RESPONSE

FRAUD ON THE MARKET: AN ACTION WITHOUT A CAUSE

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In response to William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69 (2011).

INTRODUCTION

In *The Political Economy of Fraud on the Market*,[1] Professors William Bratton and Michael Wachter argue that it is time to cut down the infamous "judicial oak"[2] that is the fraud-on-the-market class action (FOTM, to use their lexicon)—time to stop the pointless pruning, and grind the stump itself. They suggest that the SEC act as arborist, eliminating through rulemaking the *Basic Inc. v. Levinson*[3] presumption of reliance that makes FOTM possible, as part of a grand bargain with Congress over the agency's budget. Coupling the elimination of FOTM with a step up in the agency's enforcement resources, they argue, would mitigate any reduction in fraud deterrence that might otherwise result.[4] Should this approach prove infeasible, the authors

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1 William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69.

2 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (referring to the private Rule 10b-5 cause of action as a "judicial oak which has grown from little more than a legislative acorn").

3 485 U.S. 224, 247 (1988).

4 Bratton & Wachter, *supra* note 1, at 149.

would give corporations the choice to opt out of FOTM pursuant to a federally mandated shareholder vote.[5]

Bratton and Wachter build a compelling case against FOTM and in favor of stepped-up public enforcement efforts, efforts targeted at individual wrongdoers rather than the corporate enterprise, the FOTM target of choice. They draw on a rich body of scholarship challenging FOTM's efficacy vis-à-vis the goals of investor compensation and fraud deterrence. The authors also discuss, and ultimately discard, emerging "corporate governance" justifications for FOTM. After exposing its fatal weaknesses, Bratton and Wachter attempt to explain FOTM's stubborn persistence, pointing to both politics and the SEC's perceived resource constraints.[6] These perceived resource constraints led the Supreme Court to famously declare in its 1964 decision *J.I. Case Co. v. Borak* that private enforcement is a "necessary supplement" to the SEC's efforts to enforce the securities laws.[7] Whatever the truth of that statement when written, the authors demonstrate that much has changed in the intervening forty-seven years.

In this Response, I do not disagree with any of the core points made in *The Political Economy of Fraud on the Market.* (My scholarship has similarly emphasized the benefits of shifting away from FOTM to greater reliance on public enforcement mechanisms.)[8] Instead, I take the opportunity to elaborate on the deterrence and governance shortcomings of FOTM, strengthening further the case Bratton and Wachter make for an enhanced public enforcement role. In conclusion, I suggest avenues for overcoming the political hurdles to reform that the authors identify, so that we might someday actually "get there from here."[9]

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[5] *Id.* at 166.

[6] *Id.* at 103.

[7] 377 U.S. 426, 432 (1964).

[8] *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2176 (2010) [hereinafter Rose, *The Multienforcer Approach*] (evaluating the efficiency of the United States' approach to securities fraud deterrence, which utilizes federal regulators, state regulators, and class action lawyers); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1307 (2008) [hereinafter Rose, *Reforming Securities Litigation Reform*] (arguing for further exploration of SEC oversight of securities fraud class actions).

[9] *See* Bratton and Wachter, *supra* note 1, at 107 (suggesting that, with regard to a proposed movement from enterprise liability to individual liability, "no one seems able to chart a plausible course that takes us from here to there").

Bratton and Wachter's deterrence critique of FOTM proceeds in four steps: (1) personal, not enterprise, liability is the best way to deter securities fraud, yet FOTM almost never results in individual contributions to settlement payments; (2) refocusing FOTM actions on individual defendants would require a downward adjustment of sanctions, because otherwise it would produce unacceptable overdeterrence costs; (3) such a reduction in sanctions would drastically reduce private incentives to bring suit; (4) ergo, we must tolerate the second-best deterrent effects of the current FOTM regime or rely more heavily on public enforcement (the latter being the better option, in the authors' view). In this part, I provide a theoretical basis for the authors' preference for individual liability, and suggest that private enforcement would remain inferior to public enforcement *even if* sufficient private incentives to bring suit remained after a downward adjustment of FOTM sanctions.

I. THE THEORETICAL PROBLEMS WITH ENTERPRISE LIABILITY IN FOTM

The standard economic justification for enterprise liability begins with the premise that personal liability will not deter socially harmful conduct by firm agents if those agents are judgment-proof or are otherwise resistant to liability incentives.[10] But there are steps, the argument proceeds, that a firm (through its higher-level agents) can take to help minimize the amount of social harm its agents cause in the course of their employment—for example, careful employee selection criteria, monitoring and supervision, or if all else fails, an adjustment of the firm's activity level. In the absence of enterprise liability, however, a firm's owners would lack incentive to cause their firm to invest in measures to prevent agents from imposing costs on third parties—and they might in fact *encourage* such behavior if it would increase firm profitability. Enterprise liability is therefore warranted, the argument concludes, because it forces a firm's owners to internalize fully the costs their agents impose on third parties, incentivizing them to invest socially optimal amounts of firm resources in internal deterrence measures.[11] What if firm agents are not resistant to liability incentives,

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[10] *See* Amanda M. Rose & Richard Squire, *Intraportfolio Litigation,* 105 NW. U. L. REV. (forthcoming 2011) (manuscript at 5-6), *available at* http://ssrn.com/-abstract=1769946.

[11] For classic expositions of this argument, see, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.8, at 188-90 (7th ed. 2007); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 230 (2004); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents,* 70 CALIF. L.

or are in fact overly sensitive to them? In those cases, the choice between enterprise and exclusive personal liability does not matter much—the firm and its agents can bargain to an efficient allocation of liability *inter se*.[12]

This argument for enterprise liability is compelling in many situations. It is unconvincing, however, when used to defend corporate liability for secondary market fraud, if we assume (as Bratton and Wachter do) that most shareholders are well diversified. Scholars have long asserted that well-diversified shareholders stand to pocket gains as often as they sustain out-of-pocket losses from secondary market fraud, just as those shareholders are as likely to recover damages in FOTM cases as to pay them through their ownership of the defendant firm. These assertions are commonly used to defeat the *compensatory* justification for FOTM. Less appreciated is that they also undermine its deterrence justification: the specter of damages in FOTM actions will not change the incentives of diversified shareholders if those shareholders face an equal likelihood of receiving as of paying them. Corporate liability under these circumstances is simply ineffective as a cost-internalization technique.[13] Nor is it necessary, given that diversified shareholders naturally internalize many of the social costs of fraud and thus have an incentive to deter it even in the absence of corporate liability.[14] As Professor Jack Coffee has colorfully observed, corporate liability for secondary market fraud "is a strategy akin to punishing the victims of burglary for their failure to take greater precautions."[15]

In a forthcoming essay titled *Intraportfolio Litigation*,[16] Professor Richard Squire and I explain that an assumption of broad shareholder diversification undermines the standard deterrence justification for

REV. 1345, 1345-46 (1982); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1246 (1984).

[12] For example, if there were no enterprise liability but the firm could more efficiently bear a certain type of liability risk, then it could offer firm agents indemnity. *But see infra* note 21.

[13] As Bratton and Wachter explain, there are some "clear losers in the federal securities litigation game"—investors who can expect to pay more in damages through their ownership of defendant firms than they can expect to receive as members of FOTM classes. Bratton & Wachter, *supra* note 1, at 97. These include "mom-and-pop" long-term investors, hardly a group well positioned to influence corporate behavior.

[14] For a discussion of the social costs of fraud, see Rose, *The Multienforcer Approach*, *supra* note 8, at 2179-80.

[15] John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1562 (2006).

[16] Rose & Squire, *supra* note 10 (manuscript at 11-13).

corporate liability not only in the FOTM context, but also in any intercorporate dispute. I refer you to that piece for fuller exposition, but the core idea can be simply stated: shareholders naturally want firms in their portfolio to avoid imposing deadweight costs on other firms in their portfolio, because such behavior would diminish their overall wealth. Put differently, forcing one firm you own to pay damages to another firm you own in proportionate amount will do nothing to improve your incentives to invest in precautions ex ante—yet the pocket-shifting exercise will cause you to incur transaction costs ex post in the form of attorneys' fees and other litigation costs. The more shareholder portfolios expand to approximate the entire market, the less traction the standard deterrence justification for corporate liability has vis-à-vis intercorporate disputes.

We do not conclude from this that intercorporate litigation would serve no purpose in a market dominated by broadly diversified shareholders. Instead, we identify a new justification for it, one focused on protecting diversified shareholder interests. We call it the "informational theory" of corporate liability.[17] We posit that although diversified shareholders care about maximizing portfolio value more than the value of any individual portfolio firm, individual firm managers have the opposite priority. Their compensation and future career prospects are tied to firm rather than portfolio performance—the higher their firm's profits, the more valuable their incentive-based pay, and the less likely they are to lose their jobs. Thus, corporate managers might be tempted to boost profits by externalizing (and allowing their subordinate agents to externalize) costs onto other portfolio firms. Corporate liability can mitigate this conflict of interest by ensuring that the firm's reported profits will reflect its management team's true contribution to overall portfolio value, including damage the firm's agents have caused to other portfolio firms. Corporate liability, thus conceived, does not give diversified shareholders the *incentive* to take steps to deter wealth-destroying activity by corporate agents—they already have that incentive if we are focused on firm-on-firm misconduct. Instead, it is a *mechanism* through which diversified shareholders can act on that incentive. Although the costs of this mechanism are not trivial, shareholders might be willing to pay them if corporate liability promised a greater reduction in residual portfolio-level agency costs.

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[17] *Id.* (manuscript at 10).

The informational theory of corporate liability advanced in *Intraportfolio Litigation* obviously relates to the nascent "corporate governance" justifications for FOTM that Bratton and Wachter discuss and ultimately discard. Like those justifications, the informational theory focuses on what a lawsuit promises to reveal to investors about the quality of the defendant firm's management team, and it supports a shareholder right to opt out of corporate liability. But the informational theory—also like those justifications—lends little support to FOTM at the end of the day.[18] FOTM is unlikely to be a cost-justified portfolio governance tool for a variety of reasons we discuss in our essay. Importantly, FOTM produces a relatively trivial amount of new information about a firm's management team. Fraud is seldom first revealed through the initiation of FOTM litigation; in most instances, it is ferreted out by the media or another source, and this alone is sufficient to cause the firm's stock price to take a hit—a hit that tends to far exceed the firm's expected legal penalty.[19] In light of this, it is difficult to believe that the anticipated settlement payments in FOTM suits—which are mostly funded by insurance anyway and thus have no immediate effect on the firm's financials—have anything more than a very marginal ex ante effect on managerial incentives.[20] And if corporate liability makes it easier for captured boards to insulate culpable officers from personal liability, as it likely does,[21] its ex ante effects on managerial incentives will be negative.

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[18] The informational theory presents a stronger defense for intercorporate liability in other legal areas. *See id.* (manuscript at 20) (noting that the informational theory may justify "[m]any lawsuits based on traditional common law causes of action").

[19] *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* 2 (Am. Fin. Ass'n 2007 Chicago Meetings Paper, Chicago Booth Sch. Bus. Research Paper No. 08-22, 2009), *available at* http://ssrn.com/abstract=891482 (finding that private litigation accounted for only 3% of the alleged incidents of fraud between 1996 and 2004 in companies with more than $750 million in assets); Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582 (2008) (finding that a firm's reputational losses resulting from financial fraud "exceed[] the legal penalty by over 7.5 times, and . . . the amount by which firm value was artificially inflated by more than 2.5 times").

[20] When insurers pay judgments (or settlements), it undermines the informational value of corporate liability. This problem would be mitigated if insurers charged higher premiums to firms that have greater liability risk, as higher premiums would eat into those firms' reported profits. However, Professors Tom Baker and Sean J. Griffith have found that "there is not a large marginal difference between the . . . premium[] paid by a well-governed firm relative to a poorly-governed firm . . . ." Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 GEO. L.J. 1795, 1821 (2007).

[21] I noted earlier that the choice between enterprise liability and exclusive personal liability does not matter much when firm agents are not resistant to liability incen-

I therefore agree with Bratton and Wachter that it would be better to focus securities fraud liability on the culpable individuals, rather than on the corporation that employs them. I also agree that doing so would require a dramatic reduction in the currently nonsensical measure of damages in FOTM suits,[22] which if applied to individuals would discourage any sane person from becoming a corporate executive. The following section explains *why* this is the case, and the reason highlights the advantage of public over private enforcement *even if* private incentives to bring suit could be preserved in the wake of a significant reduction in sanctions.

II. THE ADVANTAGE OF PUBLIC ENFORCEMENT

Securities fraud has no redeeming social value. Thus, absent a risk of legal error, it is not an offense that requires a carefully calibrated sanction: society would be best served by creating very punitive sanctions so as to eliminate any incentive to commit fraud.[23] Unfortu-

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tives, because the firm and its agents can bargain to an efficient allocation of liability *inter se*. A caveat is in order. Those who decide whether to shelter firm agents from personal liability are themselves higher-level firm agents, and may not always act in ways that maximize corporate wealth. Thus, a corporate board may choose to insulate officers from personal liability, even when doing so increases the likelihood of fraud and firm-level liability, without compensating reductions in overdeterrence costs. This possibility exists regardless of whether there is enterprise liability or exclusive personal liability: in a world with enterprise liability, the board might cause the defendant-firm to settle the suit without requiring any contributions from individual wrongdoers (this is typical in FOTM); in a world with exclusive personal liability, the board might cause the firm to indemnify the individual wrongdoers for their settlement payments. But state corporate law requires boards to make an affirmative determination that officers are entitled to indemnity. *See, e.g.*, DEL. CODE ANN. tit. 8, § 145(d) (mandating a determination that the defendant acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation). No such affirmative judgment is necessary for the board to forgo seeking contribution. Thus, it is less likely that boards would succumb to inappropriate pressures to indemnify than to inappropriate pressures to cause the firm to shoulder the entire settlement payment.

[22] *See* Rose, *Reforming Securities Litigation Reform*, *supra* note 8, at 1322-23 (critiquing the damages measure used in 10b-5 cases).

[23] Deterrence theory teaches that the law should assign a monetary sanction to behavior equal to its social costs multiplied by the inverse of the probability that the sanction will be imposed. SHAVELL, *supra* note 11, at 483. But a society may choose not to recognize the utility derived from certain categories of illicit activities; the goal of sanctions targeted at such activities would be to deter them unconditionally, rather than to encourage potential defendants to weigh social costs against personal benefits. A sanction of this sort may be set at an arbitrarily high level. *See generally* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). Notably, only individual wrongdoers should be threatened with a sanction designed to unconditionally deter—not the firm that employs them. This is because enterprise sanctions "in excess of the

nately, there is a nontrivial risk of false positives in securities fraud cases. Determining liability requires judges (and worse, juries) to evaluate the accuracy of statements (and worse, omissions) in hindsight, and to infer from that and other circumstantial evidence the defendant's intent to deceive. This can be incredibly difficult. It is the risk of false positives, and not the risk of high sanctions alone, that leads to the overdeterrence concerns that Bratton and Wachter raise[24]—it is cheap and easy for corporate officers not to lie, but to avoid being *misjudged* a liar, they may spend excessive corporate resources scrubbing disclosures before they are made, or just keep quiet. Either course hurts shareholders, and society more broadly, perhaps even more so than securities fraud itself.[25]

Profit-driven private enforcement exacerbates the risk of false positives. If the chance a judge or jury will decide a case in the plaintiff's favor is substantial enough to render the litigation a positive net-present-value investment, a private enforcer may pursue the case even if there is real doubt as to the defendant's guilt. And potential defendants know this, and will adjust their behavior accordingly to avoid the risk of being misjudged a fraudster. Lowering sanctions will reduce the number of positive net-present-value litigation opportunities, and hence the level of overdeterrence, assuming private enforcers' compensation is tied to the sanction recovered (as it is today). But even cases with a very high probability of success might not be worth the litigation expenses if sanctions are set too low. Bratton and Wachter see this as a Catch-22: private enforcement cannot work in a FOTM regime that targets individuals, because, to avoid unacceptable overdeterrence costs, the sanctions would have to be set at a level too low to incite any significant interest in private enforcement. The increased underdeterrence costs that would result might overwhelm the savings in overdeterrence costs. Hence, they conclude that increased public enforcement is necessary if we are to shift away from enterprise liability.

One could imagine, however, ways to decouple the plaintiff attorneys' fees from the sanction the defendant pays—for example,

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social cost of the crime (adjusted for the probability of nondetection) will cause the private gains from monitoring to exceed the social gains," leading to "an inefficiently high level of investment in monitoring." Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 324 (1996). This discussion therefore assumes a legal regime that does not utilize enterprise liability.

[24] *See* Bratton & Wachter, *supra* note 1, at 107-09.

[25] *See* Rose, *The Multienforcer Approach*, *supra* note 8, at 2184 (explaining how "overdeterrence produces some of the very same social costs as securities fraud" by increasing the cost of capital and upsetting the allocative efficiency of the economy).

through public funding of private securities fraud litigation. Thinking through how such funding would need to be structured reveals why public enforcement would be a superior option *even if* sufficient private incentives to bring suit could be maintained after a downward adjustment of FOTM sanctions. A taxpayer-funded award of plaintiff attorneys' fees would clearly have to be contingent on the lawyer's successful resolution of the case, via settlement or judgment at trial. Moreover, the amount of the promised award would need to be set high enough to incite "good" litigation (that is, litigation with a sufficiently high probability of success), but low enough to render marginal cases unattractive. This is necessary because even if securities fraud sanctions are capped at the levels Bratton and Wachter suggest,[26] overdeterrence will remain a risk so long as officers face a nontrivial possibility of legal error. Thus, discouraging borderline cases would remain important, so as to keep overdeterrence costs in check. The higher (or lower) the anticipated fee award is, the lower (or higher) the probability of success necessary to render the litigation attractive to a private enforcer. Set the award too high, and overdeterrence costs may swamp the savings in underdeterrence costs; set the award too low, and risk the opposite.

How easy would it be to arrive at such a Goldilocks figure in the real world? The fact is that using money to incent securities enforcement is fraught with difficulties.[27] These difficulties could be avoided if the enforcer were motivated not by money but by a desire to maximize social welfare.[28] Instead of looking to a rigid and imprecise financial proxy to determine if a case is worth pursuing, such an enforcer would directly consider the expected benefits of the suit in terms of future savings in underdeterrence costs and weigh those benefits against the expected enforcement costs—including the overdeterrence costs the suit might generate.

Of course, it would be naïve to presume that the SEC's enforcement choices are always the product of such a calculation, or that such calculations are always accurate when made. The SEC is staffed by

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[26] Bratton & Wachter, *supra* note 1, at 107 (suggesting "a fine capped at $5, $10, $20, or $30 million, or, alternatively, a fine set at a percentage of individual net worth" depending on the size of the company and its level of executive pay).

[27] Policymakers could try to reduce the risk of false positives in more direct ways as well, such as by narrowing the scope of the fraud prohibition or increasing procedural hurdles to bringing successful suits. As I have detailed elsewhere, however, these blunt maneuvers come at a cost, for they weed out meritorious suits as well as nonmeritorious ones. *See* Rose, *The Multienforcer Approach*, *supra* note 8, at 2184-88, 2192-93.

[28] *See id.* at 2194-97.

human beings who may sometimes fail to act in the public interest and who will naturally make mistakes. But the proper question is not whether the incentives and abilities of SEC staffers are perfect, but whether those staffers are likely to do a better job at getting the delicate deterrence calculus right than would profit-driven private enforcers. I believe that they are—or at least that they *could* be.[29] There are a variety of tools available for better aligning the incentives of bureaucrats, including those at the SEC, with the public interest. Moreover, many of the offsetting benefits that we normally associate with private enforcement—such as detection advantages and meaningful victim compensation—are not produced in the FOTM context.[30]

Thus, I agree with Bratton and Wachter that FOTM should be scrapped in favor of public enforcement not because a reduction in sanctions would render a private enforcement regime infeasible, but because I believe public enforcement could do a better job *even if* private enforcement remained a viable alternative. And I would encourage policymakers to couple the shift away from FOTM and toward public enforcement not only with an increase in the SEC's budget, as Bratton and Wachter suggest, but also with reforms designed to better align the incentives of SEC personnel with the public interest.[31]

CONCLUSION

In *The Political Economy of Fraud on the Market*, Professors Bratton and Wachter build a compelling case for scrapping the securities fraud class action that has long been derided in the academic literature and shifting to increased reliance on public enforcement mechanisms. I am convinced. But Bratton and Wachter also describe the formidable political barriers that exist to implementing this policy shift, without offering any real suggestions for how to overcome them. That is understandable. Their article is already extremely ambitious in its breadth. In this conclusion, I offer my preliminary thoughts on

[29] *See* Rose, *Reforming Securities Litigation Reform*, *supra* note 8, at 1343 (observing that correcting the misalignment between profit-driven private enforcers' incentives and the public interest "may be more difficult than—or at least as difficult as—monitoring the [SEC] for capture or regulatory inefficiency").

[30] *See, e.g.*, SHAVELL, *supra* note 11, at 578-80 (discussing detection advantages as a factor weighing in favor of private enforcement). The SEC's new Whistleblower Bounty Program may prove to be a more effective way to generate private information about securities fraud than FOTM. *See Office of the Whistleblower*, SEC.GOV, http://www.sec.gov/whistleblower (last visited Oct. 15, 2011).

[31] For a discussion of possible reforms to better the SEC, see Rose, *The Multienforcer Approach*, *supra* note 8, at 2224-27.

how we might "get there from here," the logical next question scholars in this field must confront.

Bratton and Wachter tell a sad story about the persistence of FOTM. That story involves politicians who place special interests above the social welfare—namely, the interests of attorneys who directly profit from FOTM and those of the "management class" who benefit because FOTM helps to insulate them from personal liability. These politicians get away with their malefaction because the public suffers from the illusion that FOTM is a vehicle for challenging the privileged status of corporate managers and for vindicating shareholder interests, when in fact it serves to protect managers at the expense of shareholders.

If their story is correct, the only way forward involves breaking the illusion. That means educating shareholders (and perhaps misguided but well-meaning politicians) about the reality of FOTM, and convincing them of the superiority of the public enforcement option so that they might use their clout to pressure Congress for reform. Articles like *The Political Economy of Fraud on the Market* are an important step in this regard, but only if they are read outside the ivory towers of academia. Scholars writing in this field should expand the names on their reprint lists to include policymakers, shareholder activists, and institutional money managers—including those who run hedge funds, mutual funds, and public pension funds. We should invite them to our conferences and seek to keep an open dialogue with them. Perhaps we also have something to learn from them about hidden benefits of FOTM, or hidden dangers of public enforcement. To be sure, the groups I mention face their own conflicts of interest, but they may be the best shot we have at actually improving upon the status quo. And if that isn't a viable goal, what's the point?

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