.

independent monitor's success in contacting and communicating with workers away from the plant is likely dependent on the active involvement of a local trade union or labor NGO.⁷⁸

Even for independent monitors and auditors, however, there remain genuine obstacles. The opaque web of subcontracting relationships often includes short-term agreements and constant shifting between suppliers.⁷⁹ The complex arrangements for payroll and benefits distributions may be similarly difficult to penetrate. Employees may be unwilling to share critical information or perceptions absent a strong local workers' organization on the ground. A clear system of sanctions also must be in place for use against code violators, something that requires initiative and leadership from corporate managers rather than outside monitors.⁸⁰

Moreover, factories that respond to an external audit by complying with code standards face a short-term competitive disadvantage. They may react by closing and then relocating production to begin anew the process of evading costly labor requirements.⁸¹ Such relocations mean that workers who are the victims of code violations experience job loss as their "remedy."

Finally, a corporation that is determined to monitor rigorously – whether on its own or through independent audits – may still have only limited leverage over its suppliers. For apparel and other consumer goods production, MNCs typically outsource to hundreds if not thousands of facilities. Their share of production in any given factory may be at most 10% to 15% of that factory's overall output. In such circumstances, a single company that seeks to impose compliance with FOA or other core

78. See Barenberg, *supra* note 72, at 41–42 (discussing operation of Worker Rights Consortium (WRC) monitoring teams, which maximize participation by local worker and community representatives while excluding plant workers or union officials seeking to organize the factory). The WRC is described *supra* note 12.

79. See TEARING APART AT THE SEAMS: HOW WIDESPREAD USE OF FIXED-DURATION CONTRACTS THREATENS CAMBODIAN WORKERS AND THE CAMBODIAN GARMENT INDUSTRY, ALLARD K. LOWENSTEIN INT'L HUMAN RTS. CLINIC (Apr. 2011), http://www.law.yale.edu/documents/pdf/Intellectual_Life/Cambodia_TearingApartattheSeams.pdf (reporting that Cambodian garment industry's increasing use of short-term employment contracts threatens to roll back labor rights progress); Jiang, *supra* note 70, at 78 (stating that long-term contracts are an important prerequisite to improve suppliers' labor standards performance); O'Rourke, *supra* note 9, at 21–22 (emphasizing firm's ability to move production rapidly and to hide behind multiple layers of ownership).

80. See generally Lars-Eric Petersen & Franciska Krings, *Are Ethical Codes of Conduct Toothless Tigers for Dealing with Employment Discrimination?*, 85 J. BUS. ETHICS 501, 504, 509 (2009).

81. In Indonesia, an investigation by the WRC resulted in substantial improvements to employee working conditions. The factory was then closed in 2010, and management took steps to blacklist employee union leaders with other local area employers. See *WRC Factory Investigation: Kwangduk Langgeng*, WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org/Freports/Kwangduk%20Langgeng.asp>, (last visited June 6, 2012). A comparable scenario played out for workers at a factory in the Dominican Republic. Management responded to a WRC investigation, recognized a free trade union, then relocated production to other facilities and closed the plant in 2007. See *WRC Factory Investigation: BJ&B*, WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org/Freports/bjandb.asp> (last visited June 6, 2012).

labor standards by severing ties with the factory loses even its limited amount of leverage. Because suppliers as factory owners will be reluctant to compromise their competitive position at the behest of one customer, they may well be unwilling to do the right thing.⁸²

The range of obstacles confronting self-enforcement efforts does not mean corporations are incapable of making genuine progress. Professor Cynthia Estlund has cogently described the rise of regulated self-regulation in the workplace, observing that corporate efforts have grown steadily stronger since the 1990s and that the trend toward such self-regulation seems here to stay.⁸³ Moreover, there are modest success stories. Reebok attracted favorable attention for its monitoring in the 1990s, which included assigning company personnel to observe inside its supplier plants; deploying audit teams from corporate headquarters to visit and evaluate; and relying on an independent accounting firm as well.⁸⁴ Since the 1990s, Nike has made significant efforts to improve working conditions among its suppliers.⁸⁵

In the end, however, even the most aggressive self-monitoring programs cannot be enough on their own. A recent NGO critique reported that despite improvements in MNC efforts, there remain serious problems with the basic auditing approach in place.⁸⁶ A more recent study of a well-known global apparel company revealed pervasive violations of code provisions addressed to FOA, overtime and work hours, and safety and health; these violations were widespread among the company's suppliers in Asia, Latin America, and the Middle East.⁸⁷ Aptly summarizing the current state of affairs, an in-depth report on Nike's monitoring efforts concluded that they produced at best mixed results:

82. See generally, Locke, Amengual & Mangla, *supra* note 9, at 326. The WRC proposal known as the designated supplier program (DSP) encourages major apparel brands to concentrate corporate control over working conditions. The DSP remains in the advanced planning stage; the Department of Justice recently announced that it would not challenge the program on antitrust grounds. See Letter from Sharis Pozen, Acting Assistant Attorney General, to Donald I. Baker, Worker Rts. Consortium (Dec. 16, 2011), <http://www.workersrights.org/dsp/Letter%20from%20DOJ%2012.16.2011.pdf>

83. See ESTLUND, *supra* note 3, at 75–95; see generally Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct As a Regime of Labour Market Regulation*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 471 (Joanne Conaghan et al. eds., 2000).

84. See Lance Compa & Tashia Hinchcliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 682–83 (1995); Yu, *supra* note 19, at 241–47.

85. See Locke, Qin & Brause, *supra* note 5.

86. See CLEAN CLOTHES CAMPAIGN, LOOKING FOR A QUICK FIX: HOW WEAK SOCIAL AUDITING IS KEEPING WORKERS IN SWEATSHOPS 12–33 (2005), http://www.cleanclothes.org/documents/05-quick_fix.pdf (reporting that audit approach used by large retailers like Walmart in eight countries marginalizes workers and their organizations, relies on unskilled and inexperienced auditing staff, invites widespread deception perpetrated by factory managers, and lacks effective remediation follow-up); *Auditing Working Conditions*, *supra* note 71.

87. See Locke, Amengual & Mangla, *supra* note 9, at 330–31.

After years spent by Nike developing ever more comprehensive monitoring tools, hiring growing numbers of internal compliance specialists, conducting hundreds and hundreds of factory audits, and working with external consultants and NGOs, analyses of the company's own data suggest that conditions have improved somewhat in some of its suppliers but either stagnated or deteriorated in many others.⁸⁸

C. The Complementary Value of Judicial Enforcement

Before exploring specific cause-of-action options for employees, consumers, and investors, it seems important to consider the overarching justification for seeking to promote private enforcement. As reported by numerous workplace scholars, MNCs in recent decades have institutionalized their self-regulatory approach to labor standards.⁸⁹ Particularly for global industries involving apparel, footwear, and other labor-intensive products, private and independent monitoring of suppliers' compliance with corporate codes has become entrenched. Some academics have expressed more optimism than others regarding this development,⁹⁰ but the development itself shows no signs of abating.⁹¹

It is widely understood that meaningful code compliance by global suppliers is unlikely without genuinely effective monitoring. For reasons already discussed, a robust commitment to FOA seems essential to the success of such monitoring.⁹² In addition, however, there is inevitably a certain disconnect between monitoring and enforcement. Even the best set of benchmarks and independent monitoring techniques may not be sufficient, especially for a low-wage workforce that too often lacks key support structures. Additional options may well be needed to spur corporations to discipline or reorient their suppliers, and to incentivize proactive code compliance efforts by suppliers themselves. One such option is to think more creatively about private enforcement.

In this regard, a useful analogy is to the proliferation of whistleblower causes of action. Over the past three decades, Congress and state legislatures have enacted scores of provisions protecting whistleblowers from employer retaliation.⁹³ The key rationale for such protection is the

88. See Locke, Qin & Brause, *supra* note 5, at 21.

89. See generally ESBENSHADE, *supra* note 1; ESTLUND, *supra* note 3; ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? (2001); SEIDMAN, *supra* note 7.

90. Compare e.g., FUNG ET AL., *supra* note 89 (relatively hopeful) with Dara O'Rourke, *Monitoring the Monitors: A Critique of Corporate Third-Party Labour Monitoring*, in CORPORATE RESPONSIBILITY AND LABOUR RIGHTS, *supra* note 1, at 196–208 (highly skeptical) and ESBENSHADE, *supra* note 1 (same).

91. See ESTLUND, *supra* note 3, at 6–23.

92. See *supra* Part II.G.

93. See, e.g., Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801, 1855 (2006); Superfund Act, 42 U.S.C. §§ 9601, 9610 (2006); Surface Transportation Assistance Act, 49

important role of the private attorney-general. Any activity that justifies government regulation to establish basic labor standards also warrants protection for individuals who seek to ensure compliance with those underlying standards. Given the challenge of discovering and remedying hazardous or substandard conditions in today's U.S. workplaces, private watchdog efforts have become an important contributor. Their role has assumed more urgency due to the shrinking level of government enforcement resources and the substantially diminished presence of trade unions able to negotiate worker protections.

Like government regulation of labor conditions, corporate monitoring of labor standards faces myriad obstacles including restricted access to relevant information, lack of transparency, worker perceptions of vulnerability, and inadequate resources for the task at hand. In this context, private enforcement can serve as a complementary incentive to promote compliance with core labor standards. To be sure, whistleblowers are specifically protected by statute and are assisting in enforcement of legislatively approved standards, whereas consumers, investors, or employees might well be assisting in enforcement without such an express legislative imprimatur.⁹⁴ But promoting enforcement of "soft law" can be conceived of as extending beyond the boundaries of statutes and regulations, as has occurred with respect to the widely recognized public policy exception to employment at will.⁹⁵

Moreover, while corporate codes of conduct are not themselves positive law, MNCs hope to reap rule-of-law-type advantages from their promulgation. Corporations intend for targeted audiences to favor their products in part because of reliance on these standards, and for government regulators to minimize interventions in part based on internal compliance with the standards. Under these circumstances, allowing private parties at whom the codes are targeted to help enforce code commitments may well be justified from a public policy standpoint.⁹⁶

There are potential costs involved if private causes of action are authorized and then pursued. We may see frivolous lawsuits or excessive

U.S.C. §§ 31100, 31105 (2006); Sarbanes Oxley Act, 18 U.S.C. § 1514A (2006); Michigan Whistleblower Protection Act, M.C.L.A. § 15.362 (2012).

94. There are some potential statutory causes of action. For example, for employees under the Alien Tort Claims Act, for consumers under state false advertising laws, and for investors under Rule 10b-5. See Part IV *infra*.

95. See, e.g., *Gardner v. Loomis Armored, Inc.*, 913 P. 2d 377 (Wash. 1996); *Gantt v. Sentry Ins.*, 824 P.2d 680 (Cal. 1992); see generally CLYDE SUMMERS ET AL., *LEGAL RIGHTS AND INTERESTS IN THE WORKPLACE: STATUTORY SUPPLEMENT AND MATERIALS* 179–92 (2007) (reporting all fifty states have adopted some version of the public policy exception).

96. Cf. Miriam F. Weisman, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615, 625–26 (2009) (discussing shortcomings of a purely self-regulatory model when attempting to eradicate bribery as a rational global market entry strategy).

discovery requests that divert corporate resources from code enforcement. Further, in the long run, worker interests may be more effectively represented through corporate negotiations with trade unions and labor NGOs than with hit-or-miss litigation. For instance, there may still be ways to render global production efforts more responsive to codes though designated suppliers or other closed-supply-chain efficiencies.⁹⁷ But whatever the costs, pervasive weaknesses in code compliance and monitoring of global suppliers invite new inquiries regarding how to make codes more than aspirational.

In order to explore possible options for private litigation, I have chosen to reference certain FOA code language or approaches as a benchmark. Part IV invokes the Nestlé language at various points because it is clear and includes relatively little wriggle room. If causes of action cannot be defended based on the strongest code language, the prospects for such private enforcement seem bleak. On the other hand, to the extent certain causes of action are deemed plausible or justified under the Nestlé provision, then interested consumers, investors, or NGOs may seek to include comparable language in other codes.

IV. OPTIONS FOR PRIVATE ENFORCEMENT OF CODES

For purposes of this Part, I assume a corporate code that pledges adherence to the ILO convention on FOA for both the parent corporation and its suppliers. I assume further that there are serious questions regarding the effectiveness of monitoring undertaken to assure compliance with code provisions, including the provision related to FOA.

A. Causes of Action by Employees

Employees may consider a number of theories to vindicate their FOA protections. I briefly examine three such possibilities: enforcing the code directly by relying on the employee handbook doctrine; asserting employees' rights as third party beneficiaries of the parent-supplier agreement; and, for employees who are not United States citizens, bringing an action under the Alien Tort Claims Act.

1. Employee Handbook Doctrine

In the 1980s, state courts established that employer commitments on job security, set forth with sufficient clarity in employee handbooks or

97. See designated supplier program discussed *supra* note 82; *Designated Supplier Program* (DSP), WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org/dsp/> (last visited June 6, 2012) (describing program in detail); see also ESBENSHADE, *supra* note 1, at 206.

manuals, could be enforceable under a theory of unilateral contract.⁹⁸ These courts ruled that it was proper to presume employee knowledge and reliance so long as the handbook was widely disseminated and the employee continued to stay on the job.⁹⁹ Courts applied unilateral contract theory even though most employers issuing handbooks did not believe they were extending a contractual offer and had no intention of so doing.

If corporate codes are viewed as analogous to employee handbooks, then commitments to respect FOA – and ergo not to retaliate against employees who assert FOA rights – could be viewed as enforceable. The analogy, however, is far from perfect. Employees are the primary intended recipients of handbooks, and in most cases they are actual recipients as well. By contrast, corporate codes are aimed primarily at consumers and investors rather than employees. Further, even in this electronic age, code web postings may not be properly comparable to employee handbook distributions that typically are combined with employee training and orientation sessions. The comparison becomes still more remote for low-wage employees outside the United States, who may have limited internet access and also limited facility in English. Accordingly, presumptions of employee knowledge and reliance are far more tenuous with respect to corporate code provisions than employee handbooks.

Efforts to invoke the handbook doctrine to protect whistleblowers under corporate codes of business conduct have met with little success in the courts.¹⁰⁰ Outcomes are due in part to the overly general language of code anti-retaliation provisions, which courts deem not to qualify as a specific employer promise.¹⁰¹ That concern could apply to aspects of FOA code language as well. For instance, assertions that the corporation will not tolerate harassment or retaliation against efforts to form a union may be viewed as statements of values rather than actionable promises.¹⁰²

98. See, e.g., *Wooley v. Hoffman-LaRoche*, 491 A.2d 1257 (N.J. 1985); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980).

99. See *Wooley*, 491 A.2d at 1264–66; *Toussaint*, 292 N.W.2d at 892–93; *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626–30 (Minn. 1983). Not all state courts were this adventurous. See, e.g., *Johnson v. National Beef Packing Co.*, 551 P.2d 779, 782 (Kan. 1976) (manual is a unilateral expression of company policy the terms of which were not bargained for); *Edwards v. Citibank N.A.*, 425 N.Y.S.2d 327, 328–29 (App. Div. 1980) (manual does not create a unilateral obligation).

100. See generally Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 1012–18 (2008).

101. See, e.g., *Riel v. Morgan Stanley*, No. 06 CV 524(TPG), 2007 WL 541955, at *6 (S.D.N.Y. 2007 Feb. 16, 2007) (refusing to enforce code provision stating that employer “will not tolerate any kind of retaliation for” good faith whistleblower complaints); *Adcox v. SCT Prods.*, No. 01A01-9703-CV-00123, 1997 WL 638275, at *2 (Tenn. Ct. App. Oct. 17, 1997) (refusing to enforce code provision holding managers responsible for a work environment where “constructive, frank, and open discussion is encouraged and expected, without fear of retaliation”).

102. Cf. *Belgasem v. Water Pik Techns., Inc.*, 457 F. Supp. 2d 1205, 1220 (D. Colo. 2006) (refusing to enforce antidiscrimination and anti-harassment policies in company’s *Ethics and Compliance Guidelines*).

Beyond problems of language, however, courts regularly insist on individualized employee reliance when assessing anti-retaliation statements in corporate business codes.¹⁰³ By requiring whistleblowers to allege and establish actual reliance on the code commitment, courts have signaled their doubts as to whether employees are the primary recipients for this commitment. These doubts may well extend to the circumstances surrounding labor standards code provisions as well.

2. Third-Party Beneficiary Doctrine

In *Doe v. Wal-Mart Stores, Inc.*,¹⁰⁴ the Ninth Circuit dismissed a third-party beneficiary claim brought by employees of Wal-Mart's foreign suppliers located in Asia, Africa, and Central America. Plaintiffs contended that Wal-Mart had promised its suppliers it would monitor their compliance with the corporate code, and that as employees they were beneficiaries of this promise.¹⁰⁵ After reviewing the language of Wal-Mart's code of conduct for its suppliers, the court held that plaintiffs' claim failed for two reasons. First, Wal-Mart did not make a promise to monitor suppliers and therefore created no duty that could flow to employees as beneficiaries.¹⁰⁶ Second, even if Wal-Mart had made such a promise, plaintiffs failed to plead that it was the suppliers' intent as promisees to benefit their employees through agreeing to follow the corporate code – the suppliers' intent was more logically to benefit themselves.¹⁰⁷

As the leading decision addressing possible enforcement by third-party beneficiaries of corporate code commitments, *Wal-Mart* presents a substantial challenge to employee causes of action. The court's key reasoning is that under the language and structure of its supplier code, Wal-Mart "reserved the right to inspect the suppliers, but did not adopt a duty to inspect them."¹⁰⁸ Still, a differently worded code provision could give rise to a duty of monitoring and inspection. Moreover, a promise to inspect can be inferred from the circumstances surrounding a supplier contract as well as from contract language.¹⁰⁹

103. See Moberly, *supra* note 100, at 1017–18 and cases cited therein.

104. 572 F.3d 677 (9th Cir. 2009).

105. See *id.* at 681.

106. See *id.* at 681–82.

107. See *id.* at 682. This second ground is more clearly articulated in the district court opinion affirmed by the Ninth Circuit. See No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *4 (C.D. Cal. 2007).

108. *Id.* at 681–82. The code language relied on by plaintiffs was part of a paragraph entitled "Right of Inspection." *Id.* at 682.

109. See generally *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (Ct. App. N.Y. 1917). This inference will be subject to each jurisdiction's parole evidence rule.

In contrast to *Wal-Mart*, some courts have found a reservation of rights to imply an affirmative duty sufficient to give rise to a third-party-beneficiary cause of action. In one case, the Tenth Circuit held that an auto racing association's contractual "right to cancel" race track events due to "unsafe racing conditions" gave rise to an actionable duty to protect race car drivers from a fire hazard at the track.¹¹⁰ In another example, a New York state court recognized that tenants and visitors could sue as intended beneficiaries based on general language in an agreement between a security company and a residential complex.¹¹¹ And courts have been willing to sustain third-party actions in an employment setting if the contract language is sufficiently specific regarding benefits accruing to employees, including the benefit of a compliance and monitoring program.¹¹²

These cases suggest that the language of a code agreement may allow for third-party actions stemming from a corporate commitment to have suppliers recognize FOA and to monitor their FOA practices. Courts must decide in specific circumstances whether code language demonstrates an undertaking with employees as intended beneficiaries or merely a reservation of rights or acknowledgement of general principles. Employees as third parties need not establish individual reliance so long as they are intended beneficiaries of the undertaking.¹¹³ In addition, and subject to parole evidence rule restrictions, employees may seek to establish their status as intended beneficiaries from the record surrounding code adoption. This record could include corporate awareness of widespread FOA problems in its industry or of public backlash due to employees being mistreated generally by its suppliers.

The second prong of *Wal-Mart* was the court's conclusion that even if the company's promise was sufficiently specific, its suppliers must have entered into the code agreement for their own benefit rather than to benefit their workers.¹¹⁴ One might argue, however, that although a promisee

110. See *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1524–25 (10th Cir. 1997).

111. See *Kelly v. Norgate Bus. Ass'n*, 2009 N.Y. Slip Op. 5196 U, at * 5–8. See also *Ayala v. Bos. Hous. Auth.*, 536 N.E.2d 1082, 1088–90 (Mass. 1989) (tenants of housing project were intended beneficiaries of housing authority's contract with federal agency under which authority was to inspect for lead paint hazards). Other state courts have agreed with the *Wal-Mart* court's conclusion that in order to establish a third party beneficiary cause of action, the relevant contract language must evidence a specific undertaking rather than recognition of general responsibilities. *Gay v. Ga. Dep't of Corr.*, 606 S.E. 2d 53, 54–57 (Ga. Ct. App. 2004).

112. See *Chen v. Street Beat Sportswear, Inc.*, 226 F. Supp. 2d 355, 361–65 (E.D.N.Y. 2002) (garment workers were intended beneficiaries of compliance program agreement between clothing manufacturer and Department of Labor); *Prouty v. Gores Techn. Grp.*, 18 Cal. Rptr. 3d 178, 180–85 (Cal. Ct. App. 2004) (former employees were intended beneficiaries of severance pay provisions in purchase agreement between current and former employer companies, despite general clause disavowing any rights to third parties).

113. See generally *Ratzlaff v. Franz Foods of Ark.*, 468 S.W.2d 239, 241 (Ark. 1971); *Boise Cascade Corp. v. Pence*, 394 P.2d 359, 361–62 (Wash. 1964).

114. See *supra* note 107 and accompanying text.

supplier's primary intent in agreeing to a corporate code is to benefit itself, it also knows – or should objectively be understood to recognize – that agreement to the code will result in benefits to its employees. A promisee's mixed motive or primarily self-interested motive for agreeing to the contract is compatible with the contract also being intended to benefit third parties.¹¹⁵ And these third parties may be intended beneficiaries even if not expressly mentioned or identified in the agreement.¹¹⁶

The fact that a supplier's noncompliance with corporate code provisions has important consequences for supplier employees does not mean that those employees' interests were part of the contemplated arrangement between corporation and supplier. Still, although the Wal-Mart decision signals judicial reluctance to regard employees as intended beneficiaries of code agreements between MNCs and their suppliers, other courts may be less skeptical about this prospect. Further, corporate code language and the circumstances surrounding its adoption may diverge from the Wal-Mart setting, permitting a more favorable result for employees.¹¹⁷ In sum, the third-party-beneficiary theory appears somewhat promising for employees when compared to the employee handbook doctrine.

3. Alien Tort Claims Act

The Alien Tort Claims Act (ATCA), part of the Judiciary Act of 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹¹⁸ Scholars disagree as to the precise original intent behind enactment of ATCA, but Congress's likely interest was to assure foreign governments and merchants that the new nation would take seriously those duties imposed by the law of nations.¹¹⁹

115. See *Vidimos, Inc. v. Laser Lab. Ltd.*, 99 F.3d 217, 220 (7th Cir. 1996); *Vikingstad v. Baggott*, 282 P.2d 824, 826 (Wash. 1995). See generally 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §10.3 (2004).

116. *Ratzlaff*, 468 S.W.2d at 241; *Boise Cascade*, 394 P.2d at 361–62; FARNSWORTH, *supra* note 115.

117. Admittedly, corporations faced with the possibility of third-party actions by employees may choose to add clear and prominent disclaimer language to their codes. A suitably prominent statement that employees are not meant to benefit in any specific way from the agreement between a corporation and its suppliers may also undermine the faith of consumers and investors, and attract critical attention from NGOs and the media. See *supra* Part II.F.

There may be procedural hurdles involving *in personam* jurisdiction and *forum non conveniens* if the defendant is a foreign supplier or subsidiary of a U.S. corporation, or a corporation that is headquartered in Europe. Those issues are beyond the scope of this Article. See generally Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (Fall 2002).

118. 28 U.S.C. § 1350 (2006), originally codified at 1 Stat. 73 (1789).

119. See generally Anne-Marie Burley, *The Alien Tort Statute and The Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464–82 (1989) (discussing different possible purposes for ATCA).

Whatever its exact historical purpose, the Act was essentially dormant as a basis for litigation from 1789 to 1980.¹²⁰

Since the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*,¹²¹ courts have sustained jurisdiction under ATCA with greater frequency. The court in *Filartiga* held that under ATCA, the contemporary law of nations extended to a foreign state's treatment of its own citizens and that the law applied to prohibit torture sanctioned by a state government.¹²² Subsequently, in *Sosa v. Alvarez-Machain*,¹²³ the Supreme Court indicated that for ATCA jurisdiction to apply, the "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."¹²⁴

For present purposes, a hypothesized ATCA claim would involve allegations by alien workers that their employer – probably a foreign-based supplier but perhaps a parent MNC – denied them protections and/or punished them for attempting to engage in FOA. There are at least two substantial obstacles to such a claim: whether ATCA allows for enforcement against private actors such as corporations or only against state actors, and whether FOA is a sufficiently universal and obligatory norm of international law.¹²⁵ Each obstacle implicates complex disagreements over doctrine and policy, addressed only briefly here.

On the liability of corporate actors, the case law has been rapidly developing. As set forth above, the statutory text confers jurisdiction for torts in violation of international law without specifying or limiting the identity of the perpetrator. The Second Circuit in 2010 held, over a forceful contrary view, that ATCA does not extend to corporate actors because there is no customary international standard holding corporations accountable for human rights violations.¹²⁶ Prior to the Second Circuit's *Kiobel* decision, the Eleventh Circuit had ruled that corporations may be held liable for violations of human rights, notably torture.¹²⁷ And in the past year, two

120. See Gary Clyde Hufbauer & Nicholas K. Mitroostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004) (reporting ATCA was used at most twenty-one times during this period, and only two cases upheld jurisdiction).

121. 630 F.2d 876 (2d Cir. 1980).

122. See *id.* at 881–85. The case was brought as a wrongful death action by the family of a Paraguay citizen (*Filartiga*) who allegedly was kidnapped and tortured to death by the Paraguay Inspector General of Police (*Pena-Irela*). The suit was filed when *Filartiga's* family members and the former Inspector General were living in the United States. *Id.* at 878–79.

123. 542 U.S. 692 (2004).

124. *Id.* at 732 (internal citation omitted). The Court held that short term illegal detention of an alien, followed by his transfer across the border and lawful arraignment, "violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

125. Once again, potential obstacles involving *in personam* jurisdiction or forum *non conveniens* are beyond the scope of this Article. See *supra* note 117.

126. Compare *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 120–21, 136–37 (2d Cir. 2010) with *id.* at 150–52 (Leval, J., concurring in result).

127. See *Romero v. Drummond Co. Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

other circuits have come down on the side of approving corporate liability.¹²⁸ The D.C. Circuit in particular concluded that the majority in *Kiobel* had misunderstood ATCA's textual structure, history, and purpose and had ignored the law on corporate liability from 1789 as well as the Supreme Court's admonition in *Sosa* to follow federal common law.¹²⁹ The Supreme Court will address the circuit court conflict,¹³⁰ but to this point lower courts are leaning in favor of allowing suitably framed ATCA claims against corporate actors to proceed.

On the issue of what actions give rise to liability under ATCA, however, employees asserting violations of FOA face an uphill battle. Claims that have achieved traction under ATCA have involved human rights violations sufficiently heinous to be deemed universal and obligatory norms under international law. These have included acts of torture,¹³¹ genocide,¹³² the use of forced labor,¹³³ and certain extreme forms of child labor.¹³⁴ It is doubtful that deprivations of FOA protection – which on their face do not threaten the health and safety of affected individuals – would similarly qualify as a “norm of international character accepted by the civilized world.”¹³⁵

The Seventh Circuit's recent decision in *Flomo v. Firestone Natural Rubber Co.*¹³⁶ suggests one possible approach for affected employees. In reviewing whether Firestone's treatment of child labor on its rubber plantation in Liberia violated customary international law, Judge Posner for the court invoked the United Nations Convention on The Rights of the Child and the two fundamental ILO Conventions addressed to child labor. Noting that the United States had ratified only one of these three conventions, the court observed that conventions not ratified by all nations “can still be evidence of customary international law. . . . Otherwise every

128. See *Flomo v. Firestone Nat. Rubber Co.*, 643 F. 3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

129. See *id.* at 39–55.

130. See *Kiobel*, 132 S. Ct. 472 (2011) (granting cert.). Following oral argument in February, 2012, the case was restored to the calendar for re-argument in the 2012 Term. See 132 S.Ct. 1738 (2012).

131. See, e.g., *Kiobel*, 621 F. 3d at 120; *id.* at 155 (Leval, J. concurring in result); *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242, 1250–53 (11th Cir. 2005); *Hilao v. Estate of Marcos*, 25 F. 3d 1467, 1475 (9th Cir. 1994).

132. See *Kadic v. Karadzic*, 70 F. 3d 232, 243–44 (2d Cir. 1995).

133. See, e.g., *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1074 (C.D. Cal. 2010); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 441 (D.N.J. 1999).

134. See, e.g., *Nestle*, 748 F. Supp. 2d at 1075–76; *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1020–21 (S.D. Ind. 2007).

135. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). But cf. *Estate of Valmore Lacarno Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003) (finding that “the fundamental rights to associate and organize support actionable torts under the ATCA”).

136. 643 F.3d 1013 (7th Cir. 2011).

nation (or at least every “civilized” nation) would have veto power over customary international law.”¹³⁷

Although the United States has not ratified the core ILO Conventions on FOA and collective bargaining, the vast majority of nations have done so. This broad level of international acceptance compares favorably with ratification levels for other “core” conventions.¹³⁸ When considered along with additional international agreements recognizing the fundamental nature of FOA,¹³⁹ courts may be willing to examine the contention that at least certain deprivations of that right implicate customary international law.

At the same time, the Supreme Court in *Sosa* offered multiple reasons for setting a high bar against new private causes of action under ATCA.¹⁴⁰ One of these reasons, concern over foreign policy implications, might carry special force in countries that do not allow free trade unions or collective bargaining under their national laws. Moreover, unless FOA deprivations are accompanied by acts of violence or physical harm from corporate actors, or perhaps threats posing an imminent risk of such harm, they may well not be regarded as sufficiently universal and obligatory. For these reasons, it seems less likely that federal courts will find a loss of FOA protections to be grounds for recovery under the statute.

B. Cause of Action By Consumers: False Advertising

When a corporation in its code promises to abide by the dictates of ILO Convention 87 and to require that its suppliers do so as well, some consumers are likely to rely on these statements when determining which goods or services to purchase. The issue becomes whether, in appropriate circumstances, an action for false advertising can be brought by or on

137. *Id.* at 1021.

138. The FOA Convention has been ratified by 150 nations and the Collective Bargaining convention by 160 nations. This closely approximates ratification levels for the Convention on the Abolition of Forced Labor (169 nations), the Minimum Age Convention (160 nations), and the Worst Forms of Child Labor Convention (174 nations). For data on ILO convention ratifications see ILOLEX: DATABASE OF INTERNATIONAL LABOUR STANDARDS, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited June 6, 2012).

139. See, e.g., ILO Declaration on Fundamental Principles and Rights at Work, International Labour Organization, <http://www.ilo.org/declaration/lang-en/index.htm> (last visited June 6, 2012); International Covenant on Economic, Social and Cultural Rights, art. 8, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); The Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

140. See *Sosa*, 542 U.S. at 724–28 (identifying as reasons for judicial caution: (i) reluctance to expand the discretionary power of judges in this common law arena; (ii) recognition that common law in general has become interstitial at most; (iii) preference that creating new private rights of action is best left to legislative judgment; and (iv) concern over the potential implications for U.S. foreign relations policy).

behalf of consumers, and relatedly whether such an action should be limited by First Amendment considerations.

More than forty states have laws regulating statements that the speaker knows or reasonably should know to be false or misleading when such statements are made with the intent to dispose of goods or services.¹⁴¹ In the leading case of *Kasky v. Nike, Inc.*,¹⁴² the California Supreme Court held that false statements about its employees' labor conditions, made by Nike in letters to its customers, were actionable under state law to prevent consumer deception.¹⁴³ In reaching its conclusion, the court held that even though Nike was responding to publicly aired allegations about its mistreatment of foreign workers, it was engaged in commercial rather than noncommercial speech. The court relied on several factors: Nike was itself a commercial speaker, its speech was aimed at a commercial audience (university athletic departments that were major purchasers), and its factual representations were commercial in nature (labor conditions in Nike factories are part of the company's own business operations).¹⁴⁴ The U.S. Supreme Court agreed to review the decision, and while the Court ultimately remanded the case without deciding it, a number of Justices expressed concern at what they saw as difficult First Amendment questions.¹⁴⁵

Are corporate codes commercial speech? One can argue that they are, given how they are packaged (in a glossy advertising-type format with elaborate graphic design and colorful illustrations) and how their message is a recognizable form of puffery to the general public (describing the virtues of their labor standards operation). Indeed, in contrast to Nike's press releases and letters to newspaper editors and university athletic directors in *Kasky*, corporate codes seem directed not at public-opinion-makers as part of an ongoing exchange but rather at the commercial audience of consumers and investors. When Nestle or Ikea extol their commitment to high labor standards on their websites as a visible element of corporate identity, they are invoking social responsibility as a marketing tool to boost product sales. This form of unilateral self-promotion would seem to qualify as a type of

141. See David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1079 (2004).

142. 45 P.3d 243 (Cal. 2002).

143. *Id.* at 262.

144. *Id.* at 258.

145. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (dismissing writ of certiorari as improvidently granted); *id.* at 663–64 (concurring opinion of Stevens, Ginsburg, Souter, JJ.); *id.* at 672, 676–77 (Breyer & O'Connor, JJ., dissenting).

advertising, albeit one focused on the attractiveness of a corporate image rather than the utility of a corporate product.¹⁴⁶

Are the codes actually or inherently misleading? Under California's false advertising law, a plaintiff must show only that members of the public are likely to be deceived under a "reasonable consumer" standard.¹⁴⁷ New York's law is somewhat less generous: a plaintiff must allege that the advertisement had an impact on consumers at large, was deceptive or misleading in a material way, and resulted in injury.¹⁴⁸

Whether reasonable consumers are likely to be deceived will require code-specific analysis. A careful reading of text is needed to determine whether a corporation is claiming to engage in the practices it states are necessary and proper, or is merely espousing policy preferences it aims to achieve. Provisions pledging FOA protections might be viewed as too general or aspirational to be capable of deceiving a reasonable purchaser. On the other hand, an unequivocally clear code commitment to respect FOA regardless of local laws could be seen as deceptive if a corporation produces most of its goods in a country like China that refuses to accept independent labor organizations, if a corporation's factory supervisors regularly punish employee attempts to form unions, or if a corporation makes no serious effort to monitor the repressive FOA practices of its suppliers.

For those jurisdictions requiring individualized proof of deception and reliance, it may be necessary to establish that customer choice is dependent on the presence of FOA protections. Consumers focused on promises of socially responsible or sweat-free production seem more likely to be attentive to code statements about child labor, forced labor, wage minimums or overtime maximums than about the rights to unionize. Still, one can imagine a class of concerned purchasers for whom FOA is salient within a group of deceptively presented code protections on which they relied.¹⁴⁹

Finally, should state laws regulating the truth or falsity of corporate code representations about labor conditions receive heightened First

146. See Tomi J. Kallio, *Taboos in Corporate Social Responsibility Discourse*, 74 J. BUS. ETHICS 165, 170 (2007); Vladeck, *supra* note 141, at 1084; Ronald K. L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697, 708–10 (1993).

147. See *Colgan v. Leatherman Tool Grp. Inc.*, 135 Cal. App. 4th 663, 679–83 (Ct. App. 2006).

148. See *DeAngelis v. Timberpeg East, Inc.*, 858 N.Y.S. 2d 410, 414 (App. Div. 2008). Other state laws require proof that the deceptive practice proximately caused damage to plaintiff. See *Barbara's Sales Inc. v. Intel Corp.*, 879 N.E.2d 910, 919 (Ill. 2007) (noting conflict between Illinois and California standards).

149. Consumers who are deceived by a product's advertising or marketing campaign into spending money to purchase the product would appear to have standing, although assessing the amount of monetary damages may be problematic. See generally *Kwikset Corp. v. Sup. Ct. of Orange Cnty.*, 246 P.3d 877, 885–90 (Cal. 2011).

Amendment scrutiny because such codes are inevitably “a blending of commercial speech [with] noncommercial speech and debate on an issue of public importance?”¹⁵⁰ It can be argued that even if the codes are economically motivated, and even if they are packaged in a public-relations type format, a corporate presentation about labor conditions invites public reaction and response to an ideologically-framed message. As such, codes are contributing to debate on a matter of public concern and efforts to regulate their content should be reviewed more rigorously than typical commercial speech.¹⁵¹

Unlike the back and forth exchanges in the *Nike* case, however, corporate codes are unilateral website presentations. Rather than initiating or contributing to public debate, they are more accurately described as efforts to declare that the companies promulgating them rely on “sweat-free” or “human-rights-friendly” manufacturing processes. Whether such declarations are actually or inherently misleading, potentially misleading, or not at all misleading will depend on precise code language and specific state law standards. But it is well settled that governments may regulate the accuracy of corporate declarations about products being “made in the U.S.A.”¹⁵² even though the country-of-origin issue is a matter of ideological and political controversy. It is hard to see why corporate code declarations about FOA or other labor standards should be analyzed differently from a consumer protection standpoint.¹⁵³

C. Causes of Action by Investors

Like employees, investors may pursue different legal approaches in an effort to assure the provision of FOA protections. Investors, however, do not experience labor standards first-hand. Instead, their code-related claims will likely focus on top corporate management’s role in overseeing or monitoring code implementation. I briefly examine four possible claims: an action pursuant to Rule 10b-5 of the 1934 Securities Exchange Act; a

150. *Nike*, 539 U.S. at 663 (Breyer & O’Connor, JJ., dissenting).

151. See generally *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 576 (1988); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940); Brief of Amicus AFL-CIO at 5-17, *Nike Inc. v. Kasky*, 539 U.S. 654 (2003).

152. At the state government level, see *Leatherman Tool Group*, 135 Cal. App 4th at 679-83; *Kwikset Corp.*, 246 P.3d at 889-90. At the federal government level, see for example *United States v. Stanley Works*, No. 3; OB CV 883 (JBA) (D. Conn. 2006) (consent decree ordering \$205,000 civil penalty to settle charges under Federal Trade Commission Act that company falsely claimed its ratchets were made in United States); *In re Jore Corp.*, 131 F.T.C. 585 (2001) (consent order enjoining deceptive made-in-U.S.A. claims for power tool accessories).

153. California state law appears especially hospitable in light of state supreme court rulings in *Nike Inc.* and *Kwikset Corp.* Whether the FTC would pursue such claims, as it has done for deceptive advertising with respect to “made in the U.S.A.” labels, may be in part a function of how scarce enforcement resources are allocated.

statutory action under the Foreign Corrupt Practices Act; a common law claim for failure of oversight by the board of directors under the *Caremark*¹⁵⁴ decision and its progeny; and a claim pursuant to Rule 14a-8 of the federal proxy rules.

1. SEC Rule 10b-5

Under Securities and Exchange Commission (SEC) Rule 10b-5,¹⁵⁵ promulgated pursuant to the Securities Exchange Act of 1934, it is unlawful to make a false statement of material fact or to omit to state a material fact in connection with the sale or purchase of securities. The existence of an implied private right of action under 10b-5 is well-established,¹⁵⁶ as are the basic elements of such a private securities fraud claim: a material misrepresentation or omission, made with *scienter* and relied on by the purchaser or seller, that causes economic loss.¹⁵⁷

Assuming a MNC has made material misstatements or omissions related to its own or its suppliers' labor practices, a private cause of action would face substantial obstacles. One challenge is establishing *scienter*, probably through smoking-gun type evidence indicating that a corporate official intentionally or recklessly misstated or omitted a material fact. The existence of media reports highlighting FOA practices by suppliers that violate MNC code standards is not enough on its own. Such reports may well reflect good faith failures to enforce standards or even negligent monitoring, but in either case conduct that falls well short of *scienter*.

Equally if not more important is the difficulty of establishing loss causation. The alleged misstatement or omission about labor practices must be significant enough to affect the value of the security so that the market price drops when the true state of affairs is disclosed. Assuming *arguendo* that top corporate officials concealed evidence of FOA violations at supplier factories, investors must still demonstrate that this misconduct impacted the bottom line—presumably because NGOs or the media shined light on the events, information flows influenced investor confidence, and the stock price went down. In this regard, the drop in price must be traceable to the particular misstatement or omission.¹⁵⁸

In short, although egregious misstatements or omissions in the monitoring context may turn out to be actionable under 10b-5, private

154. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

155. See 17 C.F.R. § 240.10b-5 (2011).

156. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 & n. 10 (1983).

157. See *Dura Pharm. v. Broudo*, 544 U.S. 336, 341 (2005).

158. *Id.* at 342–43 (observing that lower price “may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events . . .”).

investors seeking to bring claims for such fraudulent or deceitful conduct regarding labor practices face a high barrier.¹⁵⁹

2. Foreign Corrupt Practices Act

Congress in 1977 passed the Foreign Corrupt Practices Act (FCPA)¹⁶⁰ to target corruption by requiring *inter alia* that publicly traded companies maintain accurate books and accounts.¹⁶¹ As part of its bookkeeping requirements, the Act specifies that companies must “devise and maintain a system of internal accounting controls.”¹⁶² Federal courts have regularly held that there is no *scienter* requirement for establishing civil liability under these bookkeeping provisions.¹⁶³ The FCPA bookkeeping and internal controls section also lacks a requirement of materiality.¹⁶⁴ Thus, in theory, a corporation’s minor inadequacy in operating its internal monitoring controls could give rise to liability under the Act.

There are, however, two large problems in seeking to allege that a company’s failure to monitor FOA code compliance may trigger an investor cause of action under the FCPA. One is that the statute lacks a private right of action. Because courts have regularly held that there is no private action under the FCPA bookkeeping provisions,¹⁶⁵ it is only the federal government that might use these provisions to enforce monitoring of corporate labor standards codes.

A second problem, if anything more serious, is that judicial interpretation of the phrase “internal accounting controls” has focused on maintenance of financial information while ignoring substantive or performance-based data.¹⁶⁶ This focus is understandable given that

159. Government enforcement actions under 10b-5 are somewhat easier because reliance and loss causation do not apply to SEC civil enforcement actions. *See, e.g.,* S.E.C. v. Pirate Investor, LLC, 580 F.3d 233, 239 n.10 (4th Cir. 2009). The SEC must still establish *scienter*; in addition, the agency’s enforcement priorities are subject to the constraint of limited resources. *See also supra* note 153 (discussing possible impact of limited FTC resources).

160. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78 m(b), (d)(1), (g), (h), 78 dd-1, 78dd-2, 78dd-3, 78ff (2006)).

161. *See* 15 U.S.C. § 78m (a), (b).

162. 15 U.S.C. § 78 m (b) (2) (B).

163. *See, e.g.,* McConville v. S.E.C., 465 F.3d 780, 789 (7th Cir. 2006); S.E.C. v. McNulty, 137 F.3d 732, 740–41 (2d Cir. 1998); S.E.C. v. World-Wide Coin Inv. Ltd., 567 F. Supp. 724, 749 (N.D. Ga. 1983).

164. *See, e.g.,* S.E.C. v. Thielbar, No. Civ. 06-4253, 2007 WL 2903948 at *10 (D.S.D. Sept. 28, 2007); *World-Wide Coin*, 567 F. Supp. at 748–50.

165. *See, e.g.,* *In re Remec, Inc. Sec. Litig.*, 388 F. Supp. 2d 1170, 1177 (S.D. Cal. 2005); *Davis v. DCB Fin. Corp.*, 259 F. Supp. 2d 664, 673 (S.D. Ohio 2003); *Nat’l Semiconductor Corp. v. Sporek*, 612 F. Supp. 1316, 1326–34 (N.D. Cal. 1945). Federal courts also have held there is no private right of action under the FCPA’s antibribery provisions. *See* *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027–30 (6th Cir. 1990); *Scientific Drilling Ass’n v. Gyrodata Corp.*, 215 F.3d 1351, *3–*4 (unpublished opinion) (Fed. Cir. 1999).

166. *See, e.g.,* *McConville*, 465 F.3d at 790; *World-Wide Coin*, 567 F. Supp. at 750–51.

Congress's major concern in the Act was with deterring bribes by U.S. companies to foreign officials.¹⁶⁷ I have not found any case in which the federal government invoked the bookkeeping and internal controls provision with reference to a corporation's performance audits or other nonfinancial monitoring.¹⁶⁸ Thus, despite the FCPA's strict auditing requirements and low barriers to liability, it is unlikely that investors or the federal government can invoke the Act's bookkeeping provisions to enforce monitoring of corporate labor standards.

3. Failure to Monitor Under Caremark

In *Caremark*, a 1996 Delaware Chancery Court decision,¹⁶⁹ shareholders argued that the board of directors' failure actively to monitor corporate performance subjected the corporation to substantial legal liability.¹⁷⁰ The court held that a board of directors has a duty to ensure that "appropriate information and reporting systems are established by management,"¹⁷¹ systems that:

[A]re 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 compliance with law and its business performance*.¹⁷²

In doctrinal terms, it would seem that investors may bring *Caremark* claims based on the corporation's inadequate monitoring of known business risks.¹⁷³ Although a number of post-*Caremark* decisions have involved challenges to monitoring and compliance programs in the context of civil or criminal liability,¹⁷⁴ the *Caremark* test envisions holding directors accountable for oversight failures related to business performance as well as law compliance.¹⁷⁵

167. See generally *World-Wide Coin*, 567 F. Supp. at 746.

168. Cf. *Freuler v. Parker*, 803 F. Supp. 2d 630, 641–42 (S.D. Tex. 2011) (shareholder derivative action alleges *inter alia* that failure to maintain internal controls related to culture of bribery by its employees, agents, and contractors damaged company reputation and required company to incur substantial investigatory costs; complaint dismissed on other grounds).

169. See *supra* note 154.

170. See *Caremark*, 698 A.2d at 963–64. The civil complaint was filed the day after a federal grand jury indicted *Caremark* for making illegal payments to healthcare providers in exchange for referrals of Medicare or Medicaid recipients. See *id.* at 962–63.

171. *Id.* at 969–70.

172. *Id.* at 970 (emphasis added).

173. See Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 968 (2009).

174. See, e.g., *Stone v. Ritter*, 911 A.2d 362 (Del. 2006); *White v. Panic*, 793 A.2d 356 (Del. Ch. 2000).

175. See generally *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 772–79 (Del. Ch. 2005) (alleging failure of oversight related to lucrative severance payments to CEO who was terminated after fourteen months); *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 121–35 (Del. Ch. 2009)

To be sure, it is not easy to prevail on a *Caremark* claim under Delaware precedent. The *Caremark* court itself declared that the theory of directors violating their duty to be “active monitors of corporate performance” is “possibly the most difficult theory in corporation law upon which plaintiff might hope to win a judgment.”¹⁷⁶ The alleged failure of oversight must be pleaded with particularity regarding the inadequacy of the board’s monitoring mechanisms; these allegations should reflect what amounts to a conscious decision by directors to ignore their oversight responsibilities.¹⁷⁷

Still, the Delaware courts have made clear that there are paths to recovery under *Caremark*. A decision to ignore oversight responsibilities may be predicated on the board of directors having not created an important supervisory structure such as a monitoring committee, or on the committee’s having failed to meet after being formally constituted.¹⁷⁸ In addition, and importantly, the good faith oversight obligation requires that directors pay appropriate attention to information enabling them to spot “red flags.”¹⁷⁹ As explained by one corporate scholar, red flag situations – pointing to a flaw in an internal compliance system or a problem outside the system – may arise due to a single dramatic incident or a series of more modest episodes over a period of time.¹⁸⁰ Shareholder allegations of directors’ failure to spot red flags may be sufficient to survive motions to dismiss in appropriate factual settings.¹⁸¹

(alleging failure of oversight related to inadequate protection from exposure to subprime lending market).

176. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

177. See *Citigroup*, 964 A.2d at 126–29; *Stone*, 911 A. 2d at 370–73; see generally Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457 (2009); Hilary A. Sale, *Monitoring Caremark’s Good Faith*, 32 DEL. J. CORP. L. 719 (2007). There is some uncertainty as to whether the directors’ oversight duty under *Caremark* is a duty of loyalty or a duty of care. See generally Martin Petrin, *Assessing Delaware’s Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433 (2011); Bainbridge, *supra* note 173, at 975. Whatever its doctrinal foundation, the *Caremark* duty arguably precludes as a defense both the business judgment rule and the exculpatory charter provisions identified in § 102(b)(7) of the Delaware corporations statute. See *Canadian Commercial Workers Indus. Pension v. Alden*, No. Civ.A. 1184-N, 2006 WL 456786, at *6 (Del. Ch. Feb. 22, 2006); Bainbridge, *supra* note 173, at 975; Petrin, *supra*, at 449. Additionally, *Caremark* complaints in which there was no pre-suit demand submitted to the board of directors must allege particularized facts sufficient to excuse this failure by plaintiffs. See *White*, 793 A.2d at 356; *Stone*, 911 A.2d at 362; DEL. CH. CT. R. 23.1(a). Debates surrounding these doctrinal issues are beyond the scope of this Article.

178. See *Shaev Profit Sharing Account v. Armstrong*, No. Civ. A. 1449-N, 2006 WL 391931 at *5 & n.13 (Del. Ch. Feb. 13, 2006) (citing cases). For a case in which the Chancery Court imposed liability on directors for the total absence of internal controls, see *ATR-Kim Eng. Fin. Corp. v. Araneta*, No. CIV.A. 489-N, 2006 WL 3783520 (Del. Ch. Dec. 21, 2006), *aff’d* 930 A. 2d 928 (Del. 2007).

179. See *Shaev*, 2006 WL 391931; *Guttman v. Huang*, 823 A.2d 492, 507 (Del. Ch. 2003).

180. See Sale, *supra* note 177, at 733. See also Bainbridge, *supra* note 173, at 985.

181. See *In re Abbott Labs. Derivatives S’holders Litig.*, 325 F.3d 795, 805–06 (7th Cir. 2003) (analyzing directors’ “unconsidered inaction” under *Caremark*); *McCall v. Scott*, 239 F.3d 808, 817–18 (6th Cir. 2001) (same).

How might the “ignoring red flags” theory apply with respect to labor standards codes? Assume *arguendo* it is well known in the global apparel or athletic shoe or toy industries that suppliers frequently maintain duplicate books to deceive auditors about wage and hour irregularities, and that they script or intimidate workers to avoid detection of their refusal to respect FOA. A corporation may be ignoring red flags when it continues to rely on the same porous monitoring approach. Thus, for instance, when directors allow managers to conduct only five percent of performance audits unannounced, although it is widely known that unannounced audits yield more accurate and complete information, that conduct may support shareholders’ red-flag assertions.

The red flag assessment may be affected by a wide range of factors. Should directors pay attention to the oversight problems of other companies in the industry as well as their own company’s track record? If industry-wide monitoring problems have existed for years, or if the media exposes them in dramatic terms, does that increase the obligation upon directors to initiate new inquiries or demand more information from their own managers? What questions must directors ask of their managers involved in monitoring and to what extent must they raise questions about the answers they receive?¹⁸²

The existence of paths to recovery is not meant to suggest that pursuing a *Caremark* approach will be easy. Most corporations are likely to have some kind of system in place to monitor violations of FOA and other labor code provisions. While there may be isolated instances of deliberate indifference to the overall monitoring structure or to information produced thereunder, it seems safe to assume that corporate directors generally do not adopt a “conscious disregard” posture.

There is also the issue of determining how shareholders have been injured by a failure to monitor that is unattached to violations of law. The Delaware Chancery Court has declared more than once that “[o]versight duties under Delaware law are not designed to subject directors, even expert directors, to *personal* liability for failure to predict the future and to properly evaluate business risk.”¹⁸³ Where an auditing committee is operative, efforts to plead a *Caremark* violation with the requisite particularity based only on business performance will likely face judicial skepticism.

182. See Sale, *supra* note 177, at 733–35.

183. *In re Goldman Sachs Grp., Inc.*, Civ. Action No. 5215-VCG at *64 (Del. Ch. Court, Oct. 12, 2011) (quoting *Citigroup*, 964 A.2d at 131) (emphasis in original).

At the same time, the Delaware courts continue to preserve the possibility that investors can meet their burden.¹⁸⁴ With respect to injury, perhaps lack of oversight on labor standards compliance has resulted in serious adverse publicity that tangibly affects corporate goodwill with one or more key audiences. Negative media coverage also may contribute to a decision by large institutional investors that they will no longer hold shares. Moreover, even if damage may be difficult to quantify, shareholders presumably can still seek injunctive relief. Such injunctive relief, including decrees that directors must monitor more vigorously to assure verifiable labor standards compliance, might be better achieved through the proxy rules approach discussed in the next section. In the end, though, the *Caremark* approach offers some prospects for success, especially along the “red flags” path.

4. Proxy Proposals Under SEC Rule 14a-8

Under SEC Rule 14a-8,¹⁸⁵ shareholders with minimum levels of stock¹⁸⁶ may require a publicly traded corporation to include certain kinds of proposals in the company’s own proxy statements. If the company wishes to exclude a particular shareholder proposal, it has the burden of proving that exclusion is warranted under one of thirteen grounds set forth in the rule.¹⁸⁷ The SEC reviews requests for exclusion on a case by case basis, issuing short “no-action” letters that declare the contested proposal excludable or nonexcludable given the asserted regulatory grounds.¹⁸⁸ Proxy proposals under Rule 14a-8 provide an opportunity for socially conscious investors to compel voting on resolutions designed to ensure meaningful compliance with FOA and other code labor standards.

Proposals intended to encourage or require effective monitoring of code implementation can be cast either as corporate governance initiatives or as resolutions addressing corporate social responsibility.¹⁸⁹ In general, proposals involving corporate governance—typically framed as bylaw amendments – have become more common and often garner significant

184. See *Goldman Sachs*, Civ. Action No. 5215-VCG at * 60–*61; *In re Citigroup Inc. S’holder Deriv. Litig.*, 964 A.2d 106, 126 (Del Ch. 2009).

185. 17 C.F.R. § 240.14a-8 (2012) [hereinafter Rule 14a-8].

186. See § 14a-8 (b)(1) (requiring that shareholder has continuously held at least \$2,000 in market value or 1% of corporation’s voting securities for a minimum of one year).

187. See § 14a-8 (i) (listing thirteen grounds, several of which are discussed in text).

188. See *generally* Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106 (May 28, 1998).

189. See WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 213 (3d ed. 2009) (reporting that most § 14a-8 shareholder proposals fall into one of these categories).

shareholder votes.¹⁹⁰ When challenged, they will likely be reviewed based on 14a-8's exclusion of proposals "improper under state law."¹⁹¹ As explained recently by the Delaware Supreme Court, "a proper function of bylaws is . . . to define the process and procedures by which [substantive business] decisions are made"; the court added that "[s]uch purely procedural bylaws do not improperly encroach upon the board's managerial authority under [state law]."¹⁹²

Assuming investors' proposed bylaw would require that the board of directors adopt some form of more rigorous monitoring and compliance system than what currently exists, a key question is whether the proposal "is one that establishes or regulates a process for substantive director decision making, or one that mandates the decision itself."¹⁹³ The answer may hinge on how the proposed bylaw is phrased, but also on an analysis of its intent and likely effect given the surrounding circumstances.¹⁹⁴ Shareholder proposals worded as recommendations rather than unqualified mandates are likely to pass muster. In addition, while the board retains the exclusive authority to manage the corporation's business and affairs,¹⁹⁵ a bylaw that effectively requires expenditure of corporate funds to enhance the current monitoring system does not thereby lose its process-related classification.¹⁹⁶

Over the past several years, the SEC has declined to exclude bylaws that require the corporation to establish a human rights committee.¹⁹⁷ Proposals deemed nonexcludable expressly reserve the board's power to manage the business and affairs of the company. In this regard, the SEC evidently distinguishes between permissible human rights monitoring proposals and impermissible monitoring of financial or reputational risks that may be associated with human rights violations.¹⁹⁸ Thus, a bylaw or resolution containing detailed instructions about steps the board should take to monitor risks of code noncompliance may run afoul of Rule 14a-8's exclusion of proposals "relating to the company's ordinary business operations."¹⁹⁹ The SEC recently authorized exclusion of a proposal

190. See *id.* at 213–14; Randall S. Thomas & James F. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FINANCE 368 Table 2 (2007).

191. Section 14a-8 (i)(1). Bylaw amendments also may be challenged under the Rule's exclusion for proposals already substantially implemented by the company. See § 14a-8 (i)(10). These grounds for exclusion more often arise when the proposal involves amending a company's existing human rights policies or code. See *infra* note 215 (discussing *Kroger* and *Abercrombie & Fitch* cases).

192. *CA Inc., v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 234–35 (Del. 2008).

193. *Id.* at 235.

194. See *id.* at 235–36.

195. See, e.g., DEL. GEN. CORP. L. § 141 (a).

196. See *AFSCME Emps. Pension Plan*, 953 A.2d at 236.

197. See, e.g., *Chevron Corp.*, 2011 WL 291318 at *3–*4 (S.E.C. No-Action Letter, Mar. 28, 2011); *Bank of Am.*, 2008 WL 591024 (S.E.C. No-Action Letter, Feb. 29, 2008).

198. See *Bank of Am.*, 2008 WL 591024, at *13 (Proponent Shareholders' Response).

199. Section 14a-8(i)(7).

requesting the board to establish a risk committee that “should periodically report to shareholders” and recommending that “the reports describe how an identified risk category . . . is being addressed.”²⁰⁰ Still, as long as the bylaw proposes a commitment to monitor human rights issues themselves, not the possibly consequential economic or legal risks, it stands a good chance of being part of the company’s proxy.

The alternative 14a-8 approach is to frame a labor standards proposal as a matter of major social concern. In the 1998 amendments to its rules on shareholder proposals, the SEC stated that even if proposals relate to ordinary business operations, they will not be excludable if they “focus[] on sufficiently significant social policy issues (e.g. significant discrimination matters) . . . because [such] proposals would transcend the day-to-day business matters and raise policy issues so significant that [they] would be appropriate for a shareholder vote.”²⁰¹ The SEC further observed, however, that a proposal on a significant social policy issue could still be excluded depending on “the degree to which [it] seeks to ‘micro-manage’ the company.”²⁰² To illustrate, the agency added that a proposal would be excludable if it “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.”²⁰³

The SEC’s “micro-managing” factor provides more leeway for a shareholder proposal to include particular instructions than is allowed under the “relating to ordinary business operation” grounds for exclusion. In practice the precise extent of additional leeway remains uncertain. A recent district court decision sustaining excludability held that the challenged proposal, encompassing certain principles for implementing new sexual orientation and gender policies, sought “to micromanage the company to an unacceptable degree.”²⁰⁴ The court noted that had the proposal “simply request[ed] that [the company] add sexual orientation to its existing anti-discrimination policy” the court “would be inclined to agree with the [shareholders].”²⁰⁵

The SEC has issued hundreds of no-action letters addressed to corporate social responsibility proposals since the 1998 amendments clarifying its excludability approach on the subject.²⁰⁶ Although these

200. See *W. Union Co.*, 2011 WL 916163, at *1 (S.E.C. No-Action Letter, Mar. 14, 2011). Even though its language was precatory, the proposal was excludable because it “requests a report that describes how [the company] monitors and controls particular risks.” *Id.* at *1 (emphasis added).

201. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998).

202. *Id.*

203. *Id.*

204. *Apache Corp. v. N.Y.C. Emps. Ret. Sys.*, 621 F. Supp. 2d 444, 452 (S.D. Tex. 2008).

205. *Id.* at 451 n.7.

206. See 2011 U.S. Season Review: E&S Proposals, ISS: AN MSCI BRAND, <http://www.issgovernance.com/docs/ESProposals> (last visited June 6, 2012) (reporting that investor

letters have no binding effect as precedent or even on the parties,²⁰⁷ they offer useful guidance as to what level of prescriptive detail is acceptable to the agency.

In a 2006 letter involving Wal-Mart, the SEC concluded that the company could exclude a proposal requesting “that the board amend the company’s Equality of Opportunity policy to bar intimidation of company employees exercising their right to freedom of association, develop systems to prevent future violations of labor law, and publish periodic reports to shareholders on its progress.”²⁰⁸ While the agency evidently determined that this was unacceptable micro-managing, the *Wal-Mart* letter appears to be an exception. The SEC has declined to exclude most human rights-related proposals it has considered in recent years, including many proposals specifying in detail the importance of ILO Conventions.

In a 2008 letter involving Chevron, the agency declared that the company could not exclude a proposal requesting “that the board review and develop guidelines. . .on investing in or withdrawing from countries [and report these guidelines to shareholders] where:

- The government has engaged in ongoing and systematic violation of human rights;
- The government is illegitimate;
- There is a call for economic sanctions by human rights and democracy advocates and/or legitimate leaders of that country; and
- Chevron’s presence exposes the company to the risk of government sanctions, negative brand publicity and consumer boycotts²⁰⁹

In a 2009 letter involving Halliburton, the SEC determined that the company could not exclude a proposal “request[ing] management to review its policies related to human rights to assess areas where the company needs to adopt and implement additional policies” and report its findings within fourteen months.²¹⁰ The proposal further “recommend[ed]” that the company “base its human rights policies” on The Universal Declaration of Human Rights [and] the International Labor Organization’s Core Labor

newsletter tracked 346 environmental and social proposals through summer 2011 and 384 proposals in 2010).

207. See, e.g., *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 737 (S.D. Tex. 2010) (reporting that S.E.C. makes no attempt to reconcile its letters with prior determinations and the letters “rarely cite precedent”); *Amalgamated Clothing & Textile Workers Union v. S.E.C.*, 15 F.3d 254, 257 (2d Cir. 1994) (reporting agency’s position that no-action letters “have no binding effect on the parties addressed in the letters”).

208. *Wal-Mart Stores Workers, Inc.*, 2006 WL 695801, at *1 (S.E.C. No-Action Letter, Mar. 16, 2006).

209. *Chevron Corp.*, 2008 WL809036, at *1–*2 (S.E.C. No-Action Letter, Mar. 21, 2008).

210. *Halliburton Co.*, 2009 WL 800005, at *11 (S.E.C. No-Action Letter, Mar. 9, 2009).

Standards” “and that it “report on the current system in place to ensure that the company’s contractors and suppliers are implementing human rights policies in their operations, including monitoring, training [and] addressing issues of non-compliance. . . .”²¹¹

In a 2011 letter involving Kroger, the agency declined to exclude a proposal that “urge[d] the Board of Directors to adopt, implement, and enforce a revised company-wide Code of Conduct, inclusive of suppliers and sub-contractors, based on” enumerated ILO declarations and conventions including “All workers have the right to form and join trade unions and to bargain collectively” citing conventions 87 and 98.²¹² The *Kroger* proposal also called for the board to “prepare a report at reasonable cost to shareholders and the public concerning the implementation and enforcement of” the revised ILO-centered code.²¹³

The *Kroger* and *Halliburton* proposals reflect a recent trend in which shareholders have asked companies to revise and strengthen their existing codes and to adopt tougher monitoring and reporting approaches.²¹⁴ In declining to exclude these proposals, the SEC has rejected board contentions that a company’s current code or human rights policies already addressed what the shareholders sought to accomplish.²¹⁵ Additionally, while shareholders regularly acknowledge that their proposals should not survive if they are too specific, the SEC has declined to exclude proposals urging companies to take on substantial and far-reaching human rights commitments. These specified responsibilities include establishing independent and rigorous monitoring processes and then publishing annual reports based on the new processes that assess compliance with ILO-based standards,²¹⁶ and even prohibiting the sale of products or the provision of technical assistance to “repressive countries [when such support] could contribute to human rights abuses.”²¹⁷

As these many examples make clear, a considerable amount of specificity about labor standards compliance and monitoring will be acceptable to the SEC, *provided* the shareholders’ underlying verbal instructions are precatory and not mandatory. The proviso in turn suggests

211. *Id.* at *11–*12.

212. *Kroger Co.*, 2011 WL 1337348, at *12 (S.E.C. No-Action Letter, Apr. 6, 2011).

213. *Id.*

214. *See also* *Boeing Co.*, 2011 WL 5317484, at *6–*7 (S.E.C. No-Action Letter, Feb. 17, 2011); *Abercrombie & Fitch*, 2010 WL 620060, at *22–*23 (S.E.C. No-Action Letter, Apr. 12, 2010).

215. A proposal is excludable if the company has already substantially implemented its contents. *See* § 14a-8 (i)(10). The S.E.C. in *Kroger* and *Abercrombie & Fitch* rejected company arguments based on the “substantially implemented” provision. *See also* *Wal-Mart*, 2011 WL 304198, at *1 (S.E.C. No-Action Letter, Mar. 29, 2011).

216. *See Wal-Mart*, 2011 WL 304198, at *3-4; *Halliburton Co.*, 2009 WL 800005, at *11 (S.E.C. No-Action Letter, Mar. 9, 2009).

217. *Yahoo! Inc.*, 2011 WL 494129, at 6* (S.E.C. No-Action Letter, Apr. 5, 2011).

two caveats about 14a-8 proposals in general. First, a proposal that makes it into the company's proxy statement may not be approved by a vote of all shareholders, especially if opposed vigorously by senior management. Although a high volume of corporate social responsibility resolutions are proposed each year, and average annual voter support has more than doubled between 2001 and 2011, relatively few proposals come close to receiving a shareholder majority.²¹⁸ Second, assuming the proposal is approved, it may fail to bind the board precisely because it is framed in precatory language. Accordingly, if the board is determined to ignore such majority shareholder preferences, the success of labor standards compliance proposals like those in *Kroger*, *Chevron*, and *Halliburton* may hinge on shareholders' willingness to vote out one or more defiant board members.

Notwithstanding these caveats, 14a-8 proxy proposals offer genuine promise. The "soft enforcement" of shareholder votes rather than court proceedings may well exert pressure on a board of directors to become more aggressive on FOA monitoring and compliance. Refusal to do so in the face of a majority or substantial minority vote may not lead to ouster of board members, but it carries significant collateral risks. Additional media coverage of the board's refusal may give rise to extended negative publicity that adversely affects the company's business reputation and market standing. Such a refusal may also be invoked by shareholders as evidence of ignoring a red flag in the context of *Caremark* litigation. Faced with such risks, boards may at times decide to yield to a majority shareholder vote or even a substantial minority preference expressed with sufficient intensity. Moreover, as it has become clear that a range of detailed human rights proposals are not excludable, boards often opt to negotiate with shareholders rather than seeking to exclude or oppose their labor standards efforts.²¹⁹

218. See ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 189, at 213 (reporting that majority of proposals do not exceed 10%); 2011 *U.S. Season Review*, *supra* note 206 (reporting 20.5 average support level for first five months of 2011, compared with 8.7% a decade earlier). Further, the increased use of proxy proposals has drawn fire from some corporate observers concerned about the harassment of management. See, e.g., James R. Copland, *Proxy Monitor 2011: A Report on Corporate Governance and Shareholder Activism*, Sept. 2011, at 3, 19 (criticizing this form of shareholder activism as "more a vehicle for interest-group capture of corporations rather than for mitigating agency costs and improving shareholder returns").

219. See, e.g., 2011 *U.S. Season Review*, *supra* note 206 (referencing high number of proposals withdrawn and solutions negotiated on sexual orientation nondiscrimination). See also Adam M. Kanzer, *Putting Human Risk on the Agenda: The Use of Shareholder Proposals to Address Corporate Human Rights Performance*, FINANCE FOR A BETTER WORLD, 2009, at 9–10 (on file with author) (describing numerous instances of shareholder-MNC dialogue encouraging companies to modify their codes so as to incorporate core ILO conventions and develop credible systems of implementation).

V. CONCLUSION

This article has considered a range of private enforcement options that might be pursued to enforce FOA provisions in corporate codes. There are obstacles confronting each option, and many if not most face substantial headwinds. Still, certain claims appear to hold promise and to warrant further research and thought beyond what has been presented in overview form. Moreover, the options identified here are not meant to be exhaustive; there is ample room for other scholars as well as practitioners and NGOs to push the envelope.

The article also has attempted to answer the underlying "why" question. Why bother to envision private enforcement strategies when the status quo is corporate codes consciously framed in terms that are meant to be unenforceable? A partial response involves the purpose of codes. By promoting their commitment to FOA and other labor standards, corporations expect to foster goodwill and its attendant economic benefits in a rational market, and also to achieve a measure of regulatory forbearance. Insofar as corporate codes are intended to produce such rule-of-law type advantages, there is reason to encourage greater rule-of-law focus on their implementation.

An additional response involves the creative dynamic of the law regulating labor markets. Historically, workplace law has been essentially unidirectional: legislatures, agencies, and courts have acted to redress the perceived oppressions of employers' economic power by encouraging or requiring basic, socially acceptable terms of employment.²²⁰ As the domain of collective bargaining has receded, and global and domestic labor markets have trended toward low-wage work, acutely unequal bargaining status has become the norm for tens of millions of individual workers. The law's response has included new legislative directions²²¹ but also judicially inspired innovations such as contract and tort-based exceptions to employment at will.

Prior to 1980, state courts uniformly rejected the argument that employee handbooks could serve as the basis for an implied employment contract.²²² Judges and commentators invoked traditional doctrinal concepts such as lack of independent consideration, no meeting of the minds, and the

220. See generally Clyde W. Summers, *Labor Law As the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988). Other areas of law, such as the tax code and the regulation of securities, are less unidirectional and perhaps more cyclical when compared with workplace law.

221. See, e.g., Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988); Employee Polygraph Protection Act, Pub. L. No. 100-347, 102 Stat. 647 (1988); Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993).

222. See, e.g., *Johnson v. Nat'l Beef Packing Co.*, 551 P.2d 779, 782 (Kan. 1976); *Sargent v. Ill. Inst. of Techn.*, 397 N.E. 2d 443, 446 (Ill. App. 1979); *Shaw v. S.S. Kresge Co.*, 328 N.E.2d 775, 778-79 (Ind. App. 1975); *Edwards v. Citibank N.A.*, 418 N.Y.S.2d 269, 270 (App. Div. 1979).

absence of a fixed term.²²³ Today, courts in 41 states have held that handbooks or personnel manuals may give rise to contractual entitlements.²²⁴ Even more states have adopted the public policy exception to employment at will.²²⁵ It is at least plausible to maintain that by generating and intensifying discussion about doctrinal innovations for enforcing corporate codes, we may encourage attorneys, judges, and legislatures to take more seriously the options for complementary or interstitial private enforcement.

Finally, FOA is a special candidate for increased attention because of its potential to enhance internal monitoring and effective code compliance. While labor standards codes are generally treated as soft and unenforceable, FOA provisions have occupied a subtly disfavored status despite its position as a core ILO convention. Envisioning new pathways to enforcement will shine additional light on the framing and phrasing of FOA provisions. In that regard, a more precise and accountable code commitment to FOA should lead to more meaningful worker participation in the monitoring of labor standards. Fittingly if ironically, such a result could help to reduce the need for complementary private enforcement actions.

223. See generally Richard Harrison Winters, Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 204 (1985).

224. See SUMMERS ET AL., *supra* note 95, at 193–200.

225. See *id.* at 179–92 (reporting all fifty states have adopted some form of the public policy exception).

APPENDIX

<u>Company</u>				
<u>adidas Group</u>	<i>Code of Conduct of adidas AG</i> , http://www.adidas-group.com/en/investorrelations/assets/corporate_governance/codeofconduct/adidascode.pdf	<i>Our Workplace Standards</i> , http://www.adidas-group.com/en/sustainability/suppliers_and_workers/code_of_conduct/default.aspx		
<u>American Eagle</u>	<i>Vendor Code of Conduct</i> , http://phx.corporate-ir.net/phoenix.zhtml?c=81256&p=irol-VendorConduct	<i>Corporate Social Responsibility Report</i> , http://phx.corporate-ir.net/phoenix.zhtml?c=81256&p=irol-SocialResponsibility	<i>Corporate Governance</i> , http://phx.corporate-ir.net/phoenix.zhtml?c=81256&p=irolgovoverview	<i>Code of Ethics</i> , http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjIwODh8Q2hpbGRJR D0tMXxUeXB IPTM=&t=1 <i>Factory Compliance Challenges</i> , http://www.ae.com/web/corp/responsibility.jsp?topic=compliance
<u>Citigroup, Inc.</u>	<i>Code of Conduct</i> , http://www.citigroup.com/citi/corporategovernance/data/codeconduct_en.pdf?ieNocache=274			
<u>Deutsch post DHL</u>	<i>Code of Conduct</i> , http://www.dpdhl.com/en/about_us/code_of_conduct.html	<i>Supplier Code of Conduct</i> , http://www.dpdhl.com/en/about_us/corporate_divisions/corporate_procurement/the_supplier_code.html		
<u>Deutsch Telekom Group (DTG)</u>	<i>Our Code of Conduct: The Way We Work</i> , http://www.download-telekom.de/dt/StaticPage/28/90/dtag_code_of_conduct_en_28908.pdf			
<u>G4S (Wackenhut)</u>	<i>Business Ethics Policy</i> , http://www.g4s.com/en/Social%20Responsibility/Our%20ethics/~media/Files/Corporate%20Files/g4s_business_ethics_policy.ashx			
<u>GE Company</u>	<i>The Spirit & the Letter</i> , http://files.gecompany.com/gecom/citizenship/pdfs/TheSpirit&TheLetter.pdf	<i>Supplier Expectations</i> , http://www.gecitizenship.com/our-commitmentareas/our-suppliers/supplier-expectations/		

<u>Goodyear</u>	<i>Business Conduct Manual</i> , http://www.goodyear.com/investor/pdf/corp_gov/business_conduct_manual.pdf			
<u>Hanes Brands Inc.</u>	<i>Global Business Standards</i> , http://media.corporate-ir.net/media_files/irol/20/200600/CorpGov/GBS.pdf			
<u>Heineken</u>	<i>Heineken Code of Business Conduct: Management Primer</i> , http://www.heinekeninternational.com/content/live/files/downloads/CorporateResponsibility/CBC%20Management%20Primer.pdf			
<u>IKEA</u>	<i>IWAY Standard: Minimum Requirements for Environmental and Social & Working Conditions When Purchasing Products, Materials, and Services</i> , http://www.ikea.com/ms/en_US/about_ikea/pdf/SCGlobalIWAYSTDVers4.pdf			
<u>Krispy Kreme</u>	<i>Code of Business Conduct and Ethics</i> , http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTA1MDg1fENoaWxkSUQ9LTF8VHlwZT0z&t=1			
<u>L'Oréal</u>	<i>Code of Business Ethics</i> , http://www.loreal.com/en_ww/html/company/pdf/code_of_ethics_us.pdf			
<u>Motorola</u>	<i>Code of Business Conduct</i> , http://responsibility.motorola.com/images/uploads/cr-code-english.pdf	<i>Supplier Code of Conduct</i> , http://responsibility.motorola.com/index.php/suppliers/scoc/		
<u>Nestle</u>	<i>Nestle Corporate Business Principles</i> , http://www.nestle.com/Common/NestleDocuments/Documents/Library/Documents/Corporate_Governance/Corporate-Business-Principles-EN.pdf	<i>Code of Business Conduct</i> , http://www.nestle.com/Common/NestleDocuments/Documents/Library/Documents/Corporate_Governance/Code_of_Business_Conduct_EN.pdf	<i>Nestle Supplier Code</i> , http://www.nestle.com/Common/NestleDocuments/Documents/Library/Documents/Suppliers/Supplier-Code-English.pdf	
<u>Nike</u>	<i>Code of Conduct</i> , http://www.nikebiz.com/responsibility/workers_and_factories.html#code_of_conduct			

<u>Pepsico</u>	<i>World-Wide Code of Conduct</i> , http://www.pepsico.com/Download/CodeOfConduct/English_09.pdf	<i>Supplier Code of Conduct</i> , http://www.pepsico.com/Download/supplier_code_of_conduct/English.pdf		
<u>Procter & Gamble</u>	<i>Our Values and Policies</i> , http://www.pg.com/en_US/downloads/company/governance/P_G_Values_Policies.pdf	<i>Business Conduct Manual</i> , http://www.pg.com/en_US/downloads/company/governance/Policy_Worldwide_Business_Conduct_Manual.pdf	<i>Corporate Governance Policies</i> , http://www.pg.com/en_US/downloads/company/governance/Corporate_Governance_Guidelines.pdf	
<u>Russell Athletics (Fruit of the Loom)</u>	<i>Code of Conduct</i> , http://socialresponsibility.fruit.com/pdf/Code_of_Conduct_FOL_2011_English.pdf available at: http://socialresponsibility.fruit.com/corporate_mission.html	<i>Supply Chain Code of Conduct</i> , http://socialresponsibility.fruit.com/supply_chain.html		
<u>Shell</u>	<i>Shell Code of Conduct</i> , http://www-static.shell.com/static/aboutshell/downloads/who_we_are/code_of_conduct/code_of_conduct_english_2010.pdf			
<u>Siemens</u>	<i>Business Conduct Guide</i> , http://www.siemens.com/sustainability/pool/cr-framework/business_conduct_guidelines_e.pdf	<i>Code of Conduct for Siemens Suppliers</i> , https://w9.siemens.com/cms/supply-chain-management/en/sustainability/Documents/coc/Code_of_conduct_eng_5_FINAL.pdf		
<u>Sodexo</u>	<i>Supplier Code of Conduct</i> , http://www.sodexousa.com/us/en/citizenship/diversity/suppliercode/suppliercode.asp#freedom	<i>Policy on Human Rights</i> , http://www.sodexousa.com/us/en/Images/Human%20rights_eng_tcm87-243749.pdf		
<u>Tesco</u>	<i>Corporate Governance</i> , http://www.tescocorp.com/bins/content_page.asp?cid=5-44 (link active but document missing as of Aug. 25, 2011)	<i>Code of Business Conduct and Ethics</i> , http://www.tescocorp.com/bins/content_page.asp?cid=5-44	<i>Suppliers Who Share Our Values</i> , http://cr2010.tescopl.com/buying-and-selling-our-products-responsibly/labour-conditions-in-our-supply-chain/suppliers-who-share-our-values.aspx	<i>Corporate Responsibility Report</i> , http://cr2010.tescopl.com/country-highlights/~media/Files/T/Tesco-Corporate-Responsibility-Report-2009/Tesco_CSR_2010.pdf
<u>The Coca-Cola Company</u>	<i>Code of Business Conduct</i> , http://www.thecoca-colacompany.com/ourcompany/pdf/COC_English.pdf	<i>Supplier Code of Conduct</i> , http://www.thecoca-colacompany.com/citizenship/supplier_code.html		

<u>The Walt Disney Company</u>	<i>Code of Conduct for Manufacturers</i> , http://corporate.disney.go.com/citizenship/codeofconduct.html			
<u>Tim Hortons</u>	<i>Code of Business Conduct and Ethics</i> , http://files.shareholder.com/downloads/KKD/1181692220x0x242239/54c6e238-c443-4565-972c-270b5301671a/Code%20of%20Business%20Conduct%20and%20Ethics.pdf	<i>Standards of Business Practices</i> , http://www.timhortons.com/us/pdf/standards_of_business_practices.pdf		
<u>Unilever</u>	<i>Code of Business Principles</i> , http://www.unilever.com/images/ir20090505CoBPleafletfinalcm1312290.pdf			

