Securities Law—Eighth Circuit Rejects Knowledge Requirement in Assessing Civil Liability for Corporate Executives Who Deceive Auditors—*SEC v. Das*, 723 F.3d 943 (8th Cir. 2013)

When the United States Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977, its chief concern was deterring off-the-books bribes of foreign officials by domestic corporations.[1] The FCPA authorized the Securities and Exchange Commission (SEC) to issue new rules, including Rule 13b2-2, which imposes civil liability on corporate officers who mislead accountants concerning the corporation's finances.[2] In *SEC v. Das*,[3] the Eighth Circuit Court of Appeals addressed the issue of whether civil liability is present in cases where the corporate officer did not knowingly mislead.[4] Splitting from the Ninth Circuit—the only other circuit court that addressed this issue directly—the Eighth Circuit rejected the proposed "knowingly" requirement, holding that a reasonableness standard shall apply in such cases.[5]

Das concerned infoUSA, Inc., a publicly traded, Nebraska-based corporation that sold databases to businesses and consumers.[6] More specifically, the case concerned events involving three corporate officers: Vinod Gupta, who served as chief executive officer and chairman until 2008; Rajnish Das, chief financial officer from 2003 to 2006; and Stormy Dean, chief financial officer from 2000 to 2003 and then again from 2006 to 2008.[7] The SEC claimed, in a 2010 civil enforcement action, that Dean violated provisions of the Securities Exchange Act of 1934.[8] The agency claimed, among other things, that both former chief financial officers, Das and Dean, deceived auditors concerning payments

1. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -3, 78ff (2012)) (prohibiting bribes to foreign government officials for business purposes), *amended by* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, *and* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302; *see also* CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (explaining origins and purpose of FCPA); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 494 (2011) (stating FCPA's purpose to prohibit bribery of foreign officials by American companies).

2. 17 C.F.R. § 240.13b2-2 (2013).

3. 723 F.3d 943 (8th Cir. 2013).

4. *See id.* at 954 (classifying whether SEC required to prove knowledge as issue of first impression).

5. *See id.* at 955 (concluding SEC need not prove knowledge for violation of Rule 13b2-2). *But see* SEC v. Todd, 642 F.3d 1207, 1219 (9th Cir. 2011) (holding Rule 13b2-2 inapplicable in cases where defendant did not know falsity of statement).

6. *See* 723 F.3d at 946 (outlining facts of case).

7. *See id.* at 946-47.

8. *See id.* (listing SEC claims against Dean).

infoUSA had made to Aspen Leasing Services LLC and Annapurna Corporation—two companies owned by Gupta—to pay for Gupta's homes, yacht, and cars.[9] The SEC's complaint further alleged that Dean and Das had signed the company's management letters to external auditors, falsely representing that all related-party transactions had been properly disclosed.[10] At trial, the judge instructed the jury to find that Dean violated the law if he did not act "reasonably" regarding the false statements made to auditors.[11]

After only a few hours of deliberation, a jury returned a verdict in favor of the SEC on each of the seven claims brought against Das and Dean.[12] In Dean's subsequent appeal, he argued that the trial court abused its discretion in instructing the jury to find that Dean violated Rule 13b2-2(a) if he did not act "reasonably."[13] Dean argued that civil liability for deceiving auditors required a finding that Dean acted "knowingly."[14] He relied upon *SEC v. Todd*,[15] a Ninth Circuit decision holding that "'one must 'knowingly' make false statements'" to be liable under the rule.[16] Rejecting the Ninth Circuit's reasoning, the Eighth Circuit Court of Appeals affirmed the trial court's jury instruction applying a reasonableness standard.[17]

In 1977, Congress contemplated enacting a statute to prohibit corporate officials from making false or misleading statements to accountants—but did not do so.[18] To avoid debating the legality of the proposed "knowingly" requirement in light of a recent decision of the United States Supreme Court,

9. *See* Complaint at 33-35, SEC. v. Das, 723 F.3d 943 (8th Cir. 2013) (No. 10CV00102), 2010 WL 5758868 at *33-35 (alleging deception of auditors regarding related-party transactions); *see also* 723 F.3d at 947 (outlining claims for which SEC presented evidence at trial).

10. *See* Complaint at 19, 33-35, SEC v. Das, 723 F.3d 943 (8th Cir. 2013) (No. 10CV00102), 2010 WL 5758868 (claiming Das failed to report related-party transactions).

11. *See* 723 F.3d at 954 (explaining defendant contends judge abused discretion in jury instructions).

12. *See id.* at 947 (noting jury's findings).

13. *See id.* at 954 (explaining issue before court).

14. *See id.* at 954 (describing Dean's argument).

15. 642 F.3d 1207 (9th Cir. 2011).

16. *See* 723 F.3d at 954 (quoting SEC v. Todd, 642 F.3d 1207, 1219-20 (9th Cir. 2011)) (holding Rule 13b2-2 inapplicable in cases where defendant did not know falsity of statement).

17. *See* 723 F.3d at 956 & n.13 (affirming reasonableness standard).

18. Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, 16 SEC Docket 1143, 1147-48 (Feb. 15, 1979) [hereinafter Reliability of Financial Information] (announcing rules and proposals to assure accuracy of corporate books and records). In 1973, the SEC discovered a "pattern of conduct involving the use of corporate funds for illegal domestic political contributions." *Id.* at 1144. The SEC subsequently discovered that such contributions included foreign political payments as well. *See id*. In a 1976 report, the SEC proposed a statutory provision prohibiting the making of false statements to accountants. *See id*. at 1144-45. The ninety-fourth Congress adjourned without taking action. *See id*. at 1145. In 1977, the United States Senate passed a bill that included a provision prohibiting misleading accountants. *See id*. at 1147. The Senate bill explicitly limited the provision to apply only to conduct that was performed "knowingly." *Id*. Meanwhile, the House of Representatives passed its own corresponding bill, but its version omitted the prohibition against misleading accountants. *See id*. Ultimately, Congress enacted a law, the FCPA, which did not include the prohibition against misleading accountants. *See id*. at 1147-48.

Congress deliberately omitted the prohibition against making false or misleading statements to an accountant from the FCPA.[19] Two years later, however, the SEC, acting under the authority of the FCPA and the Securities Exchange Act, promulgated a rule to prohibit making false or misleading statements to accountants.[20] The SEC considered imposing a scienter, or knowledge, requirement but decided to leave it out.[21] The accounting provisions of the FCPA, and the new rules promulgated thereunder, broadened the scope of the SEC's authority beyond its traditional role of merely monitoring disclosures into the realm of regulating a corporation's internal management.[22] In 1988, Congress again amended section 13 of the Securities Exchange Act, providing that criminal liability for violating the Act's accounting provisions would arise only where the defendant acted

19. *See id.* at 1147-48 (describing intent behind leaving out *knowingly* requirement). When the conference committee met to consolidate the House and Senate versions of the FCPA, mental state became a thorny issue; the conferees wished to avoid a debate over whether use of the word "knowingly" in the proposed rule "would or would not affirm, expand, or overrule the decision of the Supreme Court in *Ernst & Ernst v. Hochfelder*." H.R. REP. NO. 95-831, at 10 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4123 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)). In *Ernst*, a brokerage firm's customers sued the firm's accountants, claiming the accountants were negligent in failing to conduct proper audits that would have revealed the firm was engaged in fraud. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 189-90 (1976). The customers alleged that the firm had "aided and abetted" the brokerage firm in violating section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. *See id*. at 190. The United States Supreme Court granted certiorari. *See id*. at 193. The Court found no evidence that Congress intended for the law's scope to encompass negligent conduct, and so it reversed the appeals court's judgment in favor of the customers. *See id*. at 214-15 (announcing court's decision).

20. *See* Reliability of Financial Information, *supra* note 18, at 1143 (announcing rules to prohibit making false or misleading statements to accountants); *see also* 15 U.S.C. § 78m(b) (2012) (requiring corporate accounting and authorizing SEC rules to enforce requirements).

21. *See* Reliability of Financial Information, *supra* note 18, at 1150-51 (explaining reason for excluding scienter requirement). The SEC, which solicited comments before adopting the rule, noted that "many of the comments asserted that imposition of liability for mistatements [sic] or omissions, in the absence of a scienter requirement, would . . . impede communications between auditors and those from whom they seek information in the course of an audit." *Id*. at 1153. However, the SEC stated that it believed the need for the new rule outweighed these concerns. *See id*. (explaining reasoning for not imposing scienter requirement). In the SEC release announcing the rule, the SEC put the word "scienter" in quotes. *Id.* Black's Law Dictionary offers two definitions of scienter. *See* BLACK'S LAW DICTIONARY 1463 (9th ed. 2009). The first definition is: "A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." *Id.* The second definition is: "A mental state consisting in an intent to deceive, manipulate, or defraud." *Id.* Regarding the second definition, the dictionary notes, "[i]n this sense, the term is used most often in the context of securities fraud." *Id.*

22. *See* SEC v. World-Wide Coin Invs., Ltd., 567 F. Supp. 724, 747 (N.D. Ga. 1983) (assessing the significance of FCPA and associated rules). "Until the Sarbanes-Oxley Act of 2002 . . . the FCPA's accounting provisions represented the most substantial legislative foray into the accounting arena since Congress enacted the original federal securities laws in the 1930s." Matthew J. Barrett, *The SEC and Accounting, in Part Through the Eyes of Pacioli,* 80 NOTRE DAME L. REV. 837, 855-56 (2005) (describing significance of FCPA). *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (tightening financial regulations for corporations and accounting firms).

"knowingly."[23] The SEC amended Rule 13b2-2 in 2003, pursuant to the enactment of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), but the substance of the rule remained the same, codified as Rule 13b2-2(a).[24]

The two decades following the enactment of the FCPA saw little federal action to enforce its provisions, in part because the SEC's authority to seek civil money penalties did not emerge until the Securities Enforcement Remedies and Penny Stock Reform Act of 1990.[25] In recent years, however, enforcement has skyrocketed, in terms of both the number of actions and the amount of fines.[26] Since the adoption of Rule 13b2-2(a), courts have applied the rule in cases where the defendant's mental state was not an issue because the false or misleading statements were made in connection with fraud.[27] In more recent cases, where the defendant's mental state was at issue, a number of courts concluded that scienter was not required.[28] The SEC has not deviated from its position that scienter is unnecessary, noting the absence of such a requirement in its announcement of an update of Rule 13b2-2 following passage of Sarbanes-Oxley.[29] Courts have expressed uncertainty, however, as

23. *See* 15 U.S.C. § 78m(b)(4)-(5) (providing criminal liability arises where violations of § 78m(b)(2) committed knowingly); H.R. REP. NO. 95-831, at 10 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4123 (explaining amendment's purpose to ensure criminal liability for violation of SEC accounting rules requires knowledge); *see also* SEC v. McNulty, 137 F.3d 732, 740-41 (2nd Cir. 1998) (stating scienter not required for liability under section 13 of Securities Exchange Act).

24. *See* Improper Influence on Conduct of Audits, 68 Fed. Reg. 31,820, 31,820 (May 28, 2003) (codified at 17 C.F.R. § 240.13b2-2 (2013)) (announcing changes to SEC Rule 13b2-2).

25. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 101, 104 Stat. 931, 932 (codified as amended at 15 U.S.C. § 77t(d) (2012)); Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 ALB. L. REV. 5, 6 (1994) (detailing history of FCPA's impact on SEC enforcement). "Between 1978 and 2000, the SEC and the DOJ together averaged only three FCPA prosecutions per year. The few cases that went to trial resulted in minimal or no penalties." Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 434 (2009).

26. *See* Westbrook, *supra* note 1, at 495-96 (noting increase in enforcement of FCPA by SEC in current era).

27. *See, e.g.*, SEC v. Yuen, No. CV 03-4376 MRP (PLAx), 2006 U.S. Dist. LEXIS 34759, at *3-6, 8 (C.D. Cal. May 8, 2006), *aff'd*, 272 F. App'x 615 (9th Cir. 2008) (applying Rule 13b2-2 where defendant misled auditors in connection with fraud); SEC v. Gruenberg, No. 5-91-68, 1992 U.S. Dist. LEXIS 23011, at *9 (D. Minn. July 8, 1992), *aff'd*, 989 F.2d 977 (8th Cir. 1993) (finding violation where defendant misled auditor as part of fraudulent scheme); SEC v. Benson, 657 F. Supp. 1122, 1132 (S.D.N.Y. 1987) (applying Rule 13b2-2 where defendant engaged in fraudulent scheme).

28. *See, e.g.*, SEC v. Espuelas, 908 F. Supp. 2d 402, 416 (S.D.N.Y. 2012) (adopting reasonableness standard); SEC v. Stanard, No. 06 Civ. 7736 (GEL), 2009 U.S. Dist. LEXIS 6068, at *81 (S.D.N.Y. Jan. 27, 2009) (holding scienter not required); SEC v. Goldsworthy, No. 06-10012-JGD, 2007 U.S. Dist. LEXIS 95782, at *48 (D. Mass. Dec. 4, 2007) (finding scienter not required for claims under section 13 of Exchange Act or regulations thereunder).

29. *See* Improper Influence on Conduct of Audits, 68 Fed. Reg. 31,820, 31,823 (announcing changes to SEC Rule 13b2-2). The SEC stated:

> We do not intend to hold any party accountable for honest and reasonable mistakes or to sanction those who actively debate accounting or auditing issues. We do believe, however, that those third parties who, under the direction of an issuer's officers or directors, mislead or otherwise improperly

to what standard should apply, if not scienter.[30]

In *SEC v. McNulty,*[31] the Second Circuit Court of Appeals determined that scienter is not an element of civil claims that are based on violations of provisions under section 13(b) of the Securities Exchange Act, including Rule 13b2-2.[32] The *McNulty* court deferred to the SEC's reasonable interpretation, and it relied upon legislative history indicating Congress had an opportunity to insert a scienter requirement, but chose not to do so.[33] In *McConville v. SEC*,[34] the Seventh Circuit followed suit, also relying on the SEC's interpretation.[35] Neither court, however, explicitly and directly addressed the issue of whether these general axioms applied to Rule 13b2-2 specifically.[36] The Ninth Circuit was the first court of appeals to specifically tackle this issue in *SEC v. Todd*,

> influence auditors when they know or should know that their conduct could result in investors being provided with misleading financial statements or a misleading audit report, should be subject to sanction by the Commission.

Id. at 31,822.

30. *See* SEC v. Espuelas, 579 F. Supp. 2d 461, 487 (S.D.N.Y. 2008) (assuming reasonableness standard applies); SEC v. Baxter, No. C-05-03843 RMW, 2007 WL 2013958, at *8 (N.D. Cal. July 11, 2007) (analyzing Rule 13b2-2 standard). In *Espuelas*, the court stated, "[w]hile even the SEC is not crystal clear on the subject, the Court assumes Rule 13b2-1's reasonableness standard applies to violations of Rule 13b2-2." SEC v. Espuelas, 579 F. Supp. 2d 461, 487 (S.D.N.Y. 2008). In *Baxter*, the court seemed to see it both ways, stating, "[t]he court reads Rule 13b2-2 to impose liability for both unintentional (i.e., mistakes) and fraudulent false statements or omissions to auditors. Rule 13b2-2 appears to also impose a scienter requirement." SEC v. Baxter, No. C-05-03843 RMW, 2007 WL 2013958, at *8 (N.D. Cal. July 11, 2007).

31. 137 F.3d 732 (2d Cir. 1998).

32. *See* SEC v. McNulty, 173 F.3d 732, 740-41 (2d Cir. 1998) (affirming denial of motion to vacate default judgment because scienter not element of Section 13 provisions). In *McNulty*, the SEC alleged that John M. Shanklin, while an officer and director of Auto Giant, Inc. and Auto Depot, Inc., falsified corporate books and SEC filings. *See id.* at 734. In its complaint, the SEC alleged that Shanklin knew "or recklessly failed to know" that they contained material misrepresentations. *Id.* Shanklin failed to file an answer and a default judgment was entered in 1995. *See id.* at 735. In 1996, Shanklin filed a motion to vacate the judgment, arguing that the SEC "could not establish his scienter." *Id.* The trial court denied Shanklin's motion, finding the circumstances should have aroused his suspicions, and his "conscious avoidance of knowledge satisfies the scienter requirement." *Id.* at 737.

33. *See* SEC v. McNulty, 173 F.3d 732, 741 (2d Cir. 1998) (noting Congress' opportunity to include scienter requirement for civil liability in 1988 amendment to FCPA).

34. 465 F.3d 780 (7th Cir. 2006).

35. *See* McConville v. SEC, 465 F.3d 780, 789 (7th Cir. 2006) (determining scienter not element of civil claims under section 13(b)). In *McConville*, the SEC alleged that Rita McConville, while chief financial officer and later controller of a drug company, mismanaged the company, causing it to file inaccurate financial statements with the SEC. *See id*. at 786. In its review of this administrative finding, the Seventh Circuit deferred to the SEC's interpretation that scienter is not required for liability. *See id.* at 789. The court did not reach the issue of whether false statements made without knowledge could give rise to liability for a Rule 13b2-2 violation, instead determining that there was sufficient evidence that McConville had known her statements to accountants were false. *See id*. at 786, 789.

36. *See* McConville v. SEC, 465 F.3d 780, 789 (7th Cir. 2006) (determining scienter not an element of civil claims under section 13(b)); SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir. 1998) (affirming denial of motion to vacate default where defendant demonstrated no meritorious defense). In *McConville*, the court determined that scienter was not required for civil liability under Rule 13b2-1, but it did not reach the issue of whether it applied under Rule 13b2-2. *See* McConville v. SEC, 465 F.3d 780, 789 (7th Cir. 2006).

where it distinguished between "knowing" and "intent to mislead," and held that "to be liable, one must 'knowingly' make false statements."[37]

In *SEC v. Das*, the Eighth Circuit rejected the Ninth Circuit's reasoning in *Todd*, instead concluding the SEC need not prove the defendants acted knowingly to impose civil liability.[38] The court cited *McNulty* and *McConville's* general proposition that section 13(b) does not require knowledge, and echoed the Second and Seventh Circuits in noting that SEC interpretations of its own regulations are entitled to deference.[39] The court also stated that a knowledge requirement would be inconsistent with the plain meaning of section 13(b), which specifically requires knowledge for criminal liability.[40] The court noted that the *Todd* interpretation relied upon *United States v. Goyal*, which, unlike *Todd*, correctly required knowledge in a criminal case by applying section 13(b)(5) of the Securities Exchange Act.[41]

The strange fact that it took more than three decades for this particular issue

37. SEC v. Todd, 642 F.3d 1207, 1219 (9th Cir. 2011). In *Todd*, the SEC alleged that John J. Todd and Robert D. Manza, both financial executives of Gateway Incorporated, made false statements to the company's accounting firm. *See id*. at 1212, 1219. At trial, the court granted, in part, the defendants' motions for judgment as a matter of law, finding that the defendants did not know the letter they submitted contained a false statement. *See id*. at 1219. The Ninth Circuit Court of Appeals affirmed the trial court's interpretation of the rule but overruled the finding that there was insufficient evidence that Todd and Manza knew their representations were false. *See id*. at 1219-20. The *Todd* court upheld summary judgment in favor of Jeffrey Weitzen, Gateway's chief executive officer and president, finding there was insufficient evidence that Weitzen knew his statements to the company's accounting firm were false. *See id*. at 1213, 1224-25. In interpreting Rule 13b2-2 to include a knowledge requirement, the court relied upon *United States v. Goyal*, a case in which the Ninth Circuit Court of Appeals held that criminal liability requires proof that the defendant knew his statements to auditors were false. *See id.* at 1219-20; United States v. Goyal, 629 F.3d 912, 916 (9th Cir. 2010); *see also* SEC v. Todd, No. 03CV2230 BEN (WMc), 2007 U.S. Dist. LEXIS 38985, at *44-45 (S.D. Cal. May 30, 2007), *aff'd in part, rev'd in part*, 642 F.3d 1207 (9th Cir. 2011) (summarizing case law concerning knowledge requirement). The lower court in *Todd* stated that it could find no case "where a claim of Rule 13b2-2 violations was sustained without knowledge of the falsity of the statements at issue." SEC v. Todd, No. 03CV2230 BEN (WMc), 2007 U.S. Dist. LEXIS 38985, at *44 (S.D. Cal. May 30, 2007), *aff'd in part, rev'd in part*, 642 F.3d 1207 (9th Cir. 2011). The lower court cited six cases, some of which suggested a knowledge standard, though none addressed the issue directly. *See id.* at *44-45. For example, in *SEC v. Cohen*, the court, in applying Rule 13b2-2, stated that "a finding of scienter is not required," reasoning that the defendant could not be liable because he was not aware that employees were not using the company's system of internal controls; as a result, the court concluded that he could not detect the failures of his managers in keeping proper records. *See* No. 4:05CV371-DJS, 2007 U.S. Dist. LEXIS 28934, at *59-60 (E.D. Mo. Apr. 19, 2007) (applying Rule 13b2-2). In *SEC v. Orr*, the court dismissed a Rule 13b2-2 claim because the alleged false statement was made by the defendant's subordinate, and there was insufficient evidence that the defendant knew the subordinate made the statement or directed him to do so. *See* No. 04-74702, 2006 U.S. Dist. LEXIS 11447, at *54 (E.D. Mich. Mar. 6, 2006) (indicating lack of knowledge on part of defendant).

38. *See* 723 F.3d at 955 (affirming trial court's Rule 13b2-2 instruction).

39. *See id.* at 954-55 (noting SEC's construction of Rule 13b2-2 conflicts with defendant's argument on appeal).

40. *See id.* at 955-56 (finding criminal liability triggers knowledge requirement); *see also* 15 U.S.C. § 78m(b)(4)-(5) (2012) (limiting criminal liability to knowing falsification of records).

41. *See* 723 F.3d at 955-56 (discussing *Todd*'s reasoning as distinct from current case); *see also* 15 U.S.C. § 78m(b)(4)-(5) (imposing criminal liability for knowingly falsifying records); United States v. Goyal, 629 F.3d 912, 916 n.6 (9th Cir. 2010) (noting criminal liability under Rule 13b2-2 requires false statement made knowingly).

to reach a circuit court of appeals can be attributed to a lack of SEC enforcement of Rule 13b2-2 in the decades following its promulgation.[42] This may be due to some officials' reluctance to enforce provisions in cases where bribery of foreign governments—the original target of the FCPA—was not an issue.[43] Although the accounting provisions of the FCPA emerged in the context of a legislative focus on widespread corporate bribery, the argument that Congress intended these provisions to apply only to bribery cases or cases involving intentional misconduct fails to acknowledge that Congress deliberately left the resolution of this question to the SEC and the judiciary.[44] Furthermore, Congress has had ample opportunity to amend the provision by adding a knowledge requirement but has conspicuously declined to do so, which strongly suggests the SEC standard reflects the will of Congress.[45]

The SEC's early reluctance to enforce against inadvertent violations of Rule 13b2-2 was also due to pushback from corporate stakeholders concerned about massive liabilities that might arise from the violations.[46] The public interest strongly favors rigorous enforcement of accounting violations, however, and enforcement of negligent violations can be highly effective in deterring both

42. *See* DENNIS H. TRACEY, III, GEORGE A. SALTER, AND STEVEN M. MINTZ, *Ethics in the Audit of Financial Statements: Ethics Issues in the Audit Process*, *in* ACCOUNTING ETHICS: SOURCES AND GENERAL APPLICATIONS (The Bureau of National Affairs, Inc. ed. 2014), *available at* Bloomberg Tax & Accounting Portfolio 5508 (noting SEC brought limited number of proceedings under Rule 13b2-2).

43. *See* News Release, Harold M. Williams, *The Role of the SEC in Overseeing the Accounting Profession*, SEC. & EXCH. COMM'N 42 (March 13, 1980), http://www.sec.gov/news/speech/1980/031380 williams.pdf (discussing recent adoption of accounting rules pursuant to FCPA). Williams, then SEC chairman, argued that enforcement should focus on "enabl[ing] directors and managers to rely on the corporate information systems in fulfilling their responsibilities—not merely on preventing bribes." *Id.*

44. *See* SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998) (holding scienter not required for civil liability under accounting provisions of FCPA). In *McNulty*, the court echoed the SEC's statement that scienter is not required for civil liability under section 13(b) of the Securities Exchange Act because the legislation includes no words to that effect. *See id.*; *see also* H.R. REP. NO. 95-831, at 10-11 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4123 (reporting decision to omit knowledge requirement from FCPA accounting provisions). "In deleting the Senate provisions, the conferees intend that no inference should be drawn with respect to any rulemaking authority the SEC may or may not have under the securities laws." H. R. REP. NO. 95-831, at 11 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4123; *see also supra* note 19 and accompanying text (discussing congressional reluctance to resolve scienter issue).

45. *See supra* note 23 and accompanying text (noting amendment of section 13(b) in 1988 to require scienter for criminal liability).

46. *See* Speech, Harold M. Williams, Chairman, Sec. & Exch. Comm'n, The Accounting Provisions of the Foreign Corrupt Practices Act: An Analysis 2-3 (Jan. 13, 1981), *available at* http://www.sec.gov/news/ speech/1981/011381williams.pdf (noting reactions to promulgation of FCPA's accounting provisions). SEC Chairman Williams stated, "some commentators claim that, because of the broad strokes with which the accounting provisions are fashioned, no corporate executive can ever feel fully confident that his corporation is in compliance with the law." *Id.* at 2. In response, Williams seemingly backed away from the negligence standard he had promoted. *Id.* at 4; *see also* Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1100-01 (2012) (describing early enforcement of accounting provisions). Black notes that an influential report by the American Bar Association reacted to the accounting provision with alarm. *See* Black, *supra*, at 1101-02. "After Chairman Williams stepped down in 1981, the SEC devoted little attention to either the accounting or the anti-bribery provisions of the FCPA." *Id.* at 1105.

deliberate and unintentional wrongdoing.[47] As more cases produce rulings of law delineating the meaning and scope of the accounting provisions, precedent will provide clarity and stability, benefiting corporations, regulatory agencies, and the courts.[48]

Commentators have suggested that until recently, the SEC generally devoted its limited resources to pursuing cases of fraud rather than negligence.[49] To the extent that the SEC did pursue negligent violators, the actions often arose administratively and resulted in settlements.[50] This history of reluctance to litigate unintentional violations explains the *Todd* court's inability to identify a case where liability arose without knowledge—such cases have rarely been brought or adjudicated.[51] Although an argument could be made that the SEC should conserve its resources for enforcing actions against deliberate wrongdoers involved in large-scale fraud, SEC officials have persuasively argued that pursuing relatively minor violations can have a powerful effect.[52]

47. *See* David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEX. L. REV. 1849, 1880-83 (2012) (noting SEC reluctance to pursue negligence actions); Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 675 (2007) (noting public favors adjudication). David M. Becker, a former senior policy advisor for the SEC, argues the SEC missed a valuable opportunity to rigorously define standards for determining negligent violations of securities laws. *See* Becker, *supra*, at 1849 n.a1, 1882 (arguing for enforcement of negligence standard). Another scholar suggested the deterrent effect of greater enforcement of the accounting provisions would benefit the public. Darin Bartholomew, *Is Silence Golden When It Comes to Auditing?*, 36 J. MARSHALL L. REV. 57, 62 (2002). *But see* Laby & Callcott, *supra* note 25, at 45-46 (questioning deterrent effect of enforcing against negligent violations).

48. *See* Johnson, *supra* note 47, at 675 (outlining benefits of adjudicating SEC actions). Johnson argues that a greater body of securities law would enable corporate actors to more accurately predict the outcome of future cases, and thus, adjust their conduct to conform to the law. *See id*. Furthermore, collateral estoppel will allow individual plaintiffs to benefit from the factual findings of SEC cases. *See id*. at 676.

49. *See* Speech, Paul Atkins, Comm'r, Sec. & Exch. Comm'n, Remarks Before the Federal Reserve Bank of Chicago Seventh Annual Private Equity Conference (August 2, 2007), *available at* https://www.sec.gov/news/speech/2007/spch080207psa.htm (remarking upon recently announced rule allowing SEC to pursue hedge fund advisors who defraud investors); *see also* Russell G. Ryan, *To Err is Human . . . and Punishable by the SEC,* CFO (Nov. 1, 2011), http://ww2.cfo.com/regulation/2011/11/to-err-is-human-and-punishable-by-the-sec (reporting shift in SEC's focus to include negligence cases). While the SEC has settled many negligence cases over the years, most of those cases arose out of genuine suspicion by SEC investigators of intentional or reckless misconduct. *See* Ryan, *supra.* "Now, however, the SEC appears willing to pursue cases even when the agency knows the defendant did not act with what the law calls *scienter*—that is, an intent to defraud, knowledge of wrongdoing, or at least reckless disregard of the law." *Id*. SEC Commissioner Atkins stated, "SEC enforcement resources are too scarce to expend on cases based on unintentional errors." *See* Atkins, *supra*.

50. *See* Johnson, *supra* note 47, at 647 (noting most actions settled); Laby & Callcott, *supra* note 25, at 38 (noting administrative actions settle upon instituting proceedings). "The SEC settles most enforcement actions by consent, pursuant to which the defendant(s) or respondent(s) neither admits nor denies the findings of fact and conclusions of law, but agrees to the entry of an injunction or order." Johnson, *supra* note 47, at 647.

51. *See supra* note 37 and accompanying text (analyzing reasoning in *Todd* ruling at district and appellate levels).

52. *See* Lisa Wood & Daniel Marx, *SEC Regulatory Changes and Enforcement Actions: Highlights from 2012*, THE INVESTMENT LAW., Jan. 2013, at 1, 16 (describing SEC focus on compliance requirements). Robert Khuzami, Director of the SEC Enforcement Division, compares the agency's focus on violations of technical

In *SEC v. Das*, the Eighth Circuit Court of Appeals deferred to the SEC's construction of section 13(b) of the Securities Exchange Act, which allows civil liability to arise under Rule 13b2-2 even in cases where a false statement is made to an accountant without the maker's knowledge. The history of the FCPA's enactment does not preclude the *Das* court's legal conclusion, nor is it likely that a knowledge requirement would serve the public interest. This ruling, and more like it in the future, will hopefully deter both intentional and unintentional falsity in corporate record keeping, and provide greater clarity for individuals and corporations as they strive to comply with these laws.

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rules to the "broken windows" approach to law enforcement espoused by New York Mayor Rudolph Guiliani in the 1990s. *See id*. Khuzami stated, "if you stop people when they commit small infractions, they are less likely to graduate to bigger ones." Speech, Robert Khuzami, Dir., Div. of Enforcement, Sec. & Exch. Comm'n, Remarks Before the Consumer Federation of America's Financial Services Conference (December 1, 2011), *available at* http://www.sec.gov/news/speech/2011/spch120111rk.htm; *see also supra* note 49 and accompanying text (noting shift from SEC reluctance to expend resources for negligence cases).