



## Reforming FIFA from the Inside Out

*Steven A. Bank\**

### ABSTRACT

*In response to an unprecedented crisis that has been called “the World Cup of Fraud,” the Fédération Internationale de Football Association, or FIFA, has undertaken a series of reform measures in the last several years. Most of these reforms have focused on attempting to break the cycle of corruption among football insiders by bringing in more outsiders, including independent chairs of both the Ethics Committee and Audit and Compliance Committee, as well as individuals to serve in executive positions who had not previously been involved in the sport at any level. Such an outsider-focused reform strategy takes a page from the US corporate governance playbook, which has increasingly come to rely upon independent directors as a way to keep the interests of management insiders aligned with the interests of shareholders.*

*This Article argues that, rather than focusing on bringing in more outsiders, FIFA should harness the power of insiders. The evidence is mixed as to whether independent directors are effective in public corporations, but it is even less clear in the case of nonprofit corporations where there are no stockholders to which the independent directors report. This model is particularly inappropriate in the case of FIFA, which does not even have the donors or government oversight that are present in US nonprofits. By contrast, FIFA insiders were instrumental in spurring the investigations that led to the US indictments in 2015*

---

\* Paul Hastings Professor of Business Law, UCLA School of Law. Thanks to Leonora Cohen and Jonathan Simmons for their research assistance.

against individuals for their participation in corruption and fraud. These so-called whistleblowers had better access to information and were more dedicated to FIFA's mission to foster the development and growth of the sport than any outsider would be, but they often came forward at great personal and professional sacrifice to themselves. Not only could a comprehensive program to incentivize insiders to come forward and protect them from retaliation begin to change the culture of corruption in FIFA, but it could also serve as a model for governance reform in international nonprofit organizations more generally.

### TABLE OF CONTENTS

I.	INTRODUCTION .....	266
II.	FIFA AND ITS CORRUPTION .....	278
III.	FIFA REFORM .....	285
	A. 2011–2013 .....	285
	B. 2015–2016 .....	288
III.	THE SEARCH FOR ACCOUNTABILITY .....	292
	A. <i>Independent Directors in the United States</i> .....	292
	B. <i>Obstacles to FIFA's Reliance upon the Independent Director Model</i> .....	296
IV.	HARNESSING THE POWER OF INSIDERS .....	298
	A. <i>Whistleblowers</i> .....	299
	B. <i>Disincentives to Whistleblowing</i> .....	302
	C. <i>Whistleblower Reforms</i> .....	305
	1. <i>Anti-retaliation Protection</i> .....	305
	2. <i>Facilitating and Encouraging Whistleblowing</i> .....	306
	D. <i>Utilizing Whistleblowers in FIFA</i> .....	310
	1. <i>The Power of Whistleblowing in Football</i> ...	310
	2. <i>Resistance and Retaliation in FIFA</i> .....	311
	E. <i>The Potential for Whistleblower Reform in FIFA</i> ..	317
V.	CONCLUSION .....	320

### I. INTRODUCTION

Although the World Cup in Russia dominated the headlines in the summer of 2018, a black cloud remained over the *Fédération Internationale de Football Association* (FIFA),<sup>1</sup> the tournament's

---

1. In this Article, the terms "football" and "soccer" will be used interchangeably (except where it is part of an organization's title), reflecting the fact that the sport is called football in most countries abroad, but is called soccer in the United States. Notwithstanding the cries of some fans that "soccer" is an inappropriately Americanized

organizer and soccer's global governing authority.<sup>2</sup> In 2015, in what has been called “the World Cup of Fraud,”<sup>3</sup> more than forty individuals associated with FIFA were indicted in the United States for fraud, bribery, and money laundering involving hundreds of millions of dollars.<sup>4</sup> An internal investigation by American law firm Quinn Emanuel Urquhart & Sullivan, LLP reportedly uncovered evidence of corruption that went far beyond the original indictments.<sup>5</sup> Former FIFA president Joseph “Sepp” Blatter and former Union of European Football Associations (UEFA) President Michel Platini, neither of whom were named in the US indictments, were both suspended from FIFA for ethics violations.<sup>6</sup> Moreover, in both of the regional

name for a sport that is properly called football, it actually originated in England almost 150 years ago when a rules dispute led two groups in the Football Association to split into different sports: Rugby and Association Football, the latter of which was later shortened to “soccer” by an English captain. Uri Friedman, *Why Americans Call Soccer ‘Soccer’*, THE ATLANTIC (June 13, 2014), <http://www.theatlantic.com/international/archive/2014/06/why-we-call-soccer-soccer/372771/> [https://perma.cc/ZXP4-R4L3] (archived Jan. 8, 2019).

2. Sean Ingle, *World Cup action must not divert from focus on further Fifa corruption*, THE GUARDIAN (June 10, 2018), <https://www.theguardian.com/football/2018/jun/10/world-cup-2018-fifa-corruption-new-book-red-card> [https://perma.cc/7FCZ-9B8N] (archived Jan. 8, 2019). As if to remind soccer fans of the FIFA corruption scandal, the release of several books was timed to occur right around the start of the World Cup. See generally KEN BENSINGER, RED CARD: HOW THE U.S. BLEW THE WHISTLE ON THE WORLD'S BIGGEST SPORTS SCANDAL (2018); BONITA MERSEDES, WHATEVER IT TAKES: THE INSIDE STORY OF THE FIFA WAY (2018).

3. Elliott C. McLaughlin & Greg Botelho, *FIFA corruption probe targets ‘World Cup of fraud,’ IRS chief says*, CNN (May 28, 2015), <http://edition.cnn.com/2015/05/27/football/fifa-corruption-charges-justice-department/> [https://perma.cc/EXV2-D7HD] (archived Jan. 8, 2019) (quoting Richard Weber, chief of the IRS Criminal Investigation Division).

4. See generally Indictment, United States v. Webb, No. 1:15-CR-00252 (E.D.N.Y. May 20, 2015); Superseding Indictment (S-1), United States v. Webb, No. 1:15-CR-00252 (E.D.N.Y. Nov. 25, 2015); Superseding Indictment (S-2), United States v. Webb, No. 1:15-CR-00252 (E.D.N.Y. June 14, 2017).

5. *A Hemisphere of Soccer Corruption*, N.Y. TIMES (updated Dec. 18, 2015), [http://www.nytimes.com/interactive/2015/05/27/sports/soccer/fifa-indictments.html?\\_r=0](http://www.nytimes.com/interactive/2015/05/27/sports/soccer/fifa-indictments.html?_r=0) [https://perma.cc/WT4V-KZ3L]; Graham Dunbar et al., *U.S. indicts 16 more in probe of world soccer corruption*, SAN DIEGO UNION-TRIBUNE (Dec. 2, 2015), <http://www.sandiegouniontribune.com/news/2015/dec/02/report-fifa-officials-again-subject-of-pre-dawn/> [https://perma.cc/BWT8-Y7GM] (archived Jan. 8, 2019); Tariq Panja, *FIFA’s Internal Investigation Said to Uncover More Crimes*, BLOOMBERG (Feb. 7, 2017), <https://www.bloomberg.com/news/articles/2017-02-07/fifa-s-internal-investigation-said-to-uncover-more-crimes> [https://perma.cc/5DVU-UCXJ] (archived Jan. 8, 2019); Rebecca Ruiz et al., *FIFA Corruption: Top Officials Arrested in Pre-Dawn Raid at Zurich Hotel*, N.Y. TIMES (Dec. 3, 2015), <http://www.nytimes.com/2015/12/03/sports/fifa-scandal-arrests-in-switzerland.html> [https://perma.cc/CB33-5V3N] (archived Jan. 8, 2019).

6. Owen Gibson, *Sepp Blatter and Michel Platini banned from football for eight years by Fifa*, THE GUARDIAN (Dec. 21, 2015), <https://www.theguardian.com/football/2015/dec/21/sepp-blatter-michel-platini-banned-from-football-fifa> [https://perma.cc/FUY7-KSZ9] (archived Jan. 8, 2019); Panja, *supra* note 5. They were also subject to criminal investigation in both the U.S. and Switzerland. Sam Borden, *Sepp Blatter, FIFA President, Faces Criminal Investigation in Switzerland*, N.Y. TIMES (Sept. 25, 2015), <https://www.nytimes.com/2015/09/26/sports/soccer/sepp->

confederations governing soccer in the western hemisphere—the Confederation of North, Central American, and Caribbean Association Football (CONCACAF) and the South American Football Confederation (CONMEBOL)—three presidents in a row were indicted and/or suspended for ethics violations.<sup>7</sup> In an attempt to stem the bleeding, FIFA quickly adopted a package of reform measures.<sup>8</sup> These followed closely on the heels of a previous reform effort that FIFA had undertaken after allegations of corruption and bribery surrounding Mohammed bin Hammam’s failed campaign for FIFA president in 2011.<sup>9</sup>

What is FIFA’s problem? The conventional wisdom has been that it is too insular. As a result, reformers have pushed FIFA to bring in more outsiders.<sup>10</sup> As one observer noted,

[f]or decades its leadership has been drawn almost exclusively from the ranks of the rich and powerful men who serve without term limits or transparency. If FIFA is to have any chance at persuading the world that it’s serious about reform and rehabilitating its brand, the organization needs to embrace new leadership and consider recruiting outside the football fraternity.<sup>11</sup>

---

blatter-fifa-switzerland-criminal-proceedings.html [https://perma.cc/8488-VT4E] (archived Jan. 8, 2019). Platini claims he was cleared of criminal wrongdoing recently by Switzerland. Bate Felix, *Platini says cleared by Swiss authorities, plans return*, REUTERS (May 26, 2018), <https://www.reuters.com/article/uk-soccer-fifa-platini/platini-says-cleared-by-swiss-authorities-plans-return-idUKKCN1IR08R> [https://perma.cc/R5QS-YM2M] (archived Jan. 8, 2019). Swiss authorities, however, claim that Platini has drawn a “false interpretation” of the status of his investigation and reports that the investigation of Blatter “is not definitively finished.” *Platini says Swiss have cleared him of criminal wrongdoing*, SWISSINFO (May 26, 2018), [https://www.swissinfo.ch/eng/society/corruption-probe\\_platini-says-swiss-have-cleared-him-of-criminal-wrongdoing/44146908](https://www.swissinfo.ch/eng/society/corruption-probe_platini-says-swiss-have-cleared-him-of-criminal-wrongdoing/44146908) [https://perma.cc/X9GA-AZHV] (archived Jan. 8, 2019).

7. Dunbar et al., *supra* note 5.

8. *FIFA congress votes in favour of reform package*, SKY SPORTS (Feb. 26, 2016), <http://www.skysports.com/football/news/11095/10181905/fifa-congress-votes-in-favour-of-reform-package> [https://perma.cc/4GLL-GDCX] (archived Jan. 9, 2019). CONCACAF and CONMEBOL adopted similar reform packages of their own. *See Member Association Pass Statutes Reforms*, CONCACAF (Feb. 26, 2016), <https://www.concacaf.com/en/article/member-associations-pass-statutes-reforms> [https://perma.cc/R88W-WZM8] (archived Jan. 19, 2019); *see also CONMEBOL to reform after graft scandals*, YAHOO! SPORTS (Sept. 13, 2016), <http://sports.yahoo.com/news/conmebol-reform-graft-scandals-165852277--sow.html> [https://perma.cc/NL2W-AMJ3] (archived Jan. 9, 2019).

9. Roger Pielke, Jr., *An Evaluation of the FIFA Governance Reform Process of 2011–2013*, in *MANAGING THE FOOTBALL WORLD CUP 197* (Stephen Frawley & Daryl Adair eds., 2014) [hereinafter Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*].

10. *See* Stefan Fatsis, *Blatter’s Resignation is Only the First Step*, SLATE (June 3, 2015), [http://www.slate.com/articles/sports/sports\\_nut/2015/06/sepp\\_blatter\\_resigns\\_fifa\\_must\\_clean\\_house\\_to\\_end\\_corruption.html](http://www.slate.com/articles/sports/sports_nut/2015/06/sepp_blatter_resigns_fifa_must_clean_house_to_end_corruption.html) [https://perma.cc/W7K2-64E2] (archived Jan. 9, 2019).

11. MARY PAPANFUSS & TERI THOMPSON, *AMERICAN HUCKSTER: HOW CHUCK BLAZER GOT RICH FROM—AND SOLD OUT—THE MOST POWERFUL CABAL IN WORLD SPORTS 212* (2016) (quoting Donna de Varona, a US gold medalist in swimming and former president of the Women’s Sports Federation).

The theory is that an outsider should march into FIFA offices, “presumably with rubber gloves and bleach,” and “clean the place out, with fresh elections, new executives, and new rules.”<sup>12</sup>

Given these views, it should not be surprising that one of the central features of FIFA’s reform plans has been to increase the number of outsiders in key positions.<sup>13</sup> FIFA created an Ethics Committee and an Audit and Compliance Committee, each headed by an independent chair and staffed with members unaffiliated with any other FIFA body.<sup>14</sup> It also mandated that at least half of the members of a number of committees, including the Governance, Review, Finance, and Development Committees, and the Compensation Subcommittee of Audit and Compliance, be comprised of members deemed to be independent under FIFA rules.<sup>15</sup> This is in addition to the requirement that FIFA itself be subject to audits by external auditors who are considered independent under Swiss law.<sup>16</sup> Consistent with the outsider focus of these reforms, Gianni Infantino, FIFA’s president, appointed Fatma Samoura, someone with no ties to the sport at all, to the position of secretary-general of FIFA.<sup>17</sup> In announcing her appointment, Infantino praised the fact that Samoura “will bring a fresh wind to FIFA—somebody from outside not somebody from inside, not somebody from the past. Somebody new, somebody who can help us do the right thing in the future.”<sup>18</sup>

This push for more independent oversight is straight out of the pages of the US corporate governance reform playbook. For years, increasing the number of outside directors has been a go-to reform in the context of publicly held corporations.<sup>19</sup> Some studies have shown

12. John Leicester, *In FIFA crisis, politicians must turn up the heat for change*, SAN DIEGO TRIBUNE (Oct. 2, 2015) <https://www.sandiegouniontribune.com/sdut-in-fifa-crisis-politicians-must-turn-up-the-heat-2015oct02-story.html> [<https://perma.cc/4PPD-PMNA>] (archived Jan. 19, 2019).

13. See Steven A. Bank, *Reforming FIFA From The Inside Out*, OXFORD BUS. LAW BLOG (July 11, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/07/reforming-fifa-inside-out> [<https://perma.cc/6QQK-QDY2>] (archived Jan. 19, 2019) (“Most of these [recent reform measures] have focused on attempting to break the cycle of corruption among football insiders by bringing in more outsiders.”).

14. FIFA, FIFA CODE OF ETHICS: 2012 EDITION § 34 (2012), [http://www.fifa.com/mm/document/affederation/administration/50/02/82/codeofethics\\_v211015\\_e\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/administration/50/02/82/codeofethics_v211015_e_neutral.pdf) [<https://perma.cc/PXR4-MM2Y>] (archived Jan. 27, 2019); FIFA, FIFA GOVERNANCE REGULATIONS § 37 (2016), [http://resources.fifa.com/mm/document/affederation/bodies/02/76/71/35/20160226\\_governanceregulations\\_en\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/bodies/02/76/71/35/20160226_governanceregulations_en_neutral.pdf) [<https://perma.cc/ZVK9-EZ5S>] (archived Jan. 27, 2019) [hereinafter FIFA Governance Regulations].

15. FIFA Governance Regulations, *supra* note 14, §§ 26–28, 37(11).

16. *Id.* § 39.

17. *FIFA appoint Fatma Samoura as first female secretary general*, ESPN (May 13, 2016), <http://www.espnfc.us/blog/fifa/243/post/2872047/fifa-appoint-fatma-samoura-as-first-female-secretary-general> [<https://perma.cc/UK9A-9JTL>] (archived Jan. 9, 2019).

18. *Id.*

19. See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 217–30 (2002) [hereinafter BAINBRIDGE CORPORATION] (describing the history of reform efforts aimed at requiring independent directors); Harald Baum, *The Rise of the Independent Director: A Historical and Comparative Perspective 2* (Max Planck Institute for

that they help guard against the kind of managerial expropriation that can occur when shareholders are too numerous and dispersed to monitor the managers themselves,<sup>20</sup> although others point out that they also face some unique disincentives to investigate.<sup>21</sup>

Even if outside directors may be beneficial in public corporations, they have not had much of an effect as of yet in FIFA. While problems relating to the old regime continue to surface, such as excessive compensation arrangements for former executives,<sup>22</sup> disclosures from the Panama Papers that officials may have used transactions to funnel ill-gotten funds through offshore accounts,<sup>23</sup> and fresh revelations of corruption among old-guard football officials,<sup>24</sup> new problems have emerged.

In 2016, Infantino was subject to investigation for ethics violations of his own after reports surfaced that he had ordered the destruction of tapes of a FIFA Council meeting, made lavish expenditures without

Comparative and International Private Law Research Paper Series No. 16/20, 2016) (“Over the last decades, the primary legislative and judicial response to almost every major corporate scandal in the U.S. has been to increase reliance on independent directors.”).

20. Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468 (2007) [hereinafter *Gordon Rise*]; see also Eric Helland & Michael Sykuta, *Who’s Monitoring the Monitor? Do Outside Directors Protect Shareholders’ Interests?*, 40 FIN. REV. 155, 171 (2005); Mark S. Beasley, *An Empirical Analysis of the Relation Between the Board of Director Composition and Financial Statement Fraud*, 71 ACCT. REV. 443, 445 (1996); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 2 J.L. & ECON. 301, 315 (1983).

21. Quinn D. Curtis & Justin J. Hopkins, *Do Career Concerns Create Incentives for Independent Directors to Monitor Executives?* 19 (June 25, 2017) (unpublished paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2800008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800008) [https://perma.cc/T3TC-VERW] (archived Jan. 27, 2019); see also STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 192–93 (2008) [hereinafter *BAINBRIDGE NEW CORPORATE*] (describing some of the factors impeding independent directors).

22. *See Former FIFA chiefs embroiled in £55m compensation scandal*, EXPRESS (June 4, 2016), <http://www.express.co.uk/sport/football/676721/Former-FIFA-Chiefs-Embroiled-55m-Compensation-Scandal-Sepp-Blatter-News> [https://perma.cc/E763-V2K4] (archived Jan. 9, 2019).

23. Rebecca Ruiz, *After Panama Papers, A Raid at UEFA and New Questions for FIFA*, N.Y. TIMES (April 6, 2016), <https://www.nytimes.com/2016/04/07/sports/soccer/panama-papers-raise-new-questions-for-fifa.html> [https://perma.cc/EXS8-KBXS] (archived Jan. 9, 2019).

24. *See FIFA bans Ghana football head Kwesi Nyantakyi over ‘cash gift’*, BBC (June 8, 2018), <https://www.bbc.com/news/world-africa-44414780> [https://perma.cc/P3AP-U22Q] (archived Jan. 9, 2019) (saying FIFA Council member and Ghana Football Association president Kwesi Nyantakyi suspended for taking \$65,000 from an undercover reporter posing as a businessman); Graham Dunbar, *FIFA audit official admits bribery in US federal probe*, AP NEWS (Apr. 28, 2017), <https://apnews.com/fb9300df08f84aea7ea0156a2f46fad> [https://perma.cc/H9BC-LWU4] (archived Jan. 9, 2019) (saying Richard Lai of Guam, a member of the Audit and Compliance Committee, admitted to taking more than \$1 million in bribes); Raphael Minder, *Top Spanish Soccer Official Arrested*, N.Y. TIMES, July 19, 2017, at B11 (Angel Maria Villar, Spanish FA President and a Vice President at FIFA, was arrested for fraud involving the Spanish national team).

authorization, and improperly attempted to influence the election of the next UEFA president.<sup>25</sup> Although ultimately cleared of some of those accusations,<sup>26</sup> perhaps the more serious concern is that Infantino pushed through a resolution that would enable the council to remove members of FIFA's supposedly independent committees.<sup>27</sup> This led Dominic Scala, the chairman of the Audit and Compliance Committee, to resign, and has called into question the independence of these committees.<sup>28</sup> Indeed, some have suggested that Infantino was cleared because Ethics Committee members were worried that they would be replaced on the committee if they voted otherwise,<sup>29</sup> an event that came to pass anyway when FIFA subsequently ousted the chairs of the investigatory and adjudicatory branches of the Ethics Committee and the chair of the Governance Committee,<sup>30</sup> prompting several remaining members of these committees to resign in protest.<sup>31</sup> FIFA's

---

25. Paul Nicholson, *Infantino expense details unveil a new culture of spending at FIFA*, INSIDE WORLD FOOTBALL (June 9, 2016), <http://www.insideworldfootball.com/2016/06/09/infantino-expense-details-unveils-new-culture-spending-fifa/> [https://perma.cc/R26W-SJ4L] (archived Jan. 9, 2019); Jaime Rainbow, *Report claims Infantino violated Fifa ethics code*, WORLD SOCCER (July 20, 2016), <http://www.worldsoccer.com/news/report-claims-infantino-violated-fifa-ethics-code-383852> [https://perma.cc/R26W-SJ4L] (archived Jan. 9, 2019).

26. The Investigatory Chamber reviewed certain flights Infantino took on a private jet to determine if there was a conflict of interest and found none. *FIFA President Gianni Infantino cleared after ethics committee investigation*, DAILY MAIL (Aug. 5, 2016), <http://www.dailymail.co.uk/wires/pa/article-3725313/FIFA-president-Gianni-Infantino-cleared-ethics-committee-investigation.html> [https://perma.cc/D5DS-KFUJ] (archived Jan. 9, 2019).

27. See Owen Gibson, *Fifa's independent audit committee chairman resigns in protest at reforms*, THE GUARDIAN (May 14, 2016), <https://www.theguardian.com/football/2016/may/14/domenico-scala-fifa-auditor-resigns-protest> [https://perma.cc/MN44-HDEV] (archived Jan. 9, 2019).

28. Andrew Warshaw, *Scala quits FIFA as Infantino hammers through an end to 'independent' ethics*, INSIDE WORLD FOOTBALL (June 9, 2016), <http://www.insideworldfootball.com/2016/05/14/scala-quits-fifa-infantino-hammers-end-independent-ethics/> [https://perma.cc/ECY8-XQHJ] (archived Jan. 9, 2019).

29. Andrew Warshaw, *FIFA's double standards. It's what we call reform*, INSIDE WORLD FOOTBALL (Aug. 9, 2016), <http://www.insideworldfootball.com/2016/08/09/andrew-warshaw-fifas-double-standards-call-reform/> [https://perma.cc/YF7P-DNUV] (archived Jan. 9, 2019).

30. Murad Ahmed, *FIFA Ousts Governance Chief in "Night of Long Knives"*, FIN. TIMES (May 9, 2017), <https://www.ft.com/content/79ed66e2-3504-11e7-bce4-9023f8c0fd2e> (subscription required) [https://perma.cc/D4FA-96L2] (archived Jan. 9, 2019). Reportedly, at the time the committee chairs were ousted, the Ethics Committee was actually investigating Infantino regarding fresh allegations of under-declaring the amount of money he spent on his election campaign and trying to influence the election of the new Confederation of African Football president. David Conn, *Fifa ethics committee was investigating Gianni Infantino over election expenses*, THE GUARDIAN (July 21, 2017), <https://www.theguardian.com/football/2017/jul/21/fifa-investigating-gianni-infantino-election-expenses> [https://perma.cc/G5Y7-VYST] (archived Jan. 9, 2019).

31. Tariq Panja, *FIFA Watchdogs Quit in Protest, Sparking New Soccer Crisis*, BLOOMBERG (May 17, 2017), <https://www.bloomberg.com/news/articles/2017-05-17/more-fifa-watchdogs-quit-in-protest-sparking-new-soccer-crisis> [https://perma.cc/4RJE-N6S9] (archived Jan. 9, 2019).

long-standing auditor, KPMG, also resigned with immediate effect,<sup>32</sup> citing a lack of “trust that the new management would do what they said they were going to do to improve governance.”<sup>33</sup>

In 2017, the Council of Europe launched an investigation of FIFA on the grounds that “new FIFA management under Gianni Infantino has made little effort to overhaul the scandal-ridden football body.”<sup>34</sup> In its report, it concluded that FIFA’s reform efforts might have made sense on paper, but failed in their implementation.<sup>35</sup> Indeed, according to the Council of Europe’s chief investigator, the new chair of FIFA’s Ethics Committee may have failed to disclose her ties to one of the former FIFA officials who had pled guilty to corruption charges.<sup>36</sup> Infantino’s apparent response was to propose changes that would gut the reforms even further, creating a Bureau of the FIFA Council that would replicate the old Executive Committee and removing the one fully independent member of the Compensation Subcommittee.<sup>37</sup> As one reporter observed, even after all the upheaval of the last few years, “FIFA remains more or less unchanged.”<sup>38</sup>

This Article argues that the fundamental problem with FIFA is not so much its insularity as its lack of accountability. FIFA, along with the International Olympic Committee and sixty or more other sports organizations, is headquartered in Switzerland and organized as a

32. Harriet Agnew & Mura Ahmed, *KPMG Switzerland Resigns as FIFA Auditor*, FIN. TIMES (June 13, 2016), <http://www.ft.com/cms/s/0/a872af30-316e-11e6-bda0-04585c31b153.html#axzz4BTfm41Qg> (subscription required) [<https://perma.cc/BYQ6-79BN>] (archived Jan. 9, 2019).

33. Murad Ahmed et al., *KPMG Quits FIFA Over Reform Programme Doubts*, FIN. TIMES (June 20, 2016), [https://next.ft.com/content/0de97f98-360f-11e6-9a05-82a9b15a8ee7?ftcamp=published\\_links/rss/companies/feed//product](https://next.ft.com/content/0de97f98-360f-11e6-9a05-82a9b15a8ee7?ftcamp=published_links/rss/companies/feed//product) (subscription required) [<https://perma.cc/L98A-9M5X>] (archived Jan. 19, 2019); John Letzing & Joshua Robinson, *Auditor Raised Issues With FIFA Before Resigning*, WALL ST. J. (June 19, 2016), <http://www.wsj.com/articles/auditor-raised-issues-with-fifa-before-resigning-1466380050> [<https://perma.cc/C8CC-L9AY>] (archived Jan. 10, 2019).

34. *FIFA under Scrutiny from anti-corruption body*, SWISSINFO (Feb. 15, 2017), [http://www.swissinfo.ch/eng/society/good-governance\\_fifa-under-scrutiny-from-anti-corruption-body/42962306#.WKSnf13lzyQ.twitter](http://www.swissinfo.ch/eng/society/good-governance_fifa-under-scrutiny-from-anti-corruption-body/42962306#.WKSnf13lzyQ.twitter) [<https://perma.cc/GD9L-CU7V>] (archived Jan. 10, 2019).

35. Tariq Panja, *Report into FIFA Raises Questions about Ethics Investigator*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/sports/soccer/fifa-ethics.html> [<https://perma.cc/G84M-B7DL>] (archived Jan. 10, 2019).

36. *Id.*

37. Keir Radnidge, *Infantino planning power grab at FIFA congress*, WORLD SOCCER (May 3, 2017), <http://www.worldsoccer.com/news/397418-397418> [<https://perma.cc/6792-G93E>] (archived Jan. 10, 2019).

38. Leander Schaerlaeckens, *Has FIFA really changed that much under Gianni Infantino?*, YAHOO! SPORTS (June 14, 2017), [https://sports.yahoo.com/following-fifas-crisis-reboot-anything-really-changed-gianni-infantino-181430451.html?soc\\_src=social-sh&soc\\_trk=tw](https://sports.yahoo.com/following-fifas-crisis-reboot-anything-really-changed-gianni-infantino-181430451.html?soc_src=social-sh&soc_trk=tw) [<https://perma.cc/LY5V-6UFB>] (archived Jan. 10, 2019). *See also* MERSIADES, *supra* note 2, at 341 (“While FIFA has improved its public image at one level, and introduced some bureaucratic discipline and process to some of its systems, many observers – both inside and outside FIFA – believe the current president, Gianni Infantino, is no different from his predecessors.”).



nonprofit Swiss association.<sup>39</sup> A nonprofit can still earn profits in the sense of earning revenues in excess of expenses, but it has no stockholders. Even though outsiders can theoretically watch insiders to guard against abuse,<sup>40</sup> no one watches the outsiders in a nonprofit except perhaps donors in organizations that, unlike FIFA, rely upon them. The United States has attempted to address this conundrum for nonprofits through external regulation by state attorneys general and federal tax authorities.<sup>41</sup> The oversight of FIFA, however, by Swiss authorities is still relatively lax and ineffective,<sup>42</sup> notwithstanding recent legislation to address that.<sup>43</sup> Sponsors sometimes do provide a measure of oversight, but they are often not committed to it and, even if they are, others are more than happy to take their place.<sup>44</sup> The closest analogues to stockholders are member nations that comprise the congress that theoretically oversees the FIFA Council. Member nations, however, are ill-equipped to serve in a monitoring role against corruption. Many are themselves corrupt or woefully disorganized.<sup>45</sup> For those that are not, FIFA's ability to favor or punish one individual member nation or region over others with respect to hosting rights or

39. DAVID CONN, *THE FALL OF THE HOUSE OF FIFA: THE MULTIMILLION-DOLLAR CORRUPTION AT THE HEART OF GLOBAL SOCCER* 29 (2017); Rebecca R. Ruiz, *Swiss City Is the Silicon Valley of Sports*, N.Y. TIMES, April 23, 2016, at D1.

40. *But see* Kathleen M. Boozang, *Does an Independent Board Improve Nonprofit Corporate Governance?*, 75 TENN. L. REV. 83, 86 (2007) (suggesting that while outsiders may provide internal accountability in a nonprofit organization, it is not clear that this is very effective or efficient).

41. For a general discussion of federal and state regulation of nonprofits in the U.S., see John A. Edie, *Good and Not So Good Governance of Nonprofit Organizations: Factual Observations from the USA*, in *COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS* 20–38 (Klaus J. Hopt & Thomas von Hippel eds., 2010); MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION* (2008).

42. *See, e.g., Swiss decline to tighten corruption laws excessively*, SWISSINFO (June 3, 2015), <http://www.swissinfo.ch/eng/-lex-fifa-swiss-decline-to-tighten-corruption-laws-excessively/41468372> [<https://perma.cc/79LZ-SGT8>] (archived Jan. 10, 2019) (“Critics say the cabinet’s original proposal, nicknamed ‘Lex Fifa,’ has been watered down.”).

43. Katharina Bart, *Swiss to increase oversight of FIFA, other sports bodies*, REUTERS (Dec. 5, 2014), <http://uk.reuters.com/article/uk-soccer-fifa-switzerland-idUKKCN0JJ11Q20141205> [<https://perma.cc/ULH8-SJW4>] (archived Jan. 10, 2019); Simon Bradley, *Swiss move to show corruption a red card*, SWISSINFO (Dec. 5, 2012), [http://www.swissinfo.ch/eng/house-in-order\\_swiss-move-to-show-corruption-a-red-card/34066532](http://www.swissinfo.ch/eng/house-in-order_swiss-move-to-show-corruption-a-red-card/34066532) [<https://perma.cc/FXJ9-K8LR>] (archived Jan. 10, 2019).

44. ALAN TOMLINSON, *FIFA (FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATIONS): THE MEN, THE MYTHS, AND THE MONEY* 152–54 (2014).

45. *Football Associations: One More Reason FIFA Needs Independent Reform*, TRANSPARENCY INTERNATIONAL (Nov. 19, 2015), [https://www.transparency.org/news/feature/football\\_associations\\_one\\_more\\_reason\\_fifa\\_needs\\_independent\\_reform](https://www.transparency.org/news/feature/football_associations_one_more_reason_fifa_needs_independent_reform) [<https://perma.cc/5SWC-PZ94>] (archived Jan. 19, 2019); *Football Associations Publish Little or No Information on Millions of Dollars Received from FIFA*, TRANSPARENCY INTERNATIONAL (Nov. 19, 2015), [https://www.transparency.org/news/pressrelease/football\\_associations\\_publish\\_little\\_or\\_no\\_information\\_on\\_millions\\_of\\_dolla](https://www.transparency.org/news/pressrelease/football_associations_publish_little_or_no_information_on_millions_of_dolla) [<https://perma.cc/PD9U-MX4J>] (archived Jan. 19, 2019).

development grants inhibits them from speaking out.<sup>46</sup> The independent members of FIFA committees are therefore selected by insiders and largely remain beholden to them.

Given FIFA's fundamental lack of accountability, it is not surprising that the reforms enacted to date appear to have been relatively ineffective. They are an attempt to apply public company governance regulations to a nonprofit organizational structure. In the public company environment, outside directors are traditionally considered to be a check against managers.<sup>47</sup> Outsiders are potentially useful in this case because they are "disinterested," in the sense that unlike managers they do not work for the company and therefore are able to approach potential conflict situations, such as awards of executive compensation and decisions whether to pursue change-in-control transactions, with a neutral perspective. Perhaps most importantly, outsiders are approved by and accountable to stockholders. Of course, they can be co-opted by insiders,<sup>48</sup> but there is at least some hope they will guard against abuse because they can be removed by stockholders if they fail in this task.

One of the conceptual problems with relying on outsiders to reform FIFA is that it assumes the problem with the organization is limited to a "few bad apples."<sup>49</sup> Replace the bad apples and solve the problem. If the problem is more pervasive, though, then the outsiders will have difficulty making much of a difference. Indeed, in an environment where bribery and corruption are the norm, a person's status as an outsider in the sense of not being a long-time member of FIFA does not mean much. A disinterested party can quickly become interested without a change in their formal status if they are enticed to participate in the corruption. The above-the-table payments to committee members, which include exorbitant salaries, lavish *per diems*, and stays at luxury hotels, might alone be enough to sap the most ardent outside reformer of his or her will to resist.<sup>50</sup>

---

46. Christopher Boudreaux et al., *Bend it Like FIFA: Corruption On and Off the Pitch*, 42 MANAGERIAL FIN. 866, 871 (2016); George Quraishi, *Who Owns Soccer?*, N.Y. TIMES (June 17, 2015), [http://www.nytimes.com/2015/06/17/magazine/who-owns-soccer.html?\\_r=0](http://www.nytimes.com/2015/06/17/magazine/who-owns-soccer.html?_r=0) [https://perma.cc/PQH4-8VX2] (archived Jan. 10, 2019); Stefan Szymanski, *FIFA's Long Game*, N.Y. TIMES (May 28, 2015), <http://www.nytimes.com/2015/05/29/opinion/the-long-game-of-soccers-world-body-fifa.html> [https://perma.cc/3FJL-5L4B] (archived Jan. 10, 2019).

47. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1011 (1997).

48. BAINBRIDGE NEW CORPORATE, *supra* note 21, at 193.

49. See Martin Painter, *Can FIFA Reform Itself?*, ASIA & THE PAC. POLICY SOC'Y APPS POLICY FORUM (Nov. 2, 2015), <http://www.policyforum.net/can-fifa-reform-itself/> [https://perma.cc/53K6-FKCC] (archived Jan. 10, 2019) ("For many years, Blatter's strategy to ward off calls for anti-corruption reform was to blame the 'few bad apples'; to claim 'bias' in the western media; and above all to reinforce his own position with the organization with more deals and hand-outs.")

50. Tariq Panja, et al., *A League of His Own: How Sepp Blatter Controls Soccer*, BLOOMBERG (April 30, 2015), <http://www.bloomberg.com/graphics/2015-sepp-blatter-fifa/> [https://perma.cc/2BE3-UV6B] (archived Jan. 10, 2019) [hereinafter Panja, *A League*

Even if an independent member of a FIFA committee remains free of inappropriate influences, FIFA's long-standing aversion to outsiders hampers their influence. Throughout its history, FIFA has acted like an autonomous nation, imposing its own rules rather than bowing to the rules of others.<sup>51</sup> For example, as a condition of naming it host of the 2014 World Cup, FIFA forced Brazil to adopt a "World Cup Beer Law" during the tournament, which relaxed its normal prohibition on alcohol sales during games.<sup>52</sup> More generally, FIFA operates under a policy that prohibits "governmental interference" and it often suspends or threatens to suspend football associations from international play when their national governments attempt to regulate those associations in a way that displeases FIFA.<sup>53</sup> When bad things happen, FIFA executives tend to blame outsiders like the media,<sup>54</sup> much like former members of the Confederacy blamed unrest during Reconstruction on Northern "carpetbaggers."<sup>55</sup> And even when it does act, FIFA prefers to do so itself. After one crisis in 2011, Blatter responded to calls for reform by insisting "these difficulties will be

*of His Own*] (describing how FIFA Executive Committee members receive \$300,000 in compensation, \$500 per diems, first class flights and five star hotels and even relatively minor committee members get \$350 per diems and business class flights and all expenses, which could be considered luxurious for members from poorer countries).

51. See Simon Bradley, *FIFA reforms face resistance—and huge support*, SWISSINFO (Dec. 5, 2012), [https://www.swissinfo.ch/eng/football-scandals\\_fifa-reforms-face-resistance---and-huge-support/34067104](https://www.swissinfo.ch/eng/football-scandals_fifa-reforms-face-resistance---and-huge-support/34067104) [<https://perma.cc/2CCD-ACLL>] (archived Jan. 10, 2019) ("They see themselves more as a government than as a multinational corporation."); cf. Matt Scott, *Infantino has blown it, says Pieth, calling for state control of FIFA*, INSIDE WORLD FOOTBALL (June 19, 2016), <http://www.insideworldfootball.com/2016/06/18/infantino-blown-says-pieth-calling-state-control-fifa/> [<https://perma.cc/PX6K-MDWY>] (archived Jan. 10, 2019) ("They don't want to be regulated anymore.").

52. *Brazil World Cup beer law signed by President Rousseff*, BBC (June 6, 2012), <http://www.bbc.com/news/world-latin-america-18348012> [<https://perma.cc/EE25-DYAL>] (archived Jan. 10, 2019).

53. Steven A. Bank, *Should NASL v. USSF be in Arbitration Rather than Federal Court?* 2, (UCLA School of Law, Public Law Research Paper No. 17-38, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050144](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050144) [<https://perma.cc/9TLP-KAFT>] (archived Jan. 27, 2019); Roger Pielke Jr., *How Can FIFA Be Held Accountable?*, 16 SPORT MGMT. REV. 255, 260 (2013) [hereinafter Pielke Jr., *Accountable*] (citing the suspension of Belize); see, e.g., Gerald Imray, *Sudan banned by FIFA, CAF throws 3 clubs out of competitions*, AP NEWS (July 7, 2017), [https://apnews.com/ffd35d19537a4d569747b8314e4ab8e4/Sudan-banned-by-FIFA,-CAF-throws-3-clubs-out-of-competitions?utm\\_campaign=SocialFlow&utm\\_source=Twitter&utm\\_medium=AP\\_Sports](https://apnews.com/ffd35d19537a4d569747b8314e4ab8e4/Sudan-banned-by-FIFA,-CAF-throws-3-clubs-out-of-competitions?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP_Sports) [<https://perma.cc/6868-T453>] (archived Jan. 10, 2019) (saying Sudan was suspended because the Ministry of Justice removed the SFA president and the rest of the football association's board of directors).

54. See, e.g., Nick Martin, *Sepp Blatter blames media, U.S. for FIFA suspension*, WASH. POST (Feb. 19, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/02/19/sepp-blatter-blames-media-u-s-for-fifa-suspension/> [<https://perma.cc/7WH7-6XCX>] (archived Jan. 10, 2019); Keir Radnedge, *Infantino blames media for 'Panama Papers' smoking gun*, WORLD SOCCER (Apr. 11, 2016), <http://www.worldsoccer.com/news/infantino-blames-media-for-panama-papers-smoking-gun-369927> [<https://perma.cc/SRQ3-V9VU>] (archived Jan. 10, 2019).

55. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 at 294 (1988).

solved within our family.”<sup>56</sup> Jeffrey Webb, who later became head of CONCACAF after Jack Warner resigned, said much the same thing in 2002 in the face of corruption allegations facing Blatter, telling the FIFA Congress that “FIFA is family and family must stay together.”<sup>57</sup> Thus, relying upon outsiders, selected by the insiders and accountable to the insiders, to parachute into the FIFA morass and save the day seems to be a long shot. The FIFA Council’s retention of the right to appoint and fire independent heads of committees only underscores that fact.

This does not mean that reform is a lost cause. One way to increase accountability given the weaknesses of outsiders is to focus more attention on the people who are already inside the organization. Indeed, insiders were critical in uncovering the corruption that led to the 2013 reforms and helped to lay the foundation for the U.S. Department of Justice’s arrests and indictments in 2015.<sup>58</sup> Several studies have suggested that this practice of “whistleblowing,” or the “disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action,”<sup>59</sup> can be more effective in combatting corporate fraud than conventional tools such as securities regulators, independent auditors, private litigation, or monitoring by equity or debt holders.<sup>60</sup> The United States has included whistleblower provisions in each of its major pieces of corporate governance legislation in recent years, including the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and both the Securities and Exchange Commission (SEC) and the Internal Revenue Service have recently initiated or expanded whistleblower programs.<sup>61</sup>

---

56. Panja, *A League of His Own*, *supra* note 50.

57. BENSINGER, *supra* note 2, at 239 (quoting Jeffrey Web, a banker and the deputy director of the Internal Audit Committee at FIFA)

58. *See At last, a challenge to the impunity of FIFA*, THE ECONOMIST (May 30, 2015), <http://www.economist.com/node/21652328> [<https://perma.cc/ETU7-Y567>] (archived Jan. 20, 2019) [hereinafter *At Last*]; *FIFA corruption crisis: Key questions answered*, BBC (Dec. 21, 2015), <https://www.bbc.com/news/world-europe-32897066> [<https://perma.cc/7X2Z-BEEH>] (archived Jan. 20, 2019).

59. Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 4 (1985) [hereinafter Near & Miceli, *Organizational Dissidence*]. The term “whistleblowing” reportedly derives “from the practice of English policemen who blew their whistle when they observed the happening of some crime.” Siddhartha Dasgupta & Ankit Kesharwani, *Whistleblowing: A Survey of Literature*, 9 IUP J. CORP. GOV. 57, 57 (2010).

60. *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010); Rajeev K. Goel & Michael A. Nelson, *Whistleblower Laws and Exposed Corruption in the United States*, 46 APPLIED ECON. 2331, 2339 (2014); Kelly Richmond Pope & Chih-Chen Lee, *Could the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 Be Helpful in Reforming Corporate America? An Investigation on Financial Bounties and Whistle-Blowing Behaviors in the Private Sector*, 112 J. BUS. ETHICS 597, 605–06 (2013).

61. *See* STEPHEN M. BAINBRIDGE, THE COMPLETE GUIDE TO SARBANES-OXLEY: UNDERSTANDING HOW SARBANES-OXLEY AFFECTS YOUR BUSINESS 99–105 (2007);

Although these whistleblowing programs are not without their critics,<sup>62</sup> they might have some distinct structural advantages in an institution like FIFA. First, insiders are the most likely to have the access to evidence of corporate fraud and misconduct. None of the commonly cited alternative sources of accountability for international sports organizations—such as governments, sponsors, or the media<sup>63</sup>—have typically provided that accountability without insiders tipping them off to the potential for wrongdoing.<sup>64</sup> This is especially true in FIFA and its affiliated confederations and national member associations, where transparency is difficult to come by even under the latest reforms. Second, utilizing insiders in a nonprofit organization helps to address the absence of residual claimants like stockholders to monitor operations or to hold auditors accountable. Employee insiders are often the actors with the most incentive to report fraud and abuse.

The problem is that FIFA has historically treated its whistleblowers very badly.<sup>65</sup> Indeed, even the whistleblowers who came forward after the indictments to report on Infantino's own alleged transgressions were reportedly fired for their disloyalty in providing evidence to the Ethics Committee.<sup>66</sup> Transparency International, a global-governance nongovernmental organization, proposed a whistleblower program in the last round of reform discussions, but this

---

Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43, 44 (2015); Pope & Lee, *supra* note 60, at 597–98; Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX L. 357, 361 (2008).

62. See, e.g., Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 21–38 (2012) [hereinafter Moberly, *Sarbanes-Oxley's Whistleblower Provisions*] (describing failures of Sarbanes-Oxley's reforms); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 74–75 (2007) [hereinafter Moberly, *Unfulfilled Expectations*] (describing how many employees kept quiet rather than reporting fraud); Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 91 (2012) (describing the limitations of the bounty scheme).

63. See Pielke Jr., *Accountable*, *supra* note 53, at 260–63.

64. See Janet P. Near & Marcia P. Miceli, *Wrongdoing, Whistle-Blowing, and Retaliation in the U.S. Government*, 28 REV. PUB. PERSONNEL ADMIN. 263, 264 (2008) [hereinafter Near & Miceli, *Wrongdoing*] (“Modern organizations are so complex that outsiders are unlikely to become aware of organizational action without learning inside information from current or former employees.”).

65. See, e.g., MERSIADES, *supra* note 2, at 317–28; see also Owen Gibson, *World Cup whistleblowers submit complaints after cover is blown*, THE GUARDIAN (Nov. 17, 2014, 8:25 AM), <https://www.theguardian.com/football/2014/nov/17/whistleblowers-complain-fifa-ethics-report> [<https://perma.cc/ZJM3-P4VL>] (archived Jan. 20, 2019) [hereinafter Gibson, *Complaints*]; James Masters, *World Cup: Who would be a FIFA whistle-blower?*, CNN (Nov. 18, 2014, 1:43 PM), <http://edition.cnn.com/2014/11/18/sport/football-uefa-fifa-whistle-blower-qatar/> [<https://perma.cc/8YJK-GULX>] (archived Jan. 20, 2019).

66. Andrew Warshaw, *More blood on the walls at FIFA as top bosses purge ethics collaborators*, INSIDE WORLD FOOTBALL (July 6, 2016), <http://www.insideworldfootball.com/2016/07/05/blood-walls-fifa-top-bosses-purge-ethics-collaborators/> [<https://perma.cc/HLP7-6A8N>] (archived Jan. 20, 2019) [hereinafter Warshaw, *Blood*].

was ignored and it was not considered in the latest set of reforms.<sup>67</sup> This reduces the chance that future whistleblowers will be willing to come forward. If reformers are going to have a chance at changing the culture of corruption at FIFA, they must be able to harness the power of insiders at both the FIFA level and the confederation and national member association levels.

The Article begins by describing FIFA and its long history of corruption. In Part II, it then discusses the reform efforts undertaken in recent years, including the latest round adopted in early 2016, and the recent revelations that suggest that the threat of abuse remains. In Part III, the Article discusses the structural impediments to reform, noting that most of the reforms are borrowed from the public corporation arena where, at least in theory, stockholders and the market offer a measure of accountability. By contrast, FIFA is a nonprofit that lacks the kind of proxies for investor accountability that exist in the United States. The Article proceeds in Part IV to address an alternative means of providing accountability, arguing that while no one method is sufficient, adopting a program of whistleblower inducements and protections to harness the power of insiders should be a critical ingredient of any effort. In the conclusion, the Article discusses why this is a particularly appropriate time for FIFA to adopt a comprehensive whistleblower program given the threats to whistleblowers in both Russia, where the 2018 World Cup was held, and Qatar, where the 2022 World Cup is slated to be held.

## II. FIFA AND ITS CORRUPTION

FIFA was founded in 1904 by seven nations in Europe as an umbrella organization that sought to standardize the rules for the game and to stage an international tournament.<sup>68</sup> They had originally intended to ally with the British associations of England, Scotland, Wales, and Ireland, which had convened to form their Football Association (FA) over forty years earlier in 1863,<sup>69</sup> but the FA resisted attempts to engage with their continental counterparts on a grander scale at that time.<sup>70</sup> FIFA nevertheless continued on without them,

---

67. See Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 210; TRANSPARENCY INTERNATIONAL, SAFE HANDS: BUILDING INTEGRITY AND TRANSPARENCY AT FIFA 6 (2011).

68. TOMLINSON, *supra* note 44, at 12; Christine Eisenberg, *FIFA 1975–2000: The Business of a Football Development Organisation*, 31 HIST. SOC. RES. 55, 56 (2006). The founding nations were Belgium, Denmark, France, the Netherlands, Sweden, Switzerland, and the club Espir FC Madrid, representing Spain. CONN, *supra* note 39, at 23.

69. See TOMLINSON, *supra* note 44, at 31; *History of FIFA—Foundation*, FIFA, <http://www.fifa.com/about-fifa/who-we-are/history/> (last visited Jan. 17, 2019) [<https://perma.cc/KL72-XSQ>] (archived Jan. 20, 2019).

70. CONN, *supra* note 39, at 25; TOMLINSON, *supra* note 44, at 12–13; see BENSINGER, *supra* note 2, at 46 (“England’s Football Association, already forty years old,

albeit while still adopting the FA's Laws of the Game as their standard for games played by their members.<sup>71</sup> Eventually, after several starts and stops, the two groups permanently united in 1946,<sup>72</sup> operating primarily to regulate the game, create rules for the movement of players internationally, and organize the World Cup that had been held every four years since 1930.<sup>73</sup>

It was not until 1974 with the rise to power of Brazilian João Havelange that FIFA began to enter the modern era as a major international sports power.<sup>74</sup> As Alan Tomlinson described, “[w]hen Havelange took over at FIFA, it was a modest operation with few personnel and negligible finances, fewer than a hundred member national associations, and a single tournament, in the form of the 16-nation World Cup finals.”<sup>75</sup> The transformation under his leadership was nothing less than astounding. “A quarter of a century later, when Havelange stepped down in Paris in 1998 on the eve of the first ever 32-nation senior competition,” FIFA’s revenues from the World Cup were more than \$4 billion and football as a whole was estimated to generate approximately \$250 billion annually.<sup>76</sup> Havelange also ran FIFA like a for-profit enterprise to generate its revenues, leading critics to accuse him of “misus[ing] the organization as a license to print money.”<sup>77</sup>

Part of the problem with FIFA’s rise to global prominence was that the growth in revenues was not accompanied by a change in the organization itself. Guido Tognoni, FIFA’s former secretary-general and media director, noted that “people say that [Havelange] was leading FIFA like an industry—but he was leading FIFA like a private enterprise, like a proprietor,” which Tognoni agreed, was as if Havelange “owned” FIFA.<sup>78</sup> If Havelange “laid the groundwork for epic and endemic corruption,”<sup>79</sup> his successor, Sepp Blatter, nurtured it and allowed it to flourish by further expanding the patronage system Havelange put in place to curry favor with voters outside of the traditional European nations.<sup>80</sup> The result was a system ripe for the

---

was particularly skeptical, writing dourly that it ‘cannot see the advantages of such a federation’”).

71. See CONN, *supra* note 39, at 46.

72. *Id.* at 32.

73. TOMLINSON, *supra* note 44, at 19–21.

74. See *id.* at 63–64.

75. *Id.* at 63.

76. *Id.* at 64. According to David Conn, though, it would be too much to credit Havelange for this growth in revenues. See CONN, *supra* note 39, at 53 (“There was to be a sudden multiplication of income for Fifa, but this was not a result of João Havelange’s business brilliance, rather a consequence of the TV rights hyper-inflation which Fifa reaped principally after the France World Cup in 1998.”).

77. Eisenberg, *supra* note 68, at 60.

78. TOMLINSON, *supra* note 44, at 66.

79. PAPENFUSS & THOMPSON, *supra* note 11, at 220.

80. See TOMLINSON, *supra* note 44, at 71; Guillermo Jorge, *Fixing FIFA: The Experience of the Independent Governance Committee*, 21 SW. J. INT’L L. 165, 170 (2014).

corruption that eventually was exposed in May of 2015 in the arrests of officials in the Bar-au-Lac hotel in Zurich, Switzerland.<sup>81</sup>

According to the U.S. Department of Justice's indictments brought against current and former officials of FIFA and its regional confederations in the Western Hemisphere—CONCACAF and CONMEBOL—the conspiracy to use these organizations to engage in criminal activities such as fraud, bribery, and money laundering extends as far back as twenty-five years.<sup>82</sup> Although the roots of the corruption may have started to grow even earlier,<sup>83</sup> it rose in significance during a period in which the sale of media and marketing rights for games began to generate “unprecedented profits.”<sup>84</sup> During the last World Cup cycle that ended in 2014, FIFA grossed \$5.72 billion, and over the last decade FIFA cash reserves rose to \$1.52 billion.<sup>85</sup>

Documenting all of the allegations of corruption is not necessary to reveal the depths to which FIFA and its affiliated regional organizations have sunk. A few examples will suffice to illustrate the boldness of the misconduct. Many of the most colorful illustrations begin with Jack Warner of Trinidad and Tobago, who was vice president of FIFA and president of CONCACAF and the Caribbean Football Union (CFU).<sup>86</sup> He may have been a target for bribery attempts in part because, as one commentator put it, he came from a country where “corruption is a part of life,”<sup>87</sup> but even more relevant is that he held positions of importance both at FIFA and in his region. First, he was a member of the FIFA Executive Committee and therefore had a vote on where to host a World Cup.<sup>88</sup> Second, he

---

81. PAPPENFUSS & THOMPSON, *supra* note 11, at xii.

82. Indictment, U.S. v. Jeffrey Webb et al., 15 CR 0252 (RJD)(RML), United States District Court, Eastern District of New York, filed May 20, 2015, at 29, 31 [hereinafter Indictment 5/20/15].

83. See PAPPENFUSS & THOMPSON, *supra* note 11, at 178 (suggesting that João Havelange of Brazil, who came to power as FIFA president in 1974, “inaugurated FIFA’s historic epoch of corruption.”). Moreover, the raid at the Bar au Lac hotel was not even the first corruption case brought to trial against FIFA. That occurred ten years earlier in a bribery investigation involving FIFA’s commercial partner, International Sport and Leisure (“ISL”). Although there was evidence of at least \$22 million of bribery and kickbacks paid to Havelange and his son-in-law, Brazilian FA president Ricardo Teixeira, as well as CONMEBOL president Nicolas Leoz, most of the defendants were acquitted and no one served any prison time in the scandal. BENSINGER, *supra* note 2, at 32–33.

84. Indictment 5/20/15, *supra* note 82, at 31.

85. Panja, *A League of His Own*, *supra* note 50.

86. Jacqueline Charles, *Powerful Trinidad lawmaker at center of FIFA corruption scandal lashes out at U.S.*, MIAMI HERALD (May 31, 2015), <https://www.miamiherald.com/news/nation-world/world/americas/article22746000.html> [https://perma.cc/XCV5-9M4B] (archived Jan. 20, 2019).

87. Joshua Surtees, *Jack Warner—Trinidad’s ‘Robin Hood’—Will Never Accept the Blame*, VICE SPORTS (June 1, 2015), [https://sports.vice.com/en\\_us/article/jack-warner-trinidad39s-39robin-hood39-will-never-accept-the-blame-us-translation](https://sports.vice.com/en_us/article/jack-warner-trinidad39s-39robin-hood39-will-never-accept-the-blame-us-translation) [https://perma.cc/SZ5Q-NTXJ] (archived Jan. 20, 2019).

88. Prior to 2011, the decision where to host the World Cup was exclusively made by the Executive Committee, which facilitated vote buying. Reforms adopted at that time



controlled a large bloc of votes from the Caribbean member nations and many of the smaller members of CONCACAF itself.<sup>89</sup> Because FIFA's Congress operates on a one-nation, one-vote principle,<sup>90</sup> this meant that he could claim to be able to deliver a large number of votes on issues presented for decision at the FIFA Congress, which most notably included the election of the FIFA president.

Warner reportedly received bribes or siphoned off money on a number of occasions during his tenure either in return for (1) supporting a particular country's bid to host the World Cup or (2) delivering the vote for a particular candidate for president. Evidence of bribery in the context of an election came in 2011. At the time, Mohammed bin Hammam, the Qatari businessman running against Sepp Blatter for president of FIFA, reportedly provided Warner with the funds to distribute \$40,000 in cash to each of the CFU's twenty-five members, which he did in brown envelopes at a meeting of the organization.<sup>91</sup> When some individuals questioned this at the meeting, Warner protested that it wasn't a bribe, but rather a "gift" from a candidate who had "fresh ideas," and the CFU could deliver him the presidency if it voted as a bloc.<sup>92</sup> Warner informed the crowd that "any country that doesn't want the gift has the right to give it back to him."<sup>93</sup> According to reports, Warner added that "I know there are people here who believe they are more pious than thou. If you are pious, go to a church, friends, but the fact is that our business is our business."<sup>94</sup>

An example of bribery in the context of a World Cup vote occurred in 2010 when South Africa was named host for the 2010 games. In order to secure the vote of Warner's bloc of nations, South Africa promised to pay amounts totaling \$10 million for a "so-called diaspora legacy programme to develop football in the Caribbean."<sup>95</sup> Instead of going toward the development of the game in that region, though, the funds went into Warner's pocket and the pocket of Chuck Blazer of the

---

require such votes to be submitted to the FIFA Congress for a vote of all member nations. Carl Bialik, *How FIFA's Structure Lends Itself to Corruption*, FIVETHIRTYEIGHT (May 27, 2015), <http://fivethirtyeight.com/features/how-fifas-structure-lends-itself-to-corruption/> [https://perma.cc/6SNN-PSVP] (archived Jan. 20, 2019).

89. Given all of the small island nations in CONCACAF, the Caribbean has more votes than all of South America. PAPENFUSS & THOMPSON, *supra* note 11, at 46.

90. Bialik, *supra* note 88.

91. Michael E. Miller, *The rise and fall of Trinidad's Jack Warner, the former teacher at the center of the FIFA allegations*, WASH. POST (May 28, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/28/the-rise-and-fall-of-trinidad-jack-warner-the-former-schoolteacher-at-the-center-of-the-fifa-scandal/> [https://perma.cc/MB6L-U8H3] (archived Jan. 20, 2019).

92. *Id.*

93. *Id.*

94. *Id.*; see also BENSINGER, *supra* note 2, at 70.

95. Ed Thomas, *FIFA corruption: Documents show details of Jack Warner 'bribes'*, BBC NEWS (June 7, 2015), <http://www.bbc.com/news/world-latin-america-33039014> [https://perma.cc/DM2Q-J26V] (archived Jan. 20, 2019).

United States,<sup>96</sup> Warner's second-in-command at CONCACAF and a fellow FIFA Executive Committee member—who later became an informant after being confronted by the FBI.<sup>97</sup> A similar thing occurred during the bidding over the 2022 World Cup, with Warner and his sons reportedly receiving \$1.2 million from a company linked to the Qatari bid.<sup>98</sup> The transfer was so suspect that a bank in the Cayman Islands refused to process the payments and it eventually went through a bank in New York, which is one of the ways that the illegal payment both came to the attention of the FBI and came within US jurisdiction.<sup>99</sup>

Many times, bribes appeared to be granted merely to solidify Blatter's support in the region. For example, FIFA sold the Caribbean broadcast rights to the 2010 and 2014 World Cups to the CFU for a mere \$600,000.<sup>100</sup> Warner then sublicensed the rights to a Cayman Islands company that he owned, J&D International, and for which Jeffrey Webb, who eventually succeeded Warner as president of CONCACAF and was also indicted by the United States, served on the board of directors.<sup>101</sup> The company then sold the rights to a Jamaican TV station for approximately \$20 million, resulting in a tidy profit for Warner and his company.<sup>102</sup> Perhaps even more outrageously, Warner reportedly diverted money intended for Haitian earthquake relief efforts in 2010 to his own personal use, including \$500,000 sent from South Korean football officials.<sup>103</sup>

Warner, who resigned from FIFA in 2011 and was subsequently banned for life for ethics violations,<sup>104</sup> may have been one of the most

96. Owen Gibson, *Sepp Blatter under pressure over World Cup TV rights links to Jack Warner*, THE GUARDIAN (Sept. 13, 2015), <https://www.theguardian.com/football/2015/sep/13/jack-warner-sepp-blatter-world-cup-rights-profit> [https://perma.cc/JX8S752Z] (archived Jan. 20, 2019) [hereinafter Gibson, *Blatter under pressure*]; Teri Thompson et al., *Soccer Rat! The inside story of how Chuck Blazer, ex-U.S. soccer executive and FIFA bigwig, became a confidential informant for the FBI*, N.Y. DAILY NEWS (Nov. 1, 2014), <http://www.nydailynews.com/sports/soccer/soccer-rat-ex-u-s-soccer-exec-chuck-blazer-fbi-informant-article-1.1995761> [https://perma.cc/7YMJ-MUQM] (archived Jan. 20, 2019).

97. Thompson et al., *supra* note 96.

98. Claire Newell et al., *Qatar World Cup 2022 investigation: former Fifa vice-president Jack Warner and family paid millions*, THE TELEGRAPH (Mar. 17, 2014), <http://www.telegraph.co.uk/sport/football/world-cup/10704290/Qatar-World-Cup-2022-investigation-former-Fifa-vice-president-Jack-Warner-and-family-paid-millions.html> [https://perma.cc/L82X-NY4Q] (archived Jan. 20, 2019).

99. *See id.*

100. Gibson, *Blatter under pressure*, *supra* note 96.

101. *Id.*

102. *See id.* This was a long-standing practice. In 2001, FIFA's then-secretary-general, Michael Zen-Ruffinen, claimed that Blatter underpriced FIFA media deals for regional soccer leaders by as much as \$500 million "to solidify his support so that he would remain president election after election." PAPANFUSS & THOMPSON, *supra* note 11, at 185.

103. Panja, *A League of His Own*, *supra* note 50.

104. *FIFA bans Sepp Blatter ally Jack Warner for life over repeated bribery*, USA TODAY (Sept. 30, 2015), <http://www.usatoday.com/story/sports/soccer/2015/09/29/with-fifa-in-meltdown-chung-wants-emergency-body/73016524/> [https://perma.cc/2UAY-VAEB] (archived Jan. 20, 2019).

audacious of the participants in corruption, but the pervasiveness of the activity runs deep throughout the organization of FIFA and its regional confederations. In the two indictments handed down in the United States, forty-one people or entities were charged with engaging in schemes to solicit and receive more than \$200 million in bribes and kickbacks.<sup>105</sup> Moreover, although the charges have focused on individuals in the Western Hemisphere because that is where US investigators' jurisdiction and access has been strongest, it is highly likely that corruption extends to other regions and confederations. In 2010, for example, Reynald Temarii, the president of the Oceanic Football Confederation, reportedly received multiple offers of between \$10 and \$12 million to sway his vote and the backing of his confederation for the 2018 World Cup hosting decision, and Temarii was subsequently suspended by FIFA.<sup>106</sup> The same year, Amos Adamu, a Nigerian member of the FIFA Executive Committee, reportedly solicited \$800,000 for the construction of fields in return for "facilitating access" to the men who would decide where the World Cup would be hosted, and he too was banned by FIFA.<sup>107</sup> In November 2015, Ganesh Thapa, the head of the All-Nepal Football Association, and Vipheth Sihachakr, president of the Lao Football Federation, were both banned from FIFA for accepting bribes.<sup>108</sup> Even in Europe, where laws and customs against corruption ostensibly appear to be tighter than in some regions, FIFA commenced an investigation into allegations that Germany won the hosting rights to the 2006 World Cup with the use of a multi-million dollar slush fund set up to buy votes.<sup>109</sup> The Swiss

---

105. Press Release, U.S. Dep't of Justice, Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption (Dec. 3, 2015) <https://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption> [<https://perma.cc/R925-8TWW>] (archived Jan. 20, 2019); *A Hemisphere of Soccer Corruption*, *supra* note 5.

106. Ben Rumsby, *Fifa scandal: How to solve the crisis engulfing the world football*, THE TELEGRAPH (Oct. 10, 2015), <http://www.telegraph.co.uk/sport/football/fifa/11924211/Fifa-scandal-How-to-solve-the-crisis-engulfing-world-football.html> [<https://perma.cc/V2FW-WRLJ>] (archived Jan. 20, 2019).

107. *Id.*

108. See Media Release, Adjudicatory Chamber FIFA Ethics Comm., Independent Ethics Committee Bans Football Officials (Nov. 16, 2015), <http://fifa.pressfire.net/newsletter/newsletter?id=3291&html=1> [<https://perma.cc/FAU2-U46S>] (archived Jan. 20, 2019).

109. James Riach, *Fifa opens investigation into Franz Beckenbauer and Germany's 2006 World Cup bid*, THE GUARDIAN (Mar. 22, 2016), <https://www.theguardian.com/football/2016/mar/22/fifa-franz-beckenbauer-germany-2006-world-cup> [<https://perma.cc/K37U-AWTQ>] (archived Jan. 20, 2019); see Rob Turner, *Report: More dubious payments uncovered in German World Cup scandal*, DW (Mar. 24, 2017), <http://www.dw.com/en/report-more-dubious-payments-uncovered-in-german-world-cup-scandal/a-38115278> [<https://perma.cc/XRM2-D4RC>] (archived Jan. 20, 2019). Wolfgang Niersbach, former chair of the German Football Association, the chairman of the local organizing committee for the 2006 German World Cup Organizing Committee and a member of the FIFA Council and UEFA Executive Committee, was already suspended for one year by the FIFA Ethics Committee for failing to report evidence of misconduct. *Independent Ethics Committee bans Wolfgang Niersbach*, FIFA (July 25, 2016), <http://www.fifa.com/governance/news/y=2016/m=7/news=independent->

have also opened up their own criminal investigation relating to the same allegations.<sup>110</sup>

Not only is FIFA corruption widespread, it also appears to go straight to the top. As mentioned earlier, two of the most powerful men in football—FIFA president Sepp Blatter and UEFA president Michel Platini—were suspended for conflicts of interest and breaches of loyalty.<sup>111</sup> Blatter allegedly authorized FIFA to make a payment of \$2 million to Platini in 2011.<sup>112</sup> The men claimed that it was to compensate Platini for a verbal agreement they had made a decade earlier for Platini to serve as an advisor to Blatter during the period from 1999–2002.<sup>113</sup> The Ethics Committee, however, found the explanation unconvincing and the timing of it suggested that it may have been designed to purchase Platini and UEFA’s loyalty to Blatter in his election contest with Bin Hammam.<sup>114</sup> Both Blatter and Platini were suspended for eight years, although on appeal those suspensions were reduced to six years.<sup>115</sup> They also remain under investigation by Swiss authorities for possible criminal violations.<sup>116</sup>

This isn’t to say that the perpetrators of bribery and corruption have necessarily been an unmitigated evil for FIFA or world football. Many of the worst offenders only were able to secure their ill-gotten gains by significantly expanding football’s revenues. In theory, this should have trickled down to the benefit of the people in their regions. In CONCACAF, for example, the annual budget was a mere \$140,000 before Warner and Blazer took over and it became “a \$40 million cash cow on sponsorship, media, and vendor contracts that Blazer negotiated.”<sup>117</sup> Nevertheless, it’s not clear how much, if any, of the

ethics-committee-bans-wolfgang-niersbach-2812953.html [https://perma.cc/LMQ7-VYPU] (Jan. 20, 2019). German prosecutors have also charged former German Football Association and FIFA officials with tax evasion in connection with misreporting a deductible payment that may allegedly been used as part of a World Cup 2006 “slush fund.” See *German prosecutors charge former DFB, FIFA officials with tax evasion*, REUTERS (June 1, 2018), <https://www.reuters.com/article/us-soccer-germany-worldcup/german-prosecutors-charge-former-dfb-fifa-officials-with-tax-evasion-idUSKCN11X45R> [https://perma.cc/KHY3-WGFT] (archived Jan. 20, 2019).

110. *Swiss launch criminal probe of Beckenbauer over German World Cup bid*, REUTERS (Sept. 1, 2016), <http://uk.reuters.com/article/uk-soccer-fifa-germany-swiss-idUKKCN1174JQ> [https://perma.cc/YRB4-NS3M] (archived Jan. 20, 2019).

111. See *supra* text accompanying note 6.

112. *FIFA ethics court bans Sepp Blatter and Michel Platini for 8 years*, L.A. TIMES (Dec. 21, 2015), <http://www.latimes.com/sports/soccer/la-sp-fifa-blatter-platini-banned-20151221-story.html> [https://perma.cc/6ZJC-TBB5] (archived Jan. 20, 2019).

113. *Id.*

114. *Id.*

115. Mike McGeehan, *Sepp Blatter and Michel Platini have suspensions from football cut to six years*, INDEPENDENT (Feb. 24, 2016), <http://www.independent.co.uk/sport/football/international/sepp-blatter-and-michel-platini-have-suspensions-from-football-cut-to-six-years-a6893801.html> [https://perma.cc/YDN5-4MAQ] (archived Jan. 20, 2019).

116. Sam Borden, *FIFA Committee Suspends Blatter and Platini for 8 years in Ethics Case*, N.Y. TIMES, Dec. 22, 2015, at B11; see sources cited *supra* note 5 (discussing Platini’s status in Switzerland).

117. Miller, *supra* note 91.

money actually made its way to the people who play and watch the game.<sup>118</sup> For example, Trinidad's Centre of Excellence (the Centre), a football academy built with CONCACAF funds, reportedly hosts "more weddings and conventions than matches."<sup>119</sup> Clive Toye, a former senior consultant at CONCACAF, remarked that "I never saw a single person playing a game or practicing" at the Centre's one field.<sup>120</sup> Since the Centre is registered personally to Warner, none of its profits are plowed back into the sport either.<sup>121</sup> Much like in FIFA more generally, while the game grew in popularity and spread to new places, most of the revenue from that explosion in interest redounded to the benefit of the leaders rather than the game itself.

### III. FIFA REFORM

None of the recent revelations regarding FIFA corruption should have been much of a surprise to even casual fans of the game. Reformers have been attempting to fix FIFA for years. Since the 2010 World Cup alone, there have been two major reform efforts commissioned by FIFA's leadership. Both of these produced a number of thoughtful recommendations, many of which were adopted in whole or in part by the FIFA Executive Committee and Congress and were implemented or are in the process of being implemented. Nevertheless, the early signs suggest that although the reforms may have improved matters to some extent, those reforms that appear to have been beneficial are already being subverted and those that might have made the most difference remain blocked. As a result, it is hard to be optimistic that real change has occurred.

#### A. 2011–2013

The first of the recent movements for reform of FIFA came after allegations of corruption and bribery surrounding Mohammed bin Hammam's failed campaign for president in 2011. FIFA created an Independent Governance Commission to craft an institutional reform

---

118. The Caribbean Football Union's financial situation, for example, has been described as "grave," suggesting that any profits Warner secured for it have long since been siphoned away. Steve Menary, *Caribbean football in 'dire financial straits' as election looms*, *WORLD SOCCER* (July 19, 2016), [http://www.worldsoccer.com/news/caribbean-football-in-dire-financial-straits-as-election-looms-383757?utm\\_content=buffer697dd&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.worldsoccer.com/news/caribbean-football-in-dire-financial-straits-as-election-looms-383757?utm_content=buffer697dd&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) [<https://perma.cc/SG94-CBXG>] (archived Jan. 20, 2019).

119. *Trinidad academy a symbol of Warner's shady deals*, *DAWN* (June 9, 2015), <http://www.dawn.com/news/1187041> [<https://perma.cc/44CQ-EJ3N>] (archived Jan. 20, 2019) [hereinafter *Trinidad Academy*].

120. PAPPENFUSS & THOMPSON, *supra* note 11, at 73.

121. *Trinidad Academy*, *supra* note 119.

proposal.<sup>122</sup> They were hampered from the beginning by allegations that the commission, chaired by Mark Pieth, a criminal law professor at the Basel Institute of Governance in Switzerland, was not actually “independent.”<sup>123</sup> Observers complained that Pieth was appointed personally by Blatter and his status as a paid advisor on a report submitted prior to being named chair of the commission tainted his ability to be neutral in his recommendations.<sup>124</sup> After the commission had concluded its investigation and reported its recommendations, Guido Tognoni explained that “Mark Pieth has good intentions but to me he’s like Sepp Blatter’s poodle. He must bark loud but he’s not allowed to bite.”<sup>125</sup>

Ultimately, the commission made nineteen recommendations, only six of which were fully implemented at the time and five more of which were partially implemented.<sup>126</sup> One member of the commission suggested that the most important recommendation, and one of the few fully adopted by FIFA, was the radical reform of its Ethics Committee, with its creation of investigatory and adjudicatory chambers and adoption of a new Code of Ethics.<sup>127</sup> The concept of an Ethics Committee, which had first been formed in 2004,<sup>128</sup> was cited by Blatter in 2013 as one of his six crowning achievements since assuming the presidency in 1998,<sup>129</sup> but it had floundered for a lack of independence. The theory underlying the Commission’s recommendations was that the subdivided Ethics Committee would be chaired by people with “no previous relationship with the ‘football family,’” which was designed to reduce the risk of their “capture” by FIFA’s “patronage network.”<sup>130</sup> The commission also recommended that the Ethics Committee’s investigatory chamber be permitted to independently initiate investigations, thereby insulating it from the politics of the FIFA Executive Committee.<sup>131</sup> Michael Garcia, the

---

122. Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 197.

123. Martyn Ziegler, *Fifa advisors criticize anti-corruption committee*, INDEPENDENT (Dec. 11, 2011), <http://www.independent.co.uk/sport/football/news-and-comment/fifa-advisors-criticise-anti-corruption-committee-6270385.html> [https://perma.cc/3PAN-FCLJ] (archived Jan. 20, 2019).

124. *Id.*; Roger Pielke Jr. & Jens Weinreich, *FIFA’s “Independent Governance Commission” is far from Independent*, SPORT & POLITICS (Dec. 19, 2011), <https://www.jensweinreich.de/2011/12/19/fifas-independent-governance-committee-is-far-from-independent/> [https://perma.cc/W7GQ-LKSH] (archived Jan. 20, 2019).

125. Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 198.

126. *Id.* at 203.

127. Jorge, *supra* note 80, at 172; *Chairmen of Ethics Committee announced and a new Code of Ethics approved*, FIFA (July 17, 2012), <http://www.fifa.com/about-fifa/news/y=2012/m=7/news=chairmen-ethics-committee-announced-and-new-code-ethics-approved-1664989.html> [https://perma.cc/T763-PXBG] (archived Feb. 4, 2019).

128. TOMLINSON, *supra* note 44, at 37.

129. *Id.* at 47.

130. *Id.*

131. Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 213.

former U.S. Attorney for the Southern District of New York, was appointed as chair of the investigatory chamber in 2012, promising a new era of independence and accountability in FIFA.<sup>132</sup>

Notwithstanding Blatter's declaration upon the completion of the commission's term in 2013 that "we have weathered the storm,"<sup>133</sup> it was obvious that very little had changed. Most of the commissioners' recommendations were either rejected or partially ignored by FIFA's Executive Committee.<sup>134</sup> One member of the commission, anti-bribery specialist Alexandra Wrage, quit in protest over the failure to implement the reform recommendations.<sup>135</sup> Tognoni concluded that although Pieth had a "promising approach," he was "banging his head against a block of granite."<sup>136</sup> The reforms adopted were described as "nothing more than . . . marginal."<sup>137</sup>

Furthermore, even the reforms that were implemented soon fell apart. After Garcia's appointment as independent ethics investigator in 2012, he undertook an investigation of FIFA corruption in the wake of allegations about the selection process for the 2022 World Cup in Qatar.<sup>138</sup> In the fall of 2014, Garcia submitted a 430-page report to Hans-Joachim Eckert, the chair of the adjudicatory chamber of the Ethics Committee.<sup>139</sup> Critics were dubious of the investigation, with *The Economist* claiming that "Garcia, who spent more than a year looking into the allegations [of vote-rigging and kickbacks], never interviewed Mr. bin Hammam or examined the trove of e-mails acquired by the *Sunday Times*."<sup>140</sup> Even so, Eckert refused to submit the entire report to the committee, choosing instead to provide his own forty-two-page written summary.<sup>141</sup> This prompted Garcia to resign, calling Eckert's summary "incomplete and erroneous" in material respects and suggesting that his ability to operate independently had been seriously compromised.<sup>142</sup>

132. Owen Gibson, *FIFA 'strongly advised' to implement report's advice on reform*, THE GUARDIAN (Apr. 23, 2014), <https://www.theguardian.com/football/2014/apr/23/fifa-advised-implement-report-advice-reform> [<https://perma.cc/8ZRQ-6D47>] (archived Jan. 20, 2019) [hereinafter Gibson, *Strongly Advised*].

133. Joshua Robinson, *FIFA Slowly Sails Toward Reform*, WALL ST. J. (June 4, 2013), <http://www.wsj.com/articles/SB10001424127887324063304578521301415971928> [<https://perma.cc/VG2Z-WHFF>] (archived Jan. 20, 2019).

134. Gibson, *Strongly Advised*, *supra* note 132.

135. *Id.*

136. Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 198.

137. MERSIADES, *supra* note 2, at 341.

138. Boudreaux et al., *supra* note 46, at 8.

139. *Id.*

140. *At Last*, *supra* note 58.

141. Owen Gibson, *Michael Garcia quits Fifa ethics committee over handling of report*, THE GUARDIAN (Dec. 17, 2014), <https://www.theguardian.com/football/2014/dec/17/michael-garcia-resigns-fifa-ethics-committee> [<https://perma.cc/3N23-58MZ>] (archived Jan. 20, 2019).

142. *Id.*

## B. 2015–2016

The second major reform movement in the last decade occurred in the months following the arrests and subsequent indictments of numerous FIFA, CONCACAF, and CONMEBOL officials in May of 2015. Reform was already in progress as a result of the Garcia report submitted in the fall of 2015, but the indictments and the ensuing resignation of FIFA president Sepp Blatter gave the movement renewed energy.<sup>143</sup> The focus was on increasing the number of outsiders and trying to create spaces for political independence. Although it is still early, the results do not suggest that the effort has had much success.

As with the reform effort that preceded it a few years earlier, the process started with the creation of an *ad hoc* body in July of 2015.<sup>144</sup> Almost immediately after its creation, this Reform Task Force was immersed in controversy. With the Audit and Compliance Chair, Dominic Scala, slotted to lead the task force,<sup>145</sup> Transparency International noted that the committee “would not be fully independent . . . [and] will not be sufficient to win back trust in FIFA.”<sup>146</sup> Coca-Cola, one of FIFA’s main sponsors, dismissed the effort, calling instead for a fully independent committee led by an “eminent” chair who could review the governance of the organization from top to bottom.<sup>147</sup>

FIFA responded to the critics by subsequently dumping Scala as chair of the Reform Task Force and instead appointing the International Olympic Committee’s (IOC) former director-general, Swiss lawyer Francois Carrard, to lead the task force in its effort to make recommendations about how to address the organization’s apparently “widespread corruption within its leadership.”<sup>148</sup> This was an ironic twist given the IOC’s own problems with corruption and

---

143. Indeed, Blatter promised in his resignation speech after the indictments that he planned to pursue reform measures before leaving FIFA. *Blatter begins work on FIFA reforms days after his resignation*, FOX SPORTS (June 4, 2015), <https://www.foxsports.com/soccer/story/sepp-blatter-begins-work-on-fifa-reforms-after-announcing-presidential-resignation-060415> [https://perma.cc/3S5L-PZ4T] (archived Jan. 20, 2019).

144. *Fifa: New taskforce announced to tackle corruption*, BBC (July 21, 2015), <http://www.bbc.com/sport/football/33595702> [https://perma.cc/T6HP-MHGG] (archived Jan. 20, 2019).

145. Richard Conway, *Fifa: Dominic Scala set to lead reform taskforce*, BBC (July 22, 2015), <http://www.bbc.com/sport/football/33624227> [https://perma.cc/4H9M-9SGC] (archived Jan. 20, 2019).

146. *Id.*

147. *Id.*

148. Thomas Barbari, *Who is Françoise Carrard? FIFA Corruption Reform Task Force May be Led by Former IOC Official*, INT’L BUS. TIMES (Aug. 7, 2015), <http://www.ibtimes.com/who-francois-carrard-fifa-corruption-reform-task-force-may-be-led-former-ioc-official-2043883> [https://perma.cc/6YLX-BNMT] (archived Jan. 20, 2019). Scala ended up proposing reforms on his own in his capacity as chair of the FIFA Audit and Compliance Committee. Sam Borden, *FIFA Official Proposes Overhaul of Executive Panel*, N.Y. TIMES, Sept. 11, 2015, at B14.



scandal while Carrard was there.<sup>149</sup> Carrard did not help matters by later dismissing soccer in America as “just an ethnic sport for girls in schools,” which suggested an underlying disdain for the country that was leading the prosecution of abuses he was supposedly trying to correct.<sup>150</sup> Moreover, even if Carrard could be considered an impartial outsider with no previous ties to FIFA or the game of football,<sup>151</sup> observers doubted that the task force would have much effect. Michael Hershman, an international corporate governance consultant and a member of the Independent Governance Commission, reportedly had “no faith” that the committee would be able to accomplish its tasks: “The only way things will change is if there’s a top-to-bottom, complete reorganization of FIFA, with a change in leadership and in the top staff.”<sup>152</sup>

Notwithstanding the dismal predictions, pressure from both sponsors and another round of US indictments in December led to the acceptance of all of the recommendations of the Reform Task Force in a special meeting of the FIFA Congress in February of 2016.<sup>153</sup> There were four major categories of reforms: (1) restructuring committees and governance authority; (2) checks on members and limits on terms; (3) increasing transparency and outside auditing; and (4) requiring more outsiders and increased independence.<sup>154</sup> Unlike the previous reforms, these were all implemented, but they still have been described as “modest” and not going far enough.<sup>155</sup>

The first category of reform was to restructure committees and governance authorities in an attempt to provide a “clear separation

149. See Amy Shipley, *IOC Expels Six for Corruption*, WASH. POST (Mar. 18, 1999), [https://www.washingtonpost.com/archive/politics/1999/03/18/ioc-expels-six-for-corruption/83106a9b-5347-4fb7-aec9-ef71aa607bda/?noredirect=on&utm\\_term=.7750aea53043](https://www.washingtonpost.com/archive/politics/1999/03/18/ioc-expels-six-for-corruption/83106a9b-5347-4fb7-aec9-ef71aa607bda/?noredirect=on&utm_term=.7750aea53043) [<https://perma.cc/X8YM-3S42>] (archived Jan. 20, 2019).

150. Christian Red et al., *FIFA reform committee leader apologizes for making disparaging remarks about American soccer*, N.Y. DAILY NEWS (Nov. 5, 2015), <http://www.nydailynews.com/sports/soccer/fifa-reform-leader-apologizes-ripping-soccer-article-1.2422795> [<https://perma.cc/698S-9EYR>] (archived Jan. 20, 2019).

151. Carrard himself expressed doubt that outside influence was necessary to reform FIFA, opining that “[b]eing some kind of an insider I believe is a necessity.” PAPANFUSS & THOMPSON, *supra* note 11, at 209.

152. *Id.* at 208.

153. PAPANFUSS & THOMPSON, *supra* note 11, at 217–18; Andrew Warshaw, *FIFA sponsors turn up reform pressure as exco gathers for Carrard report*, INSIDE WORLD FOOTBALL (Dec. 2, 2015), <http://www.insideworldfootball.com/2015/12/02/fifa-sponsors-turn-up-reform-pressure-as-exco-gathers-for-carrard-report/> [<https://perma.cc/KB6E-3F7Z>] (archived Jan. 20, 2019); *Fifa sponsors demand ‘independent oversight’ of reform process*, THE GUARDIAN (Dec. 1, 2015), <https://www.theguardian.com/football/2015/dec/01/fifa-sponsors-reform-process-letter> [<https://perma.cc/94ZY-HYXQ>] (archived Jan. 20, 2019).

154. See generally FIFA REFORM COMMITTEE, 2016 FIFA REFORM COMMITTEE REPORT (2015), [https://resources.fifa.com/mm/document/affederation/football\\_governance/02/74/17/54/2015.11.27finalreport\\_forpublication\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/football_governance/02/74/17/54/2015.11.27finalreport_forpublication_neutral.pdf) [<https://perma.cc/4Z8Y-FXAS>] (archived Jan. 20, 2019) [hereinafter 2016 FIFA REFORM COMMITTEE REPORT].

155. MERSIADES, *supra* note 2, at 341.

between 'political' and management functions of FIFA."<sup>156</sup> The FIFA Executive Committee previously had the power not only to supervise and provide strategic direction to FIFA, but also to control key management decisions that implemented those strategies.<sup>157</sup> This theoretically presented the Executive Committee members with more opportunities to extract bribes or to curry favor, such as in the decision as to how to distribute funds under the Goal Programme for developing soccer in needy areas.<sup>158</sup> Thus, FIFA separated those functions. Under the new rules, the political and supervisory functions would be exercised by a FIFA Council, while the management and executive powers would be exercised by the FIFA Administration, led by the FIFA secretary-general.<sup>159</sup>

This separation of functions is consistent with a more German-style two-tier corporate board. Under this structure, a corporation has a supervisory board and a management board, which in theory reduces opportunities for conflicts of interest and self-dealing.<sup>160</sup> In reality, however, the evidence is scant that it has had much of an effect, and some scandals in Germany and elsewhere have been traced to defects in the system.<sup>161</sup> Moreover, if the president and the FIFA Council exercise their supervisory power to replace the secretary-general as a way to ensure that management decisions are made to their liking, as may have occurred with the move to permit the council to replace members of independent committees, then the separation will be merely in form rather than substance.

In the second category of reforms, FIFA enacted measures to guard against appointing and retaining corrupt leaders. On the former, FIFA mandated integrity checks conducted by an independent FIFA Review committee, which were already utilized in the election to

---

156. *Id.* at 5.

157. See FIFA, STATUTORY REFORMS FAQ—EXTRAORDINARY FIFA CONGRESS 1–2 (Jan. 27, 2016), <https://resources.fifa.com/image/upload/faq-statutory-reforms-extraordinary-fifa-congress-2747654.pdf?cloudid=rv7iv1mcltlzh5zb18u> [<https://perma.cc/SG95-R2RP>] (archived Jan. 20, 2019) (explaining distinction between the jurisdiction of the former FIFA Executive Committee and the proposed FIFA Council).

158. Cf. Emmanuel Bayle, "FIFA-gate": An Opportunity to Clean Up International Sports Governance, *SOCCER & SOC'Y* 1, 2 (2015) (suggesting GOAL fund distribution should be entrusted to an independent organization such as a foundation).

159. 2016 FIFA REFORM COMMITTEE REPORT, *supra* note 154, at 5.

160. BRIAN R. CHEFFINS, *COMPANY LAW: THEORY, STRUCTURE, AND OPERATION* 623 (1997).

161. *Id.* at 619. See generally, e.g., Benedicte Millet-Reyes & Richard Zhao, *A Comparison Between One-Tier and Two-Tier Board Structures in France*, 21 *J. INT'L FIN. MGMT. & ACCT.* 279 (2010) (finding that French blockholders often misused the two-tier structure); Dieter Fockenbrock, *The Flaws of Germany's Corporate Board System*, *HANDELSBLATT TODAY* (May 28, 2018), <https://www.handelsblatt.com/today/companies/of-laymen-and-lemmings-the-flaws-of-germanys-corporate-board-system/23582266.html> [<https://perma.cc/YLM8-EUHP>] (archived Mar. 13, 2019) (describing scandals at a number of German companies).

replace Blatter.<sup>162</sup> Integrity checks are a standard process in the business world and they were recommended by the Independent Governance Commission in 2012, but they were nonetheless resisted in the past.<sup>163</sup> To further ensure that FIFA Council members would not become entrenched and thereby tempted to corruption, FIFA also enacted term limits.<sup>164</sup> The FIFA president and each FIFA council member (other than *ex officio* members) would be limited to three terms of four years each (whether consecutive or not), for a maximum of twelve years.<sup>165</sup> Although not draconian, these kinds of term limits had been hotly contested during the reform process and, indeed, had been rejected in past reform movements,<sup>166</sup> so this was hailed as a significant step.

A third category of reform was to increase transparency and outside auditing. Most controversially, this included publication of compensation figures for top executives.<sup>167</sup> Blatter had always resisted calls to make public his compensation, protesting that it “risked embarrassing and upsetting his allies on the FIFA board whose pay is also secret.”<sup>168</sup> In the 2016 reform, however, the FIFA Congress approved the annual disclosure of the individual compensation of the president, all FIFA council members, the secretary-general, and chairpersons of all the independent standing and judicial committees such as Ethics and Audit and Compliance.<sup>169</sup> Soon after, FIFA revealed

---

162. See 2016 FIFA REFORM COMMITTEE REPORT, *supra* note 154, at 7–8 (noting implementation of this reform began even before the Task Force Reform Report was released); Martyn Ziegler, *FIFA ethics committee to carry out ‘integrity checks’ on presidential candidates*, DAILY MAIL (Sept. 10, 2015), <https://www.dailymail.co.uk/sport/football/article-3229512/FIFA-ethics-committee-carry-integrity-checks-presidential-candidates.html> [https://perma.cc/4NBR-GT6M] (archived Jan. 27, 2019) (describing the intent of the Ethics Committee to use integrity checks for the presidential election).

163. Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 218; see *FIFA congress to debate age limits*, ESPN (Apr. 29, 2013), <http://www.espn.com/espn/wire?id=9224088> [https://perma.cc/XTC4-XVUK] (archived Jan. 20, 2019) (“The advisory panel, chaired by Swiss law professor Mark Pieth, has repeatedly been rebuffed by FIFA in requests for . . . authorization for an independent group to perform integrity checks on senior soccer officials.”).

164. 2016 FIFA REFORM COMMITTEE REPORT, *supra* note 154, at 7.

165. *Id.*

166. Tariq Panja, *Soccer Officials Reject Term Limits for FIFA Executive*, BLOOMBERG (June 11, 2014), <http://www.bloomberg.com/news/articles/2014-06-11/soccer-officials-reject-term-limits-for-fifa-executive> [https://perma.cc/R6JK-NDXK] (archived Jan. 20, 2019); Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 216; see Bayle, *supra* note 158, at 2 (proposing two eight-year terms as the maximum).

167. See generally 2016 FIFA REFORM COMMITTEE REPORT, *supra* note 154.

168. John Leicester, *Last big test for Sepp Blatter is whether he can lift lid on the secret of how much he is paid*, U.S. NEWS & WORLD REPORT (July 10, 2015), <http://www.usnews.com/news/world/articles/2015/07/10/lifting-the-lid-on-one-of-fifas-big-secrets-executive-pay> [https://perma.cc/TRC3-ZTCQ] (archived Jan. 20, 2019).

169. See 2016 REFORM COMMITTEE REPORT, *supra* note 154, at 17–19.

that Blatter had been paid £2.6 million in 2015,<sup>170</sup> although given the revelations of under-the-table payments in the DOJ indictments, it's hard to know how seriously to trust such figures even if verified by audited financial statements. In fact, internal investigations subsequently revealed that the disclosed salary figures failed to include almost 80 million Swiss francs that Blatter and other top officials paid themselves as bonuses and other incentive payments.<sup>171</sup>

### III. THE SEARCH FOR ACCOUNTABILITY

While testifying before the U.S. Senate Commerce Subcommittee on Consumer Protection, Product Safety, Insurance and Data Security in hearings held over the FIFA corruption scandal, Michael Hershman noted that FIFA, with income in the billions of dollars, “should be treated like what it is: a major corporation.”<sup>172</sup> Given the reforms FIFA has adopted, Hershman’s statement appears to mean that FIFA should be subject to the same kind of corporate governance measures to which major public corporations are subject. One of the most prominent of those US-style corporate governance measures that FIFA reformers have sought to mimic is the use of outside or independent directors. The problem is that, even in the US public-corporation context, it is not clear that the move to require independent directors has been successful in reducing fraud and corruption. For FIFA, the obstacles are actually greater.

#### A. Independent Directors in the United States

The prominence of independent directors is a relatively new development in American corporations. During the 1930s, about half of all directors of a typical board of directors of a public corporation were insiders, and many of the rest were at least affiliated with the company, occupying positions such as chief outside counsel at the company’s law firm.<sup>173</sup> This remained true in the 1950s.<sup>174</sup> One study

---

170. David Conn, *Fifa reveals former president Sepp Blatter’s salary was £2.6m*, THE GUARDIAN (Mar. 17, 2016), <https://www.theguardian.com/football/2016/mar/17/sepp-blatter-fifa-president-annual-salary> [<https://perma.cc/4GLG-V73C>] (archived Jan. 20, 2019).

171. Joshua Robinson & Matthew Futterman, *Top FIFA Officials Allegedly Paid Each Other \$80 Million*, WALL ST. J. (June 3, 2016), <http://www.wsj.com/articles/three-top-fifa-officials-shared-80-million-in-five-years-investigators-say-1464959109> [<https://perma.cc/KQ3M-KVHP>] (archived Jan. 20, 2019).

172. PAPPENFUSS & THOMPSON, *supra* note 11, at 189 (quoting Michael Hershman).

173. See Steven A. Bank et al., *Executive Pay: What Worked?*, 42 J. CORP. L. 59, 81–82 (2016); see also ROBERT A. GORDON, BUSINESS LEADERSHIP IN THE LARGE CORPORATION 122 (1945) (with twenty-five selected large industrial corporations, 191 of the 372 directors were officers).

174. See Gordon *Rise*, *supra* note 20, at 1468 (“Circa 1950 [it was] . . . a normative and positive matter . . . that boards should consist of the firm’s senior officers . . .”);

of the rise of independent directors over time concluded that in the 1950s it was still commonly understood “that boards should consist of the firm’s senior officers, some outsiders with deep connections with the firm . . . and a few directors who were nominally independent but handpicked by the CEO.”<sup>175</sup>

In the latter half of the twentieth century, the tide turned for independent directors. Through a combination of court decisions, shareholder activism, and regulatory activity, a growing number of corporations started appointing directors who were more than just nominally independent. By the middle of the 1970s, the percentage of inside or affiliated directors in large public corporations began to fall precipitously and the percentage of independent directors rose steadily.<sup>176</sup> In 2005, only 15 percent of directors in large public companies were executives of the same firm and only an additional 11 percent were considered affiliated.<sup>177</sup> A full 74 percent of the directors were considered independent.<sup>178</sup> Moreover, according to a Conference Board survey in 2006, 30 percent of the companies were led by an outsider serving as chairman of the board, while an additional 48 percent had an independent director in a leadership position.<sup>179</sup>

After the passage of the Sarbanes-Oxley Act in 2002, the use of independent directors increased even further. Although the act did not require independent directors, it enacted standards for audit committees and for exchanges that spurred reforms.<sup>180</sup> As a result of the act, all three major exchanges—the New York Stock Exchange, the American Stock Exchange, and NASDAQ—adopted rules requiring that a majority of the members of a firm’s board of directors be independent.<sup>181</sup> By 2013, 85 percent of directors in US public corporations were independent, and in 60 percent of public corporations the only nonindependent director on the board was the chief executive officer.<sup>182</sup>

---

Kenneth M. Lehn, Sukesh Patro & Mengxin Zhao, *Determinants of the Size and Composition of US Corporate Boards: 1935–2000*, 38 FIN. MGMT. 747, 758 (2009).

175. Gordon *Rise*, *supra* note 20, at 1468; see Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. L. 921, 924, 933 (1999) (“In the 1960s most [large U.S. corporations] had a majority of inside directors”).

176. Gordon *Rise*, *supra* note 20, at 1565; see Baum, *supra* note 19, at 2 (“[T]he concept of independent directors and the related model of a ‘monitoring board of directors’ originated in the US in the 1970s and underwent some modifications thereafter.”).

177. Gordon *Rise*, *supra* note 20, at 1565.

178. *Id.*

179. BAINBRIDGE CORPORATION, *supra* note 19, at 188.

180. *Id.* at 177.

181. *Id.* The New York Stock Exchange had previously adopted a requirement that all listed companies have independent directors on the audit committee. Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73, 87 (2007).

182. Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 857 (2014); Baum, *supra* note 19, at 2.

In theory, this move to independent directors reduces the threat of managerial expropriation and thereby improves the performance of a firm,<sup>183</sup> but the data in support of that proposition is mixed. While some studies have found that the presence of independent directors improves performance and reduces the risk of fraud,<sup>184</sup> others find no such connection or even find a negative relationship.<sup>185</sup> As Harald Baum observed, “in spite of (i) much faith and fortune in the West, and more recently in Asia, being placed on board independence and (ii) the corresponding enthusiasm of policy makers to promote or enforce it, the empirical support for staffing boards with independent directors remains surprisingly shaky.”<sup>186</sup>

One problem with independent directors is that although they may start out independent,<sup>187</sup> they can quickly be co-opted. This can occur via the social norms that inhibit criticism generally, which are only increased when outside directors are required to interact more with executives in order to acquire the information necessary to make decisions.<sup>188</sup> As Leo Strine, current Delaware Supreme Court Justice and former Vice Chancellor of the Delaware Court of Chancery,

---

183. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 315 (1983).

184. See Mark S. Beasley, *An Empirical Analysis of the Relation Between the Board of Director Composition and Financial Statement Fraud*, 71 ACCT. REV. 443, 463 (1996) (finding that financial fraud is lower in firms with a higher percentage of outside directors); Christopher Chen et al., *Board Independence as Panacea to Tunneling? An Empirical Study of Related Party Transactions in Hong Kong and Singapore*, 15 J. EMPIRICAL LEGAL STUD. 987, 1018 (2018) (finding higher board independence correlated with lower incidence of tunneling in Hong Kong and Singapore between 2009 and 2015); Gongmeng Chen, et al., *Ownership Structure, Corporate Governance, and Fraud: Evidence from China*, 12 J. CORP. FIN. 424, 446 (2006) (finding, in a study of Chinese corporations, that outside directors help deter fraud); Eric Helland & Michael Sykuta, *Who's Monitoring the Monitor? Do Outside Directors Protect Shareholders' Interests?*, 40 FIN. REV. 155, 171 (2005) (finding that boards with a higher percentage of inside directors are more likely to face shareholder litigation).

185. See Bhagat & Black, *supra* note 175; Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 263 (2002); see also Shams Pathan & Robert Faff, *Does Board Structure in Banks Really Affect Their Performance?*, 37 J. BANKING & FIN. 1573, 1575–76, 1581 (2013) (finding that banks with a higher percentage of independent directors performed worse); David Finegold et al., *Corporate Boards and Company Performance: Review of Research in Light of Recent Reforms*, 15 CORP. GOVERNANCE: INT'L REV. 865, 867 (2007) (“The many empirical studies that have examined the impact of the insider-outsider ratio on boards have found no consistent evidence to suggest that increasing the percentage of outsiders on the board will enhance performance. If anything, they suggest that pushing too far to remove inside and affiliated directors may harm firm performance by depriving boards of the valuable firm and industry-specific knowledge they provide.”).

186. Baum, *supra* note 19, at 31.

187. Even that is not always clear. See, e.g., Kathleen Boozang, *Does an Independent Board Improve Nonprofit Corporate Governance?*, 75 TENN. L. REV. 83, 90 (2007) (noting that the New York Stock Exchange’s board was technically independent when Richard Grasso resigned in 2003 amid a scandal over his pay, but many directors were Grasso’s friends).

188. Jonathan H. Gabriel, Note, *Misdirected? Potential Issues with Reliance on Independent Directors for Prevention of Corporate Fraud*, 38 SUFFOLK U. L. REV. 641, 653 (2005).

explained, “our law also cannot assume—absent some proof of the point—that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk.”<sup>189</sup>

Outside directors can also be co-opted to participate in the corruption itself. For instance, a study of executive and director compensation found that “outside directors were involved as much if not more so than the executives in compensation manipulation games.”<sup>190</sup> Although director compensation may only be a mere fraction of the compensation that outside directors receive from their full-time employment or other positions, they still would prefer to receive more rather than less and this creates a conflict of interest.<sup>191</sup> As a result, outside directors are less likely to complain when a general mechanism—such as backdating option grants—applies to them as well as to the senior executives. As the study concluded, “independent directors . . . are not necessarily immune from temptations of financial fraud.”<sup>192</sup>

Further hindering their effectiveness, independent directors face disincentives to investigate corruption and fraud. Acting as a watchdog against fraud may hurt an independent director’s future career prospects.<sup>193</sup> Outside directors of firms that have been accused of financial fraud are less likely to secure outside directorships at other firms, with one study finding that these outsiders suffer a 50 percent reduction in the number of their directorships and, for those who already serve on multiple boards, 96 percent lost at least one directorship within three years of the lawsuit.<sup>194</sup> Outside directors may also be concerned about personal liability,<sup>195</sup> which paradoxically may cause them either to resign when they see signs of fraud or ignore them rather than probe deeper.<sup>196</sup> Given that outside directors already lack the time, knowledge, and incentives to keep managers in line, it is hard

189. *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003).

190. S. Burcu Avci et al., *Do Independent Directors Curb Financial Fraud: The Evidence and Proposals for Further Reform*, 93 IND. L.J. 757, 800 (2018).

191. See, e.g., Faith Stelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud and September 11, 2001*, 76 TUL. L. REV. 1579, 1606–07 (2002) (describing Enron’s substantial director compensation packages as a source of conflict).

192. Avci, *supra* note 190, at 2.

193. Curtis & Hopkins, *supra* note 21, at 1–2; see Baum, *supra* note 19, at 32 (“In general, however, there seem to be negative incentives for independent directors when it comes to encouraging companies to investigate possible misbehavior.”).

194. Eliezer M. Fich & Anil Shivdasani, *Financial Fraud, Director Reputation, and Shareholder Wealth*, 86 J. FIN. ECON. 306, 307 (2007).

195. This may be true even though outside directors face little risk of true “out-of-pocket” liability. Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1059 (2006).

196. Rüdiger Fahlenbrach et al., *The Dark Side of Outside Directors: Do They Quit When They are Most Needed?* (22 Nat’l Bureau of Econ. Research, Working Paper No. 15917, 2010).

to expect them take much personal risk to do so.<sup>197</sup> Indeed, Urska Velikonja has argued that institutional investors understand that independent directors are ineffective in reducing fraud or improving performance, but have pushed for them in order to forestall more substantive corporate governance reforms that might interfere with their own expropriation.<sup>198</sup>

### B. *Obstacles to FIFA's Reliance upon the Independent Director Model*

Even if the benefits of independent directors for US public corporations outweigh the costs, it is not clear that the analogous move to more outsiders in FIFA will offer the same benefits. As Francois Carrard, the chair of the FIFA Reform Task Force, noted, “[w]e have to be very careful and refrain from over-simplistic, Western ideas about corporate governance.”<sup>199</sup> Although FIFA’s annual revenues might make it appear to be like a major US public corporation, its governance structure differs in important respects.

Most notably, FIFA is a nonprofit corporation. Nonprofits have the same board structure as for-profit corporations,<sup>200</sup> but they lack the legal accountability that at least theoretically comes from shareholders that select a public corporation’s board of directors.<sup>201</sup> Even apart from the lack of legal accountability, nonprofit boards lack any real accountability as well. Theoretically, they could be guided principally by various stakeholder groups such as donors, clients, staff, or the communities interested in the services they provide.<sup>202</sup> In practice, however, those groups have differing and often competing goals, freeing the board of any kind of clear metric by which the organization’s performance could be measured.<sup>203</sup> Some states do require that nonprofit corporate boards utilize directors independent of management to one degree or another,<sup>204</sup> but when the American Bar Association considered such a requirement in its Revised Model Nonprofit Corporation Act in 1987, it made it optional instead, noting that many members “felt that its provisions would be ineffective in

---

197. Gabriel, *supra* note 188, at 646.

198. Velikonja, *supra* note 182, at 915–16.

199. PAPENFUSS & THOMPSON, *supra* note 11, at 209.

200. Lumen N. Mulligan, *What's Good for the Goose is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICH. L. REV. 1981, 1984 (2007).

201. George W. Dent, Jr., *Corporate Governance Without Shareholders: A Cautionary Lesson from Non-Profit Organizations*, 39 DEL. J. CORP. L. 93, 96 (2014). *But see* Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y. L. SCH. REV. 457, 460–61 (1996) (suggesting that nonprofits are more similar to for-profits than different with donors able to exercise “voice” and “exit” rights similar to shareholders).

202. Brody, *Agents Without Principals*, *supra* note 201, at 461.

203. Mulligan, *supra* note 200, at 1986.

204. Evelyn Brody, *The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice*, 76 FORDHAM L. REV. 521, 530 (2007) [hereinafter Brody, *Board*].



preventing intentional abuses, while presenting a burdensome or inconvenient requirement.”<sup>205</sup>

One might protest that FIFA is distinguishable from the average public charity. In some respects, it resembles a mutual benefit or membership organization. These are voluntary associations organized exclusively for the benefit of their members, which in this case would be the national federations that make up the FIFA Congress and the regional confederations that are represented in the FIFA Council.<sup>206</sup> In some cases, statutes governing nonprofits in the United States consider members to be a form of “shareholder-substitutes” for governance purposes.<sup>207</sup>

Even here, however, FIFA can only at best claim to be a hybrid of the mutual benefit organization. Each national football association does have a vote on the president and certain other matters sent to the FIFA Congress, but they do not vote on the composition of the FIFA Council, or FIFA’s equivalent of the board of directors, per se. They only have indirect input on board composition through their voting membership in their respective regional confederations, but they have no say on the board members submitted by other confederations.<sup>208</sup> As Alan Tomlinson observed, the “Congress has done little of serious substance beyond the acclamation or election of the presiden[cy] every four years.”<sup>209</sup> Although the FIFA Congress has since been delegated the important task of voting for the World Cup hosts and approving the members of the Audit and Compliance, Governance, and Ethics Committees submitted by the council,<sup>210</sup> Tomlinson’s statement largely continues to be true given the power of the council and the regional confederations.

Perhaps more importantly in distinguishing between FIFA and for-profit corporations is that FIFA is not subject to what corporate governance experts refer to as a “proportional sharing” requirement.<sup>211</sup> In for-profit corporations, the board may not discriminate between individual shareholders in making distributions.<sup>212</sup> Rather, distributions of profits to shareholders holding the same class of stock must be in proportion to the shareholders’ investments in the

205. REVISED MODEL NONPROFIT CORP. ACT § 8.13 cmt. (1987). Independent directors were similarly urged in connection with the drafting of the Third edition of the Model Nonprofit Corporation Act in 2007 and in other best practices guides. Boozang, *supra* note 187, at 83–84.

206. See Ira Mark Ellman, *On Developing a Law of Nonprofit Corporations*, 1979 ARIZ. ST. L.J. 153, 154 (1979) (distinguishing mutual benefit corporations from public benefit corporations).

207. Brody, *Board*, *supra* note 204, at 555–56.

208. 2016 FIFA REFORM COMMITTEE REPORT, *supra* note 154, at 7.

209. TOMLINSON, *supra* note 44, at 30.

210. 2016 FIFA REFORM COMMITTEE REPORT, *supra* note 154, at 38.

211. Michael C. Jensen & William H. Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 52 J. BUS. 469, 494 (1979).

212. *Id.*

corporation.<sup>213</sup> Given the absence of any nonpecuniary benefits that they might allocate to individual shareholders, this “severely restricts the opportunities for any individual shareholder or group of shareholders to reallocate wealth away from other shareholders to themselves.”<sup>214</sup> As a result, shareholders in a for-profit corporation, at least to the extent that they aren’t blockholders with majority control, are more likely to vote for what is in the best interests of the corporation because that will also produce the greatest benefit for themselves.

FIFA is a nonprofit corporation and therefore does not distribute profits to investors, *per se*,<sup>215</sup> but it does have benefits to distribute as it sees fit. It provides hosting rights to individual nations for FIFA competitions such as the World Cup, and it has development funds that it hands out to allow national football associations to pursue individual projects.<sup>216</sup> Since it is not subject to a proportional sharing constraint, though, it can treat national association members differently from each other. That means that the voting decisions of those member associations can be influenced by individual promises and benefits rather than by their assessment of what is best for the organization as a whole. Indeed, corruption may be in the best interest of the members if the managers participating in the illegal activity still bring them the desired result. That severely limits the extent to which member nations can serve as shareholder substitutes for purposes of overseeing outsiders named to the FIFA Council.

#### IV. HARNESSING THE POWER OF INSIDERS

The move to appoint outsiders to key positions at FIFA in order to reform the organization is ironic considering that most of the key information that led to the fall of the House of FIFA came from insiders. Even the key outside groups pressuring FIFA to reform—the U.S. Department of Justice and the media—relied primarily on insider informants to make their case.<sup>217</sup> In this sense, insiders have been more powerful agents to forcibly change the culture of corruption than the outsiders that supposedly have been brought into FIFA for the same purpose.

The role of insiders in bringing about change in FIFA suggests that rather than focusing on bringing in more outsiders to oversee FIFA, reformers should find ways to better encourage “whistleblowers,” or insiders who “blow the whistle” on wrongdoers in

---

213. *Id.*

214. *Id.*

215. TOMLINSON, *supra* note 44, at 29.

216. *See id.* at 108–11, 121–25 (describing competitions and development programs, such as the Goal Project and the Football for Hope Initiative).

217. *See infra* text accompanying notes 296–312.

their organization.<sup>218</sup> Although whistleblowing programs are not without their problems and would require customization for the FIFA environment, they may hold more promise for effecting radical change than the current approach of relying upon outsiders as a magic reform bullet.

#### A. Whistleblowers

In recent years, whistleblowers have been one of the most effective tools in the fight against corporate fraud and corruption.<sup>219</sup> According to one study of the 216 reported instances of fraud in large public corporations in America between 1996 and 2004, 17 percent of the cases were uncovered as a result of reports by employee whistleblowers—more than any other source of information such as the SEC, accountants, financial regulators, or the media.<sup>220</sup> On a global basis, the evidence is even stronger for the power of employee whistleblowers. The Association of Certified Fraud Examiners examined fraud cases in over twenty countries and found that over 51 percent of them were reported by employees.<sup>221</sup> Similarly, the global accounting firm KPMG performed an analysis of 456 instances of fraud in organizations located in Europe, the Middle East, and Africa, and found that whistleblowers and nonemployee tipsters (such as suppliers and customers) were responsible for detection 52 percent of the time, with internal audits being “much less important.”<sup>222</sup> As business ethicist Muel Kaptein concluded, “[e]mployees are a critical, increasingly important source for detecting wrongdoing.”<sup>223</sup>

218. Klaus Ulrich Schmolke & Verena Utikal, *Whistleblowing Incentives and Situational Determinants 2* (FAU Discussion Papers in Econ. No. 09/2016, 2016).

219. See SIMON WOLFE ET AL., BLUEPRINT FOR FREE SPEECH, WHISTLEBLOWER PROTECTION LAWS IN G20 COUNTRIES: PRIORITIES FOR ACTION 10 (2014) (“Whistleblowing is now considered to be among the most effective, if not the most effective means to expose and remedy corruption, fraud and other types of wrongdoing in the public and private sectors.”); Olivia Dixon, *Honesty Without Fear? Whistleblower Anti-Retaliation Protections in Corporate Codes of Conduct*, 40 MELBOURNE UNIV. L. REV. 168, 169 (2016) (“Over the past decade whistleblowers have emerged as an integral component of corporate governance through the monitoring and control of agency costs in large public companies.”).

220. Dyck et al., *supra* note 60, at 2225; see Jane Norberg, Keynote Address, *What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank*, 23 FORDHAM J. CORP. & FIN. L. 379, 390 (2018) (stating in 2016, sixty-five percent of individuals receiving awards under the SEC’s whistleblower program were insiders of the corporation about which they were providing information).

221. See ASS’N OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE 26 (2016) (finding that, in a survey of over forty thousand certified fraud examiners around the world, employees provided 51.5 percent of all tips, which is the most common means by which fraud is uncovered).

222. KPMG, GLOBAL PROFILES OF THE FRAUDSTER 14 (2016), <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/05/profiles-of-the-fraudster.pdf> [<https://perma.cc/YB8C-BS8Z>] (archived Feb. 4, 2019).

223. Muel Kaptein, *From Inaction to External Whistleblowing: The Influence of the Ethical Culture of Organizations on Employee Responses to Observed Wrongdoing*, 98 J. BUS. ETHICS 513, 513 (2011).

There are a variety of reasons insiders have become so critical to the success of any corporate governance reform. Perhaps the most important is that insiders have better access to information than outsiders.<sup>224</sup> They have spent years in the environment and are aware of the techniques being used to facilitate the fraud or corruption. As Alexander Dyck, Adair Morse, and Luigi Zingales observed, employees “gather a lot of relevant information as a byproduct of their normal work . . . and are in a much better position to identify fraud than short sellers, security regulators, or lawyers, for whom detecting fraud is like looking for a needle in a haystack.”<sup>225</sup> Consequently, they are the most likely to be aware that it is taking place.<sup>226</sup> Dyck and his colleagues found that “having access to inside information rather than relying solely on public information increases an actor’s probability of detecting fraud by 15 percentage points.”<sup>227</sup> Not surprisingly, employees are often in possession of information about wrongdoing in an organization. According to the 2013 National Business Ethics Survey, 41 percent of employees observed misconduct on the job in their company during the previous year, and that number has been as high as 55 percent in 2007 when many American companies had yet to get serious about ethics compliance.<sup>228</sup> Jane Norberg, the Chief of the Office of the Whistleblower in the SEC’s Division of Enforcement, described corporate insiders as “an extremely valuable category of whistleblower” noting that “approximately sixty-five percent of award recipients [in the SEC award program] were insiders of the entity about which they reported.”<sup>229</sup> Norberg explained that “this is because they often have firsthand knowledge of wrongdoing and can help propel an investigation with their evidence and insights.”<sup>230</sup>

By contrast, outsiders “must rely upon information they receive from corporate executives to fulfill their monitoring function.”<sup>231</sup> This naturally limits their ability to detect fraud. Moreover, these same corporate executives have an interest in presenting the corporation in the best light when conveying it to the outsiders, which can intentionally or unintentionally conceal any possible fraud. As Professor Richard Moberly observed, “[e]ven under the best circumstances, this information is certain to be incomplete and self-

---

224. Richard E. Moberly, *Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1116 (2006) [hereinafter Moberly, *Sarbanes-Oxley’s Structural Model*].

225. Dyck et al., *supra* note 60, at 2214.

226. See Gladys Lee & Neil Fargher, *Companies’ Use of Whistle-Blowing to Detect Fraud: An Examination of Corporate Whistle-Blowing Policies*, 114 J. BUS. ETHICS 283, 283 (2013).

227. Dyck et al., *supra* note 60, at 2215.

228. ETHICS RESOURCE CENTER, NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 12–13 (2013), <https://www.ibe.org.uk/userassets/surveys/nbes2013.pdf> [<https://perma.cc/E9N4-ZMMZ>] (archived Jan. 19, 2019).

229. Norberg, *supra* note 220, at 390.

230. *Id.*

231. Moberly, *Sarbanes-Oxley’s Structural Model*, *supra* note 224, at 1114.

serving due to information blocking and filtering by executives and subordinate managers.”<sup>232</sup> Of course, if the executives are participating in the fraud themselves, then they “may affirmatively hide or misrepresent information in order to evade a monitor’s oversight.”<sup>233</sup>

In theory, insiders also have a greater incentive than outsiders to “blow the whistle” on wrongdoers than pure outsiders. Insiders are often invested in a company both in terms of the time spent at the company and in terms of the emotional investment in the people at the company. If fraud or corruption is allowed to fester, they suffer disproportionately compared to outsiders, who may only serve part-time as directors in the company. Moreover, in the case of “true believers,” or employees who work in the organization or the profession because of its unique mission, corporate fraud may be seen as a threat to that mission and lead them to blow the whistle.<sup>234</sup> This may be the case in the for-profit world as well. One case study that surveyed the attitudes of employees of a financial institution in Ireland toward five scenarios of misconduct found that where employees indicated a willingness to blow the whistle, it was out of “a sense of responsibility to their organisation and their customers . . . rather than any hope of personal gain via promotion or peer respect.”<sup>235</sup> Siddhartha Dasgupta and Ankit Kesharwani describe this as “rational loyalty,” not so much to the “top management and employees of an organization but towards the mission statement, goals, value statements and codes of conduct of the organization.”<sup>236</sup> Alternatively, whistleblowers may feel uniquely guilty about standing by while in possession of evidence of the fraud. Whistleblowing in this situation operates as a form of “conscience

---

232. *Id.*; see Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313, 1350 (2005) (“[T]he independent board is reliant upon the CEO for information with respect to his own performance, information that can easily be manipulated or suppressed by the CEO because of his position as the sole source of information.”).

233. Moberly, *Sarbanes-Oxley’s Structural Model*, *supra* note 224, at 1115.

234. See, e.g., MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* 70 (1989) (describing the “ethical resisters” who, “[w]hen asked to subordinate [their] values to meet the requirements of the bureaucracy . . . conjure . . . up a ‘red line,’ a point they could not cross.”); Dasgupta & Kesharwani, *supra* note 59, at 6 (discussing the “altruistic concerns,” including “the desire to correct the wrongdoing which is harming the interests of the organization itself, the consumers, the co-workers and the society at large,” that motivate whistleblowers).

235. Conor Buckley et al., *Empirical Evidence of Lack of Significant Support for Whistleblowing*, 7 CORP. OWNERSHIP & CONTROL 275, 281 (2010).

236. Dasgupta & Kesharwani, *supra* note 59, at 6; see Symposium, *What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank*, 23 FORDHAM J. CORP. & FIN. L. 379, 414 (2018) [hereinafter Symposium] (noting that whistleblowers are often “very loyal employees who are extremely concerned about wrongdoing going on in the workplace and want to alert upper management to those concerns”).

cleansing” for an insider who feels complicit in the wrongdoing by virtue of his or her employment.<sup>237</sup>

The risk in relying upon insiders to report misconduct is that they may be motivated by a personal grudge. In other words, they might be “unhappy for reasons unconnected with the firms planned noncompliance with the regulation, but opportunistic in blowing the whistle when so doing creates sufficiently substantial discomfort (cost) for their employer.”<sup>238</sup> They are “punishment motivated” in this scenario, either against their supervisor or the company as a whole.<sup>239</sup> The concern is that this reduces the credibility of the evidence provided by the whistleblower. Studies, however, suggest that this concern may be overblown, finding that, given the personal costs involved, whistleblowing is rarely undertaken in a way that is “frivolous, misleading, or unreliable.”<sup>240</sup>

### B. Disincentives to Whistleblowing

Paradoxically, notwithstanding the benefit whistleblowers provide to an organization, its managers often are hostile to them. According to one report of whistleblowing in the G20 countries, “government and corporate employees who report wrongdoing to their managers or to regulators can face dismissal, harassment and other forms of retribution.”<sup>241</sup> Even if they are not fired outright, their credibility is attacked, they receive poor evaluations and are denied promotions, they are threatened with termination, they are isolated or humiliated, they are assigned burdensome extra work, or they are threatened with prosecution for stealing company documents or sensitive information.<sup>242</sup> The Dyck study found that in 82 percent of those cases involving nonanonymous employee whistleblowers the employee reported that they were “fired, quit under duress, or had significantly altered responsibilities as a result of bringing the fraud to light.”<sup>243</sup> Whistleblowers who are fired or driven from their jobs are

237. Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistle-Blower*, 25 J.L. ECON. & ORG. 157, 158 (2009); see C. Fred Alford, *Whistleblowers and the Narrative of Ethics*, 32 J. SOC. PHIL. 402, 405 (2001) (saying whistleblowers reported that they acted “because I couldn’t live with myself if I hadn’t done anything . . . I have to look at myself in the mirror every morning[.]”).

238. Heyes & Kapur, *supra* note 237, at 166.

239. *Id.*; see Jonathan R. Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1907 (2007).

240. Robert M. Bowen et al., *Whistle Blowing: Target Firm Characteristics and Economic Consequences*, 85 ACCT. REV. 1239, 1242 (2010). The general view is that all claims should be investigated, rather than discounting ex ante because of concerns about the reporter’s motivation, and if some claims are baseless, that is simply “the price we have to pay internally in corporations in order to get that one in however many merit-based claims.” Symposium, *supra* note 236, at 427.

241. WOLFE ET AL., *supra* note 219, at 1.

242. Dasgupta & Kesharwani, *supra* note 59, at 8.

243. Dyck et al., *supra* note 60, at 2216. In one example of a significantly altered job assignment, a scientist in the U.S. Interior Department claimed that he was

often blacklisted from ever working again in the same field or industry.<sup>244</sup> Adding insult to injury, executives also manage to suppress or disregard whistleblower reports,<sup>245</sup> resulting in the whistleblower suffering immense personal cost for no tangible benefit in revealing fraud and misconduct.

Why have employers traditionally been hostile to whistleblowers despite evidence that illegal acts and misconduct are typically correlated with declining performance by the firm?<sup>246</sup> To put it differently, if whistleblowing is potentially good for companies, why aren't companies more supportive of whistleblowers? The typical explanation is that whistleblowers are perceived to be disloyal to the organization.<sup>247</sup> As one study reported, "[a]lthough technically holding the moral high ground, whistleblowers have traditionally been regarded as spies in the camp, demonstrating disloyalty to the very organisations that have given them employment."<sup>248</sup> More than simple disloyalty, the act of whistleblowing is seen as a challenge to the organization itself. It "represents a challenge to the organization's authority structure and therefore threatens its basic mode of operation."<sup>249</sup> As Myron and Penina Glazer found after interviewing sixty-four whistleblowers over a six-year period, "[f]rom their superiors' perspective, the resisters had not uncovered serious breaches of policy but had rather involved themselves in actions against the very bureaucratic hierarchy that had hired them and provided good salaries and accoutrements of a respected position."<sup>250</sup> In effect, from management's perspective, the whistleblower is

---

reassigned to an accounting job as retaliation for speaking out about the dangers of climate change for Alaska native communities. Joel Clement, *I'm a scientist. I'm blowing the whistle on the Trump administration*, WASH. POST (July 19, 2017). [https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83\\_story.html?tid=ss\\_tw-bottom&utm\\_term=.df90dd0edc6a](https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83_story.html?tid=ss_tw-bottom&utm_term=.df90dd0edc6a). [https://perma.cc/6L52-MARW] (archived Jan. 19, 2019).

244. See Alford, *supra* note 237, at 403 (in interviews with a dozen whistleblowers over a year, "all but one lost not just his or her job, but his or her career."); Rapp, *supra* note 62, at 114 (reporting that sixty-four percent of whistleblowers in one study claimed to have been blacklisted by other employers in their fields).

245. Moberly, *Sarbanes-Oxley's Structural Model*, *supra* note 224, at 1121.

246. Near & Miceli, *Organizational Dissidence*, *supra* note 59, at 1. Some suggest that the traditional view of employers is starting to change and their perception of whistleblowers has begun to improve. Buckley et al., *supra* note 235, at 277.

247. See, e.g., Dasgupta & Kesharwani, *supra* note 59, at 5 ("[W]histleblowing has been seen as an action against the interests of the organization. Whistleblowers face sanctions from the organization as well as their colleagues for their act as, [sic] it is seen to be disloyal towards the organization."); Rapp, *supra* note 62, at 115 ("[W]histleblowing is often equated with disloyal 'snitching.'").

248. Buckley et al., *supra* note 235, at 275.

249. Near & Miceli, *Organizational Dissidence*, *supra* note 59, at 4.

250. GLAZER & GLAZER, *supra* note 234, at 133.

breaching the duties of “organizational citizenship,” which consist of being obedient, loyal, and participatory in the organization.<sup>251</sup>

Another part of the impulse to retaliate is to discredit the whistleblower as a potential witness. The Glazers observed that “[w]hile it may seem to take the form of personal revenge by superiors, retaliation is, in fact, part of a rational and planned process initiated by an organization to destroy the resister’s credibility as a witness.”<sup>252</sup> To accomplish this, “management often invokes such harsh measures as blacklisting, dismissal, transfer, and personal harassment, which far exceed the ostensible provocation.”<sup>253</sup> Companies claim that whistleblowers have “mental health or addiction issues,” further damaging their credibility.<sup>254</sup>

Regardless of why it occurs, the bottom line is that retaliation imposes a direct cost to an employee whistleblower, while the benefits from reporting the misconduct are indirect and primarily benefit the organization or society rather than the whistleblower.<sup>255</sup> Thus, it is not surprising that the costs provide a strong deterrent for employees thinking about becoming whistleblowers. Studies based on survey data have found that more than 40 percent of employees who saw misconduct in the workplace failed to report it.<sup>256</sup> This is particularly true for employees with less seniority or who are lower down in the organizational chart, who often refrain from reporting misconduct by those above them.<sup>257</sup> Professor Richard Moberly reported that in cases like Enron involving financial misconduct, “[c]ountless lower-level employees necessarily knew about, were exposed to, or were superficially involved in the wrongdoing and its concealment, but few disclosed it, either to company officials or to the public.”<sup>258</sup> Even for

251. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 437–38 (2009).

252. GLAZER & GLAZER, *supra* note 234, at 134.

253. *Id.*

254. Jayne O’Donnell, *Whistle-blowers form a breed apart*, USA TODAY (July 29, 2004), [http://usatoday30.usatoday.com/money/companies/management/2004-07-29-whistle-blower-main\\_x.htm](http://usatoday30.usatoday.com/money/companies/management/2004-07-29-whistle-blower-main_x.htm) [<https://perma.cc/7PND-UBGT>] (archived Jan. 20, 2019).

255. See Eileen Z. Taylor & Mary B. Curtis, *An Examination of the Layers of Workplace Influences in Ethical Judgments: Whistleblower Likelihood and Perseverance in Public Accounting*, 93 J. BUS. ETHICS 21, 22 (2010); see also Dixon, *supra* note 219, at 173 (“[W]hile society, shareholders and employees all benefit positively from such disclosure and face negligible downside risk, a whistleblower is often typecast as a snitch who ‘betrays a sacred trust largely for personal gain’ and faces a very real threat of retaliation.”) (internal citations omitted).

256. Buckley et al., *supra* note 235, at 278 (citing studies finding a 44 percent report rate for lower-level employees and a 47 percent report rate for employees generally); Jingyu Gao et al., *Whistleblowing Intentions of Lower-Level Employees: The Effect of Reporting Channel, Bystanders, and Wrongdoer Power Status*, 126 J. BUS. ETHICS 85, 88 (2015) (citing an Ethics Resource Center study that found a reporting rate of 42 percent).

257. Gao et al., *supra* note 256, at 86; Jessica R. Mesmer-Magnus & Chockalingam Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277, 285 (2005).

258. Moberly, *Sarbanes-Oxley’s Structural Model*, *supra* note 224, at 1108.



those employees who do have the courage to come forward, many report that “if I had to do it over again, I wouldn’t.”<sup>259</sup>

### C. Whistleblower Reforms

The question is how do authorities overcome the reticence of individuals to be whistleblowers? To facilitate whistleblowing, governments have typically resorted to one or both of two types of statutory or regulatory reforms. These include (1) protecting whistleblowers *ex post* from threats of retaliation from superiors in their companies; and (2) encouraging whistleblowing *ex ante* by creating an avenue, and even an affirmative duty, to report for those in possession of information relating to misconduct within the firm and/or offering incentives, such as “bounties.”<sup>260</sup>

#### 1. Anti-retaliation Protection

Laws have been used to protect whistleblowers in the United States since at least the Civil War, when President Lincoln pushed through the False Claims Act in 1863 to protect against fraud by government suppliers during the war.<sup>261</sup> Since then, Congress has adopted provisions protecting federal employees who reported waste or fraud in federal agencies under the Civil Service Reform Act of 1978 and its successor, the Whistleblower Protection Act of 1989.<sup>262</sup> Congress also adopted similar provisions protecting employees who reported misconduct involving public corporations under the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,<sup>263</sup> both of which were part of a spate of at least nine new federal anti-retaliation provisions enacted over the span of a decade.<sup>264</sup>

Despite their prevalence, and even necessity, anti-retaliation laws have not been considered highly effective at protecting whistleblowers. Indeed, in a study of whistleblower suits filed under Sarbanes-Oxley in the first three years after its passage, a mere 3.6 percent of employees won relief.<sup>265</sup> Moreover, at least one study found that retaliation actually increased after anti-retaliation laws were enacted,

---

259. Dyck et al., *supra* note 60, at 2216.

260. Moberly, *Sarbanes-Oxley’s Whistleblower Provisions*, *supra* note 62, at 10; Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1159–60 (2010).

261. ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS AND WHY 94–95 (2003); Goel & Nelson, *supra* note 60, at 2331.

262. JOHNSON, *supra* note 261, at 105; NEAR & MICELI, *Wrongdoing*, *supra* note 64, at 264; Goel & Nelson, *supra* note 60, at 2331.

263. Pope & Lee, *supra* note 60, at 597–98.

264. Moberly, *Sarbanes-Oxley’s Whistleblower Provisions*, *supra* note 62, at 12.

265. Moberly, *Unfulfilled Expectations*, *supra* note 62, at 67.

possibly because the likelihood of punishment was relatively slim.<sup>266</sup> Nevertheless, even the mere adoption of a whistleblowing program that protects against retaliation may have a salutary influence on an organization. Professor Olivia Dixon notes that whistleblower protection policies can be “expressive in character . . . [they] not only set a benchmark, causing some companies to alter or modify their behavior, but by diffusing norms, they positively influence organizational behavior and culture.”<sup>267</sup>

## 2. Facilitating and Encouraging Whistleblowing

If anti-retaliation protection provisions are the Version 1.0 of whistleblower reforms, measures to facilitate and incentivize whistleblowing are the Version 2.0 of such reforms. These include creating safe avenues to receive whistleblower reports, which is sometimes called the “structural model” of encouraging whistleblowing, and introducing incentives to file those reports, which is sometimes called the “bounty model.”<sup>268</sup> In both cases, the goal is to proactively seek out reports on misconduct rather than simply reduce the expected costs on the back end for those who do happen to come forward.

In Sarbanes-Oxley, Congress adopted the structural model by requiring public corporations’ audit committees, which are staffed with independent directors, to establish procedures by which they will receive whistleblower reports, including from sources who wish to remain anonymous.<sup>269</sup> As a supplement or backstop to permitting anonymous reporting, some firms also allow for external reporting of misconduct to an independent third-party.<sup>270</sup> External reporting options often appear to be better than internal options, at least for employees who are not in management positions.<sup>271</sup> This allows them to report anonymously and not to a supervisor who might be personally involved in the misconduct or to a department to which the supervisor might have access to determine the identity of the whistleblower. Nevertheless, some studies have found that external reporting where anonymity was not maintained actually increased the risk of retaliation, presumably because “the use of an external channel is likely to be interpreted as a threat to the organization’s structure and

---

266. See Marcia P. Miceli et al., *Can Laws Protect Whistle-Blowers? Results of a Naturally Occurring Field Experiment*, 26 WORK & OCCUPATIONS 129, 149 (1999) (finding that although the incidence of perceived wrongdoing after anti-retaliation laws were passed decreased, non-anonymous whistleblowers actually suffered more retaliation).

267. Dixon, *supra* note 219, at 172.

268. Moberly, *Sarbanes-Oxley’s Structural Model*, *supra* note 224, at 1108–09 n.5.

269. *Id.* at 1138 (citing § 301 of Sarbanes-Oxley).

270. Gao et al., *supra* note 256, at 88.

271. *Id.* at 86.

legitimate authority.”<sup>272</sup> It is literally going outside the chain-of-command, to use a military analogy. For that reason, many whistleblowers would prefer to report internally.<sup>273</sup> It comports with their view that whistleblowing is fundamentally an act of loyalty toward their organization and allows them to register their disapproval of corporate misconduct that threatens the organization.<sup>274</sup>

In Dodd-Frank, Congress addressed the incentives part of the equation by instituting a system for providing financial rewards to whistleblowers who provided information related to potential violations of securities or commodities laws.<sup>275</sup> Although the bounty regime has deep roots within the United States, it is fairly uncommon as a statutory method in jurisdictions around the world.<sup>276</sup> Moreover, few companies have adopted their own internal bounty program. According to the Association of Certified Fraud Examiners, a mere 11 percent of organizations around the world employ some sort of financial incentive to encourage whistleblowing.<sup>277</sup> Nevertheless, the theory underlying bounty programs is appealing. Providing a reward helps to compensate whistleblowers and thereby overcome the hesitation they might feel toward coming forward because of the retaliation and other costs they might suffer.<sup>278</sup> The SEC reports that its dual system of protection and awards has led to a 40 percent increase in the number of tips each year.<sup>279</sup> Those tips have proven useful as well, evidenced by the \$57 million in awards made in 2016 alone, which exceeded all award amounts in previous years combined.<sup>280</sup>

Both the structural and bounty models have spread to other parts of federal law. For instance, under the Internal Revenue Code, a whistleblower may receive between 15 and 30 percent of the collected proceeds depending upon the extent to which he contributed to the detection of the underpayment.<sup>281</sup> Although only an individual may file

272. See Mesmer-Magnus & Viswesvaran, *supra* note 257, at 293 (noting, however, that the risk that the retaliation would also be reported may account for the fact that the correlation was smaller than expected).

273. See Moberly, *Sarbanes-Oxley's Structural Model*, *supra* note 224, at 1142 (“A disclosure channel also harmonizes with a whistleblower’s tendency to report misconduct internally[.]”).

274. *Id.*

275. David Freeman Engstrom, *Bounty Regimes*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 3 (Jennifer Arlen ed., 2017); Pope & Lee, *supra* note 60, at 598.

276. See Lydia Mechtenberg et al., *Whistle-Blower Protection: Theory and Experimental Evidence* 3 (Centre for Economic Policy Research Discussion Paper IZA DP No. 10607, 2017).

277. See *id.* at 7 n.13 (citing ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE (2014)).

278. *But see* Feldman & Lobel, *supra* note 260, at 1206 (suggesting that, at least for low level misconduct, bounties might reduce reporting because they take the ethical outrage that motivates most whistleblowing out of the equation).

279. Norberg, *supra* note 220, at 389.

280. *Id.*

281. 28 U.S.C. § 7623(b)(1) (2018).

a whistleblower claim with the Internal Revenue Service,<sup>282</sup> which rules out filings made anonymously through a trust or a nominee, the service does promise to protect the identity of the whistleblower to the fullest extent possible.<sup>283</sup> Moreover, if a whistleblower seeks to challenge a denial of a claim for the proceeds, he may petition the Tax Court to proceed anonymously.<sup>284</sup> The Tax Court has even permitted individuals to proceed anonymously in challenges to a denial of the award where the whistleblower can demonstrate that the potential harm to themselves would outweigh the people's right to know who is using their court system.<sup>285</sup>

One of the concerns about whistleblower protections and incentives is that they encourage false or fabricated claims.<sup>286</sup> Bounties, for example, may incentivize employees to make questionable claims in the hopes of reaping a financial reward. Professor Yhonatan Givati developed a model to assess the risks and rewards of whistleblowing and concluded that financial rewards "may encourage false reports."<sup>287</sup> Even an anti-retaliation regime can arguably encourage false claims if "low-performing individuals . . . knowingly lodge false reports with the sole motivation of being sheltered from unfavorable actions such as dismissal."<sup>288</sup>

Although the risk of false claims is real, it may be overblown. First, the logistical obstacles to collecting on a false claim and the high costs of pursuing any kind of whistleblower action "make genuinely groundless claims highly unlikely."<sup>289</sup> Second, the risk can be mitigated. Some provisions protect against the risk of such false claims by conditioning protection or reward on information ultimately proven to be factual, rather than merely believed by the whistleblower to be

282. See Claims Submitted to the IRS Whistleblower Office Under Section 7623: Notice 2008-4, 2008-2 I.R.B. 253.

283. *Confidentiality and Disclosure for Whistleblowers*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/confidentiality-and-disclosure-for-whistleblowers> (last visited Jan. 16, 2019) [<https://perma.cc/LVV3-Z5AV>] (archived Jan. 31, 2019).

284. U.S. TAX CT. R. PRACTICE & P. 345(a).

285. See Whistleblower 14106-10W v. Commissioner, 137 T.C. 183, 205 (2011) (noting that the public's interest in the identity of the anonymous whistleblower is relatively weak when there is a strong societal interest in concealing their identity and no concern of illegitimate motives); see also Whistleblower 10949-13W v. Commissioner, T.C. Memo 2014-94 at \*1, n.1 (permitting anonymity in a case involving organized crime members where the whistleblower had received a death threat). *But see* Whistleblower 14377-16W v. Commissioner, 148 T.C. 510, 518-19 (2017) (denying the whistleblower's petition to proceed anonymously in part because of status as a repeat whistleblower with denied claims).

286. Mechtenberg et al., *supra* note 276, at 2, 7.

287. Yhonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43, 70 (2016).

288. Mechtenberg et al., *supra* note 276, at 2.

289. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 326 (1992) (analyzing the possibility of groundless claims under the False Claims Act).

true.<sup>290</sup> This effectively deters whistleblowers from coming forward without hard evidence. Other tools for minimizing the risk of false reports include (1) limiting rewards to cases involving high amount recoveries, such as \$1 million in the case of Dodd-Frank; (2) excluding individuals who obtain information from secondary sources that are publicly available; and (3) reducing the reward percentage for individuals with a higher propensity to make a false claim, such as a competitor.<sup>291</sup>

A second concern is that employers may try to undercut programs that encourage whistleblowing because of the potential damage to the organization.<sup>292</sup> For example, Health Net, an insurance company, created a severance agreement in which employees not only were not encouraged to blow the whistle on securities violations, but they were forced to waive their right to receive any financial incentives for whistleblowing if they signed the severance agreement.<sup>293</sup> In effect, the company recognized that financial rewards were a powerful incentive and, before being caught by the SEC and forced to end the practice,<sup>294</sup> sought to up the ante by using bigger rewards to try to silence potential informants. Such agreements, however, are likely unenforceable and the SEC has successfully pursued enforcement actions against companies that have attempted this maneuver.<sup>295</sup>

---

290. See Mechtenberg et al., *supra* note 276, at 1 (describing the difference between a belief-based and fact-based system for protection).

291. Engstrom, *supra* note 275, at 9.

292. See Norberg, *supra* note 220, at 395 (noting that in several circumstances “companies added restrictive language that required separating employees to waive any right to recovery of incentives for reporting misconduct, including under the SEC’s whistleblower program, to receive their monetary separation payments from the firm.”).

293. Melody Petersen, *SEC Says Insurer Tried to Block Whistle-Blowers*, L.A. TIMES, Aug. 17, 2016, at C2.

294. *Id.*

295. See *In re BlueLinx Holdings, Inc., Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order*, SEC Administrative Proceeding File No. 3-17371, SEC Rel. No. 78528 (Aug. 10, 2016), <https://www.sec.gov/litigation/admin/2016/34-78528.pdf> [<https://perma.cc/UCV5-8SJH>] (archived Feb. 8, 2019) (holding that BlueLinx must amend its employment and severance contracts to protect the whistleblowing rights of employees); U.S. Sec. & Exch. Comm’n, *BlackRock Charged With Removing Whistleblower Incentives in Separation Agreements* (Jan. 17, 2017), <https://www.sec.gov/news/pressrelease/2017-14.html> [<https://perma.cc/6FBJ-9T6E>] (archived Feb. 8, 2019) (announcing a monetary penalty assessed against BlackRock for improper use of separation agreements to silence whistleblowers); Richard Moberly et al., *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd-Frank’s Whistleblower Provisions*, 30 ABA J. LABOR & EMP. L. 87, 89 (2014) (explaining that employers will add de facto gag order provisions to their employment contracts through confidentiality agreements that may violate Dodd-Frank); Jason Zuckerman, *Panel Discussion, What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank*, 23 FORDHAM J. CORP. & FIN. L. 379, 404–05 (2018) (describing employer use of “de facto gag provisions” that have a “similar effect,” such as broadly-worded non-disparagement provisions that could include reporting to the SEC or other regulators).

### D. Utilizing Whistleblowers in FIFA

#### 1. The Power of Whistleblowing in Football

There is little doubt that whistleblowers played a large role in uncovering FIFA corruption and instigating reform legislation. In 2002, for instance, FIFA's Secretary-General Michael Zen-Ruffinen, who had only recently announced his campaign to challenge Sepp Blatter for the presidency, delivered a confidential report to the Executive Committee in which he detailed a number of charges about legal and financial abuses under Blatter's leadership.<sup>296</sup> Zen-Ruffinen accused Blatter of "manipulating the whole network through the material and administrative power he gained to the benefit of third persons and his personal interests."<sup>297</sup> Unlike many corporate whistleblowers, Zen-Ruffinen certainly made no attempts to submit his charges anonymously. Indeed, he held a press conference to announce that he had filed a criminal complaint with the prosecutor's office in Zurich alleging "misappropriation" or "unlawful use" of assets and "criminal mismanagement" of FIFA's resources.<sup>298</sup> Many of these allegations were ultimately confirmed, including a written-off £6 million loan to Jack Warner, by a CONCACAF Integrity Committee whose work contributed to Warner's resignation.<sup>299</sup>

Insiders were also instrumental in leaking information about FIFA corruption to the media that was later used as part of government investigations. In 2011, for instance, during the British House of Commons Digital, Culture, Media and Sport Committee's hearings on World Cup bid rigging, it published a letter from *Sunday Times* journalists that included previously unknown allegations from English Football Association chairman Lord David Triesman, Michel Zen-Ruffinen, and two African FIFA officials.<sup>300</sup> This type of whistleblowing to the media also was part of what led authorities to FIFA in the first place. Andrew Jennings, a British investigative reporter who has long pursued Sepp Blatter and FIFA officials, reported being approached by a "high ranking FIFA official" several weeks after asking Blatter at a press conference in 2002 whether he had ever taken a bribe.<sup>301</sup> In a midnight meeting, he was given "a whole load of documents," many of which contained crucial information and were ultimately handed over to the FBI in 2015 as part of the

---

296. CONN, *supra* note 39, at 69–70; TOMLINSON, *supra* note 44, at 133.

297. TOMLINSON, *supra* note 44, at 133.

298. CONN, *supra* note 39, at 70; TOMLINSON, *supra* note 44, at 133.

299. CONN, *supra* note 39, at 71, 138–49.

300. *Id.* at 95–96.

301. Ed Odeven, *Jennings predicts jail time for Blatter*, JAPAN TIMES (Aug. 5, 2016), <http://www.japantimes.co.jp/sports/2016/08/05/soccer/jennings-predicts-jail-time-blatter/#.V6S5L6I2s6F> [https://perma.cc/28NS-BMK9] (archived Feb. 8, 2019).

investigation that led to the arrests and indictments of over forty FIFA officials and the most recent round of FIFA reforms.<sup>302</sup>

Perhaps the most infamous of all FIFA whistleblowers was Chuck Blazer, an American who had served as general secretary of CONCACAF and was a member of the FIFA Executive Committee for decades.<sup>303</sup> Although Blazer eventually became a confidential informant against FIFA as part of plea bargain related to a criminal case brought against him for tax evasion and other charges,<sup>304</sup> he was originally a whistleblower against his boss at CONCACAF, Jack Warner.<sup>305</sup> In what Blazer might have characterized as a “conscience cleansing” type of whistleblowing,<sup>306</sup> but what some speculate was a plot by Blatter to push out a rival,<sup>307</sup> Blazer revealed that in 2011 Warner and other delegates of the Caribbean Football Union each received brown envelopes with \$40,000 in cash from FIFA presidential candidate Mohamed bin Hammam.<sup>308</sup> A few weeks after Blazer’s report, FIFA suspended both Warner and bin Hammam.<sup>309</sup> The latter was ultimately banned from soccer activities for life and the former resigned before receiving the same fate.<sup>310</sup> As discussed earlier,<sup>311</sup> the events ultimately led to the first major FIFA reform effort.<sup>312</sup>

## 2. Resistance and Retaliation in FIFA

Although these whistleblower reports ultimately led FIFA to consider reform, the more common reaction in FIFA has been to be dismissive. In many cases, investigators have been slow to give their allegations much credence. For example, Michael Garcia, then-chairman of the FIFA Ethics Committee’s investigatory chamber, dismissed information provided by numerous whistleblowers in his report on the 2018/2022 World Cup bidding process (the Garcia Report).<sup>313</sup> The Garcia Report stated that a female member of the

---

302. *Id.*; see *supra* Section II.B.

303. See generally PAPENFUSS & THOMPSON, *supra* note 11.

304. Rupert Neate, *Chuck Blazer agreed to go undercover at Fifa to avoid potential 75-year sentence*, THE GUARDIAN (June 15, 2015), <https://www.theguardian.com/football/2015/jun/15/chuck-blazer-fifa-ban-undercover-back-taxes-plea-deal> [<https://perma.cc/5BPX-WFDZ>] (archived Feb. 8, 2019).

305. CONN, *supra* note 39, at 100.

306. See BENSINGER, *supra* note 2, at 71 (recounting that Blazer reportedly told his attorney that “I just can’t live with this” before reporting Warner and the bribes).

307. PAPENFUSS & THOMPSON, *supra* note 11, at 125 (“Some FIFA watchers senses a conspiracy, believing that Blatter knew about the plot from the start and let it continue so he could expose—and oust—bin Hammam and Warner with Blazer’s help.”).

308. CONN, *supra* note 39, at 100–01.

309. PAPENFUSS & THOMPSON, *supra* note 11, at 125.

310. *Id.*

311. See *supra* Part II.A.

312. Pielke Jr., *An Evaluation of the FIFA Governance Reform Process*, *supra* note 9, at 197.

313. FIFA ETHICS COMMITTEE, REPORT ON THE INQUIRY INTO THE 2018/2022 FIFA WORLD CUP BIDDING PROCESS 58–61, 249–72 (2018), <http://resources.fifa.com/mm/document/affederati/footballgovernance/02/89/> [hereinafter GARCIA REPORT].

Australian 2022 bid team labeled “Australia Whistleblower,” but later identified by others as Bonita Mersiades,<sup>314</sup> provided information about potential misconduct relating to Australia’s bid for the 2022 World Cup, including money and other gifts transferred to Jack Warner and people close to him in order to secure the vote of members of the Caribbean Football Union.<sup>315</sup> Despite acknowledging that Mersiades “provided some useful information,” the Garcia Report declined to rely upon the information, citing inconsistencies, potential bias toward the other members of the bid committee, and a possible profit motive since she was writing a book about her experiences.<sup>316</sup> A similar whistleblower report from an individual on the Qatari 2022 bid team labeled the “Qatar Whistleblower,” but identified by others as Phaedra Almajid,<sup>317</sup> was also rejected by the Garcia Report.<sup>318</sup> Almajid alleged that the bid committee had paid millions of dollars directly or indirectly to members of the FIFA’s executive committee in an attempt to buy their votes.<sup>319</sup> As with Mersiades, the Garcia Report declined to rely upon the information because of concerns about Almajid’s credibility after she temporarily recanted in a public statement, despite acknowledging that she subsequently provided contemporaneously prepared journals that “provided the strongest support that her allegations were true.”<sup>320</sup>

Even worse than dismissing whistleblower reports, FIFA’s executives have been largely hostile toward whistleblowers. The organization has been described as having a “culture of self-protection,” particularly when it comes to whistleblowers.<sup>321</sup> Former President Sepp Blatter recently “slam[med] whistleblowers,”<sup>322</sup> comparing them to “a snitch at school” and bluntly stating that “if you

---

87/97/aus\_bel-ned\_eng\_esp-por\_jpn\_kor\_qat\_report\_neutral.pdf  
[https://perma.cc/9W67-TZ4H] (archived Feb. 8, 2019).

314. CONN, *supra* note 39, at 257, 259–60.

315. GARCIA REPORT, *supra* note 313, at 58–59.

316. *Id.* at 59–61. *See* MERSIADES, *supra* note 2, at dedication page. Ironically, or perhaps because of, this comment in the Garcia Report, the book states that “100% of the author’s proceeds from the sale of this book will go to the Australian Sports Foundation’s fundraising campaign for the ‘Pararoos to participate in the 2019 IFPCP World Cup.” *Id.*

317. CONN, *supra* note 39, at 96.

318. GARCIA REPORT, *supra* note 313, at 249–72.

319. *Id.* at 249–51.

320. *Id.* at 264.

321. John Sinnott, *Whistle-blower: Woe betide anyone reporting ‘FIFA corruption’*, CNN (Dec. 17, 2014), <http://edition.cnn.com/2014/12/17/sport/football/fifa-whistleblower-corruption-phaedra-al-majid/index.html> [https://perma.cc/GUR7-BGXS] (archived Feb. 8, 2019); *see also* Jack Anderson, *Fifa and other authorities fail to protect whistleblowers*, IRISH TIMES (Dec. 24, 2014), <https://www.irishtimes.com/sport/other-sports/fifa-and-other-authorities-fail-to-protect-whistleblowers-1.2047873> [https://perma.cc/TTY4-HQYJ] (archived Feb. 8, 2019).

322. Aaron Gordon, *Sepp Blatter Bolsters Credentials for FBI Director, Slams Whistleblowers*, VICE SPORTS (June 19, 2017), [https://sports.vice.com/en\\_us/article/ywz4ej/sepp-blatter-bolsters-credentials-for-fbi-director-slams-whistleblowers](https://sports.vice.com/en_us/article/ywz4ej/sepp-blatter-bolsters-credentials-for-fbi-director-slams-whistleblowers) [https://perma.cc/LH92-4263] (archived Feb. 8, 2019).



are a whistleblower, it's not correct."<sup>323</sup> He even participated in such retaliation personally according to Farah Weheliye Addo, the former president of the Somali Football Association and vice president of the Confederation of African Football, who alleged in 2002 that he was offered \$100,000 to support Blatter for FIFA president in 1998.<sup>324</sup> According to Farah, Blatter bribed a referee from Niger to provide damaging information about Farah that he presumably hoped to use to damage his reputation.<sup>325</sup>

Most whistleblowers against FIFA appear to have suffered some form of retaliation and harassment designed to get them to drop their claims. The above-described case involving Phaedra Almajid is illustrative of FIFA's hostility toward whistleblowers. The Garcia Report had dismissed her testimony in part because she had recanted it, but it acknowledged her claim that the recantation was prompted by an alleged threat of a \$1 million lawsuit against her by the Qatar bid committee for breach of a confidentiality clause in her contract.<sup>326</sup> Almajid told reporter David Conn that she "felt terrified. I have two kids, one is disabled; I was facing legal action and the loss of my income too. I agree to sign that affidavit [recanting her testimony] and they promised to release me from legal action."<sup>327</sup> The Garcia Report dismissed that threat, though, on the basis of assertions of the members of the Qatari bid committee themselves,<sup>328</sup> without any consideration of their potential bias.

Mersiades offered a summary of the kinds of retaliation that she and other whistleblowers against FIFA have suffered for coming forward:

Many of us have paid a high price. We've lost jobs; we've lost livelihoods; we've had illnesses; we've been abused by people who don't even know us; we've been

323. David Conn, *Sepp Blatter after the fall: 'Why the hell should I bear all the blame?'*, THE GUARDIAN (June 19, 2017), <https://www.theguardian.com/football/2017/jun/19/sepp-blatter-fifa-president-corruption-> [<https://perma.cc/74WY-HM3D>] (archived Feb. 8, 2019); see also MERSIADES, *supra* note 2, at 338. When informed that Mersiades was a whistleblower, Blatter responded "You have such an honest face," he said. He seemed taken aback by the concept of a whistleblower being honest." *Id.* His open vitriol is not surprising considering that a whistleblower reportedly was assisting the Swiss criminal investigation of his role in the FIFA case. See Nathaniel Vinton, 'Whistleblower' helping investigation against Sepp Blatter, N.Y. DAILY NEWS (Jan. 28, 2016), <http://www.nydailynews.com/sports/soccer/whistleblower-helping-investigation-sepp-blatter-article-1.2513071> [<https://perma.cc/GLC2-SW3S>] (archived Feb. 8, 2019).

324. *Ex-Somali FIFA official was first whistleblower to expose FIFA scandal*, SAHAN J. (June 3, 2015), <http://sahanjournal.com/sepp-blatter-fifa-scandal/#.WYPBCIGQyU1> [<https://perma.cc/K3NU-UA7R>] (archived Feb. 8, 2019) [hereinafter *Ex-Somali FIFA Official*]; see BENSINGER, *supra* note 2, at 32 ("Blatter and Bin Hammam sued the Somali for libel, then dragged him before the FIFA disciplinary committee, where he was banned from the sport for two years for failing to provide enough evidence to support his accusations.").

325. *Ex-Somali FIFA Official*, *supra* note 322.

326. CONN, *supra* note 39, at 282; GARCIA REPORT, *supra* note 313, at 260.

327. CONN, *supra* note 39, at 282.

328. GARCIA REPORT, *supra* note 313, at 260–61

disowned by people who once called themselves friends; we've been attacked personally, professionally and in cyberspace; we've been threatened; the same organizations that we once worked so diligently and loyally for have disparaged and demeaned us, campaigned against us and tried to rob us of our dignity and respect; our self-esteem, confidence, resolve and resilience have been tested.<sup>329</sup>

As Mersiades explained, “we feel that we've done our fair share of the heavy lifting” in pursuit of FIFA reform.<sup>330</sup>

Moreover, both Almajid and Mersiades claim that FIFA not-subtly retaliated against them by failing to preserve their confidentiality when Hans-Joachim Eckert initially released a summary of the Garcia Report that “effectively identified them,” which allegedly violated Rule 16.1 of the FIFA Ethics Committee Code.<sup>331</sup> Mersiades stated that Eckert's summary was a “deliberate denigration of two women who have been courageous enough to say something.”<sup>332</sup> Observers said that “[r]ather than criticizing the corrupt officials of FIFA and the bidders from Russia and Qatar, FIFA turned the report into an attack on the whistleblowers.”<sup>333</sup> Mersiades noted that “the practical fallout to being a whistleblower has been hard, as she feels ostracized in her native Australia.”<sup>334</sup> Almajid warned other potential whistleblowers that

[w]hen it comes to FIFA, be prepared to be crucified, not once or twice but over and over again . . . Be prepared to suffer and pay for your actions. Be prepared never to feel safe again and never feel you can trust anyone. But most importantly, be ready to be betrayed by those who have promised to protect you.<sup>335</sup>

---

329. MERSIADES, *supra* note 2, at 344.

330. *Id.*

331. Owen Gibson, *Whistleblower Phaedra Almajid hits back at Fifa's dismissal of complaint*, THE GUARDIAN (Dec. 16, 2014), <https://www.theguardian.com/football/2014/dec/16/whistleblower-phaedra-almajid-hits-back-fifa-confidentiality-complaint> [<https://perma.cc/V6Y5-AB94>] (archived Feb. 8, 2019); *see* MERSIADES, *supra* note 2, at 322 (“Garcia chose to turn personal and play the woman, when he should have stuck with the issues.”); Gibson, *Complaints*, *supra* note 65; Paul Kelso, *World Cup: Qatar Whistleblowers Complain to FIFA*, SKY NEWS (Nov. 17, 2014), <http://news.sky.com/story/world-cup-qatar-whistleblowers-complain-to-fifa-10382247> [<https://perma.cc/WTQ2-68SG>] (archived Feb. 8, 2019); Masters, *supra* note 65.

332. Nick Harris, *FIFA whistleblowers break their silence: If you question governing body, be prepared to be crucified, be prepared to be betrayed by those who promised to protect you...*, DAILY MAIL (Nov. 15, 2014), <http://www.dailymail.co.uk/sport/football/article-2836114/FIFA-whistleblowers-break-silence-question-governing-body-prepared-crucified.html> [<https://perma.cc/AVL6-MDR2>] (archived Feb. 9, 2019).

333. Rick Cohen, *Time to Praise Courageous Whistleblowers in FIFA Scandal*, NONPROFIT Q. (May 29, 2015), <https://nonprofitquarterly.org/2015/05/29/time-to-praise-courageous-whistleblowers-in-fifa-scandal/> [<https://perma.cc/5NFQ-78JX>] (archived Feb. 9, 2019).

334. *Id.* (noting that “the involvement of the Australian senate, which is now investigating the payment, offers some measure of protection to Mersiades and reassurance she won't be harmed.”).

335. Harris, *supra* note 332.

The retaliation risk is particularly acute for rank-and-file employees in the regional confederations. They are uniquely situated to uncover instances of fraud and corruption, but at the same time particularly vulnerable because they are far away from the power center of FIFA in Switzerland. As Mary Papenfuss and Teri Thompson explained:

Employees of CONCACAF's New York office suspected the Federation's financial statements were crooked but felt powerless to act. "What do you do in that situation? We couldn't very well report it to our bosses Chuck Blazer or Jack Warner, who seemed to be orchestrating everything," one said. "So then what? Do we call FIFA? Pick up the phone and talk to the FBI?"<sup>336</sup>

The problem, as they continued, is that "[w]histleblowers and their supporters have traditionally been forced out at FIFA and its federations."<sup>337</sup> Even Blazer became a target after he blew the whistle on Warner, with FIFA hiring an investigator, Simon Strong, to "dig up dirt on Chuck Blazer."<sup>338</sup>

This has even extended to players who have called out their leaders for corrupt dealings. Players on Trinidad and Tobago's historic 2006 World Cup team complained that Warner reneged on a deal to share all profits equally between the players and the association.<sup>339</sup> They went so far as to take their case to the Sport Dispute Resolution Panel, which was created to arbitrate disputes involving UK athletes, and later Trinidad's high court when Warner ignored the Dispute Resolution Panel's ruling in favor of the athletes.<sup>340</sup> The players, however, paid a deep price for their efforts, with Papenfuss and Thompson reporting that "some were blacklisted and forced out of the sport in their prime by Warner and his cronies."<sup>341</sup>

FIFA's retaliation toward whistleblowers has not been reserved for its own employees or people under its direct control. For example, although we don't know whether the insider who leaked the documents to Andrew Jennings was ever discovered or suffered repercussions, Jennings himself was certainly punished for his efforts.<sup>342</sup> He could not be fired from FIFA since he was not an employee, but Jennings was banned from FIFA proceedings starting in 2003, thereby cutting off his routine access to FIFA officials.<sup>343</sup>

Even outside of FIFA, retribution against football whistleblowers is often quite open and deliberate. In Cyprus, for example, Spyros Neofitides, the head of the Cypriot players' union, helped to expose match fixing and illegal betting on games in the island's professional

---

336. PAPERFUSS & THOMPSON, *supra* note 11, at 193.

337. *Id.*

338. BENSINGER, *supra* note 2, at 81.

339. PAPERFUSS & THOMPSON, *supra* note 11, at 195–96.

340. *Id.* at 196.

341. *Id.*

342. *See* Odeven, *supra* note 301.

343. *Id.*

leagues.<sup>344</sup> As thanks for his efforts, the Cyprus Football Association (CFA) accused him of slander and referred Neofitides to a CFA disciplinary committee where he faced a minimum fine of €5,000 and possible suspension.<sup>345</sup> Neofitides claims that the CFA doesn't "want anyone to speak out about this issue," suggesting that "it's a threat pure and simple. If players see this happening, how then will it be possible for me to convince them to speak out about it?"<sup>346</sup>

The most egregious example of retaliation allegedly suffered by a football whistleblower involved South African politician Jimmy Mohlala. He reported fraud relating to what he claimed was a forged tax certificate that was crucial to obtaining land for the construction of a stadium for the 2010 World Cup.<sup>347</sup> After a police investigation led to the suspension of several African National Congress politicians implicated in the scheme, Mohlala was pressured to resign by the ANC.<sup>348</sup> Refusing, he was killed by a masked gunman one day prior to appearing in court to testify regarding the construction fraud.<sup>349</sup> Prior to this, his widow had stated that her husband told her that "corrupt people wanted to kill him. He said that we must not go out in the car at night."<sup>350</sup> After his death, his widow reported that both she and their son were tortured to try to get them to confess to ordering the hit themselves.<sup>351</sup>

Cleaning house, so-to-speak, among FIFA leaders has done little to change FIFA's view of whistleblowers. In 2016, after Gianni Infantino took over the presidency, he came under fire for the use of private aircraft and for spearheading a plot to remove Dominic Scala after he refused Infantino's compensation request.<sup>352</sup> The FIFA Ethics Committee had begun to consider whether to open an investigation into potential violations of the Ethics Code, in part based on information allegedly provided by the head of FIFA's travel

---

344. See Helena Smith, *Car bombs, corruption and illegal betting—how football in Cyprus spiralled out of control*, THE GUARDIAN (Sept. 6, 2016), <https://www.theguardian.com/football/blog/2016/sep/06/bomb-attacks-and-boycotts-how-football-corruption-in-cyprus-turned-nasty> [https://perma.cc/6NMJ-Y8XK] (archived Feb. 9, 2019) (discussing football corruption in Cyprus).

345. Helena Smith, *Cyprus match-fixing whistleblower faces €5,000 fine after Guardian exposé*, THE GUARDIAN (Sept. 13, 2016), <https://www.theguardian.com/football/2016/sep/13/cyprus-match-fixing-coach-guardian-fine> [https://perma.cc/W8DV-SZRJ] (archived Feb. 9, 2019).

346. *Id.*

347. Jane Flanagan, *'My husband would still be alive today if it hadn't been for FIFA World Cup corruption': Widow of 2010 South African whistleblower reveals how he was murdered by masked hitmen after exposing multimillion pound stadium fraud*, DAILY MAIL (June 13, 2015), <http://www.dailymail.co.uk/news/article-3121989/Widow-murdered-2010-South-Africa-Fifa-World-Cup-whistle-blower-Jimmy-Mohlala-says-husband-alive-today-hadn-t-exposed-multimillion-dollar-stadium-fraud.html> [https://perma.cc/6SUD-T3JT] (archived Feb. 9, 2019).

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. Warsaw, *Blood*, *supra* note 66.

department, Severin Podolak, and the chief of staff for the FIFA secretary-general, Christoph Schmidt.<sup>353</sup> After the two whistleblowers reported the potential ethics violations to the committee, though, they were summarily dismissed by Infantino's hand-picked new secretary-general, Fatma Samoura, in what was characterized as a "purge by Gianni Infantino's administration aimed at suppressing opposition to his increasingly shaky presidency."<sup>354</sup>

#### E. *The Potential for Whistleblower Reform in FIFA*

Despite FIFA's attitudes toward whistleblowers, or perhaps because of it, whistleblowers must be part of any true solution to the FIFA problem. As Michael Kohn, president of the National Whistleblower Center, opined, "Don't expect 'accountability' to become FIFA's talking point any time soon. In the final analysis, the hope of true reform and accountability will be directly tied to the willingness of whistleblowers to come forward as quickly as possible."<sup>355</sup>

FIFA itself recognized this when it created a hotline for reporting abuses in 2013 as part of an update to its Code of Conduct and Code of Ethics.<sup>356</sup> It does not appear, however, that anonymity is assured for hotline users, let alone any protections offered if their identities are disclosed.<sup>357</sup> A reporting hotline without assurances of either confidentiality or whistleblower protections is unlikely to be heavily utilized, especially in an environment where there has historically been distrust of whistleblowers. When discussing a similar proposed reporting mechanism in the context of the 2010 World Cup in South Africa, the Brookings Institution recommended that "[t]o promote and protect impropriety reporting, FIFA and the host nation should have in place stringent whistleblower protections."<sup>358</sup>

353. *Id.*

354. *Id.*

355. Rick Cohen, *The Lives of FIFA Whistleblowers: The Courage and Conviction of Bonita Mersiades*, NONPROFIT Q. (June 4, 2015), <https://nonprofitquarterly.org/2015/06/04/the-lives-of-fifa-whistleblowers-the-courage-and-conviction-of-bonita-mersiades/> [<https://perma.cc/B8NH-M5EJ>] (archived Feb. 9, 2019).

356. See Chris Davies & Jack Mitchell, *Is whistleblowing in sport fit for purpose? Part 1—The current picture*, LAWNSPORT (Sept. 16, 2016), <https://www.lawinsport.com/topics/articles/item/is-whistleblowing-in-sport-fit-for-purpose-part-1-the-current-picture> [<https://perma.cc/25B7-TV9Z>] (archived Feb. 9, 2019) [hereinafter Davies, *Part 1*].

357. See *id.* ("Whether you submit your report anonymously or are asked to include your name, your information will be handled promptly and treated with the strictest confidentiality available under the applicable laws and regulations."); FIFA, *Fair Play – Joining Together to Protect Our Organisation Against Risks*, <https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=6fifa61&language=eng> (last visited Feb. 9, 2019) [<https://perma.cc/2EFV-DNJW>] (archived Feb. 9, 2019) (providing a platform for submitting reports of unethical behavior).

358. Daniel Kaufmann & Veronika Penciakova, *Blowing the Vuvuzela on FIFA's Governance Challenges*, BROOKINGS (July 9, 2010), <https://www.brookings.edu/>

This does not mean that devising a whistleblower program for FIFA will be easy. It is a large, diverse, organization, with employees operating around the globe in a variety of jurisdictions. Many of its leaders, especially at the national level, are deeply entrenched and are suspicious to any acts of disloyalty.<sup>359</sup> Nevertheless, FIFA could at least begin to create an atmosphere that is more conducive to whistleblowing. The precise details are less important than the act of publicly supporting whistleblowers given whistleblowing's expressive significance.<sup>360</sup> Such a move might help jump start the cultural change that is a necessary precondition to the success of any reform.<sup>361</sup>

In addition to utilizing the existing public and private resources available to whistleblowers in football,<sup>362</sup> Chris Davies and Jack Mitchell have identified a number of steps that sports organizations should consider in devising a whistleblower program.<sup>363</sup> Many of these could be adapted for FIFA. For example, it could prominently appoint someone to oversee the reporting hotline—what Davies and Mitchell call a “Whistleblowing Guardian”—to monitor the process and make sure all reports are investigated and followed through to conclusion, with updates provided to those making the reports.<sup>364</sup> It could also adopt specific penalties for the victimization of whistleblowers, including both suspensions and expulsions from the sport, as well as possible financial penalties.<sup>365</sup> Whistleblowers would be protected as long as they make reports in good faith based on their “honest belief” in the information, which would help discourage “malicious allegations,” without chilling reports based on “mere suspicion” or incomplete information.<sup>366</sup>

---

research/blowing-the-vuvuzela-on-fifas-governance-challenges/ [https://perma.cc/PS6F-3RE8] (archived Feb. 9, 2019).

359. See John Wilson, *Why stamping out corruption in FIFA won't be easy*, THE CONVERSATION (Nov. 16, 2014), <https://theconversation.com/why-stamping-out-corruption-in-fifa-wont-be-easy-34264> [https://perma.cc/7WGP-F2U5] (archived Mar. 13, 2019) (asserting that entrenched leadership is one obstacle to reform); see also *supra* text accompanying note 66 (describing Infantino's retaliation against whistleblowers for disloyalty).

360. See Dixon, *supra* note 219, at 172 (discussing the expressive character of whistleblowing).

361. This isn't to say that retaliation protection alone is enough to change an organization's culture. See Symposium, *supra* note 236, at 410 (explaining that corporate attempts to subvert the whistleblower provisions through non-disclosure provisions in severance agreements is “an issue of culture”).

362. See Davies, *Part 1*, *supra* note 356 (describing current FA, UEFA, and FIFA references to whistleblowing).

363. See Chris Davies & Jack Mitchell, *Is whistleblowing in sport fit for purpose? Part 2—Analysis and recommendations*, LAWINSPORT (Sept. 16, 2016), <https://www.lawinsport.com/topics/articles/item/is-whistleblowing-in-sport-fit-for-purpose-part-2-analysis-and-recommendations> [https://perma.cc/XAA7-V69L] (archived Feb. 9, 2019).

364. See *id.*

365. See *id.*

366. *Id.*

FIFA could also adopt proactive measures to incentivize whistleblowing. For example, it could offer financial rewards for the provision of information that leads to disciplinary sanctions. While such bounties could encourage false reports, they might counterbalance the financial disincentive to report that already exists. Furthermore, FIFA could ban contracts prohibiting the disclosure of information about wrongdoing. It could even adopt a policy mandating disclosure, much like policies that mandate that players and officials must come forward if they have been approached about match fixing, even if they rejected those advances.<sup>367</sup> That would have to be balanced against the risk that such a system would drive corruption further underground, though, by reducing the incentives of employees to be vigilant.

Beyond adopting its own internal whistleblowing incentives and protection, FIFA could go a step further and condition continued participation in FIFA-sponsored competitions on the adoption of similar programs by regional confederations, member associations, and even the legal jurisdictions in which those organizations reside and in which its major tournaments take place. Transparency International recently developed a “best practices” guide for whistleblowing legislation that could be used to help certify compliance.<sup>368</sup> Given the patchwork and incomplete nature of whistleblowing legislation in the EU and elsewhere,<sup>369</sup> a FIFA push for reform could be the catalyst for beneficial change in more than just the football industry.

A move to require adoption of whistleblower protection at the sub-FIFA level would not be as radical as it might seem, as several nations and football associations who might otherwise have been considered unlikely supporters of such initiatives have recently put programs in place. Saudi Arabia, for example, initiated an anti-corruption campaign in late 2017 after reports of corruption and embezzlement.<sup>370</sup> As part of this campaign, King Salman issued a royal decree for the protection of whistleblowers.<sup>371</sup> The decree stipulated that “the

367. See Oleg Oriekhov v. UEFA, CAS 2010/A/2172 (disciplining a referee for failing to immediately inform UEFA about an approach by a group involved in match-fixing).

368. See generally TRANSPARENCY INT’L, A BEST PRACTICE GUIDE FOR WHISTLEBLOWING LEGISLATION (2018).

369. See Peter Matjašič, *How the EU is Failing Whistleblowers*, OPEN SOCIETY FOUND. (Oct. 13, 2017), <https://www.opensocietyfoundations.org/voices/how-eu-failing-whistleblowers> [<https://perma.cc/Z3Z9-RKH6>] (archived Feb. 9, 2019); Jennifer Rankin, *EU moves to bring in whistleblower protection law*, THE GUARDIAN (Apr. 16, 2018), <https://www.theguardian.com/world/2018/apr/16/eu-moves-to-bring-in-whistleblower-protection-law-yax-avoidence-emissions-scandals> [<https://perma.cc/M4TV-MJVB>] (archived Feb. 9, 2019).

370. See Mahmoud Kassem, *Saudi Arabia’s King Salman issues order to protect whistleblowers*, THE NATIONAL (May 7, 2018), <https://www.thenational.ae/business/saudi-arabia-s-king-salman-issues-order-to-protect-whistleblowers-1.728080> [<https://perma.cc/B3ZD-GMED>] (archived Feb. 9, 2019).

371. *Id.*

National Anti-Corruption Commission shall report entities that take disciplinary action against employees or threaten their rights or job benefits if they report corrupt practices to the commission.”<sup>372</sup>

The Ghana Football Association (GFA) went a step further to encourage whistleblowers. It announced that it would be offering 30,000 Ghanaian Cedis “to any whistleblower who has credible information of corrupt practices of bribery and related accusations.”<sup>373</sup> Although this program was criticized as being merely symbolic,<sup>374</sup> providing such incentives may be an important part of a cultural shift that federations can help to foster where the traditional resistance to whistleblowing is deep seated.

FIFA could also enlist help from a number of organizations currently developing whistleblower programs or use existing programs as a template. The Foundation for Sports Integrity recently announced during a conference on FIFA reform that it intended to collaborate with other organizations to “spearhead initiatives to protect whistle-blowers and support their receipt of legal and financial support.”<sup>375</sup> More broadly, the Organisation of Economic Co-operation and Development (OECD) issued a report in 2016 calling for greater whistleblower protection in the private sector, both in the internal procedures of companies and in the laws of OECD countries.<sup>376</sup> As more FIFA member nations become subject to comprehensive whistleblower requirements, the traditional resistance to it in FIFA may inevitably decline.

## V. CONCLUSION

This may be a particularly appropriate time for FIFA to adopt a comprehensive whistleblower program. The fateful decision to award what has been described as the “scandal-ridden” 2018 and 2022 World Cups to Russia and Qatar, respectively, is one of the actions most closely identified with FIFA corruption in recent investigations.<sup>377</sup>

---

372. *Id.*

373. See George Addo, Jr., *Has GFA given up the corruption fight?*, JOY ONLINE (Mar. 27, 2018), <https://www.myjoyonline.com/sports/2018/march-27th/addo-jnr-has-gfa-given-up-the-corruption-fight.php> [<https://perma.cc/RU3Y-32LA>] (archived Feb. 9, 2019).

374. See *id.* Indeed, the fact that the president who announced this initiative was later asked to resign because of evidence of his own participation in corruption suggests that it may have been designed to deflect criticism rather than change behavior. See sources cited *supra* note 24.

375. *Foundation for Sports Integrity launches initiative to reform FIFA*, AL ARABIYA (May 22, 2018), <http://english.alarabiya.net/en/sports/2018/05/28/Foundation-for-Sports-Integrity-launches-initiative-to-reform-FIFA.html> [<https://perma.cc/BXK2-3J6S>] (archived Feb. 9, 2019).

376. See generally OECD, COMMITTING TO EFFECTIVE WHISTLEBLOWER PROTECTION (2016).

377. See Henry Buchnell, *Sepp Blatter says he, Sunil Gulati called Barack Obama in advance to say Qatar would get 2022 World Cup*, YAHOO! SPORTS (Jan. 20, 2018),



Even now, new revelations are emerging. Russian whistleblower Grigory Rodchenkov's lawyer accused FIFA of "sweeping Russia's doping fraud under the carpet" after it closed an investigation into suspected doping involving the Russian World Cup team.<sup>378</sup> Australian whistleblower Bonita Mersiaes claims that Qatar's state-owned TV company, beIN Sports, then known as Al Jazeera, agreed to pay \$100 million on the condition that Qatar was awarded the 2022 World Cup.<sup>379</sup> Moreover, both Amnesty International and Human Rights Watch have issued reports about the abuse of foreign workers involved in the construction of stadiums in each country in preparation for their respective World Cups.<sup>380</sup>

At the same time, whistleblower retaliation has been a serious concern in both countries. As discussed previously, Phaedra Almajid reported that her life was in danger after her identity as the whistleblower on the Qatar 2022 World Cup bid was effectively revealed when a summary of the Garcia Report was released.<sup>381</sup> More recently, Yuliya Stepanova, a member of the Russian track and field team, revealed that she was similarly threatened. Stepanova blew the

<https://sports.yahoo.com/sepp-blatter-says-sunil-gulati-called-barack-obama-advance-say-qatar-get-2022-world-cup-010817369.html> [https://perma.cc/Y2ZJ-5RZN] (archived Feb. 9, 2019).

378. Arve E. Bergan, *Rodchenkov's lawyer slams FIFA investigation into Russian doping crisis*, ANTI-DOPING WORLD (May 28, 2018), <https://antidopingworld.wordpress.com/2018/05/28/rodchenkofs-lawyer-slams-fifa-investigation-into-russian-doping-crisis/> [https://perma.cc/4R27-MX5Y] (archived Feb. 9, 2019); see also *Lawyers for Russian Player Say FIFA Ends Anti-Doping Case*, USA TODAY (Apr. 20, 2018), <https://www.usatoday.com/story/sports/soccer/2018/04/20/lawyers-for-russian-player-say-fifa-ends-anti-doping-case/34031647/> [https://perma.cc/693Y-JH92] (archived Feb. 9, 2019) (discussing the end of FIFA's investigation into the Russia doping scandal); *Russian World Cup player recognized by doping whistleblower*, THE GUARDIAN (May 31, 2018), <https://www.theguardian.com/football/2018/may/31/russian-world-cup-player-recognised-doping-whistleblower> [https://perma.cc/P4ET-B7MU] (archived Feb. 9, 2019). Moreover, the World Anti-Doping Agency reinstated Russia's anti-doping agency, which will permit it to more easily certify its athletes for competition despite little evidence of reform. See Tariq Panja & Matthew Futterman, *Russia's Antidoping Agency Reinstated by WADA*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/sports/olympics/russia-wada-antidoping-reinstated.html> [https://perma.cc/XGU8-VANM] (archived Feb. 9, 2019).

379. See Nick Harris, *World Cup voting scandal reignited as book claims FIFA made secret \$100m deal with Qatari TV company before Sepp Blatter twice agreed not to switch finals in exchange for free ride*, DAILY MAIL (Feb. 7, 2018), <http://www.dailymail.co.uk/sport/football/article-5292909/World-Cup-voting-scandal-reignited-amid-Qatar-deal-claim.html> [https://perma.cc/2NVA-7M4P] (archived Feb. 9, 2019).

380. See *Qatar: Abuse of migrant workers remains widespread as World Cup stadium hosts first match*, AMNESTY INT'L (May 18, 2017), <https://www.amnesty.org/en/latest/news/2017/05/qatar-world-cup-stadium-first-match/> [https://perma.cc/3MDS-J5CA] (archived Feb. 9, 2019); Hugh Williamson, *Russia World Cup: Labor Abuses on Stadium Building Sites*, HUMAN RIGHTS WATCH (June 6, 2018), <https://www.hrw.org/news/2018/06/06/russia-world-cup-labor-abuses-stadium-building-sites> [https://perma.cc/KF28-RKNZ] (archived Feb. 9, 2019).

381. See Anderson, *supra* note 321; see *supra* text accompanying notes 326–28.

whistle on extensive doping in her country's team along with her husband, who worked for the country's anti-doping authority.<sup>382</sup> Notwithstanding her action to report the doping, she was denied a spot in the 2016 Rio Olympics by the International Olympics Committee.<sup>383</sup> She and her husband were also forced to flee the country and subsequently claimed that their lives were at risk because of threats of Russian reprisals.<sup>384</sup> This all occurred despite having the support of her sport's organizing body, the International Association of Athletic Federations, and the World Anti-Doping Agency.<sup>385</sup> As the chief executive of the U.S. Anti-Doping Agency remarked, this will "undoubtedly deter whistleblowers in the future."<sup>386</sup>

The fact that FIFA has survived and popular interest remained high in the 2018 World Cup is perhaps the most important reason to pursue whistleblower reform at this time. For many, global football is a mission more than it is a business. This kind of loyalty to that mission is the seed upon which reform can be sown. Outsiders have the benefit of being disinterested and disconnected, but without the dedication to FIFA's original mission possessed by some insiders, they may be more easily corrupted once they are working for the organization. Although it is encouraging that whistleblowers have come forward despite the very real threat of personal and professional sacrifice, FIFA cannot count on that kind of selfless determination to continue. FIFA's culture of corruption is longstanding, and in the absence of continued pressure, it will only grow stronger. If there is any hope to transform this culture, it is likely to come from the insiders who are passionate and dedicated to the game and FIFA's original mission.

---

382. Daniel Schwartz, *Whistleblowers Yuliya and Vitaly Stepanov describe Russia's sports doping system*, CBC NEWS (Jan. 14, 2016), <http://www.cbc.ca/news/world/stepanov-doping-the-national-1.3402916> [<https://perma.cc/J8UN-6KLJ>] (archived Feb. 9, 2019).

383. *Russian doping whistleblower Stepanova appeals to IOC over ban*, DEUTSCHE WELLE (July 26, 2016), <http://www.dw.com/en/russian-doping-whistleblower-stepanova-appeals-to-ioc-over-ban/a-19426747> [<https://perma.cc/E8KW-WWPL>] (archived Feb. 9, 2019).

384. Bonnie D. Ford, *Russian whistleblowers say their safety concerns have deepened*, ESPN (Aug. 15, 2016), [http://www.espn.com/olympics/trackandfield/story/\\_/id/17310403/russian-whistleblowers-say-their-safety-concerns-deepened](http://www.espn.com/olympics/trackandfield/story/_/id/17310403/russian-whistleblowers-say-their-safety-concerns-deepened) [<https://perma.cc/G7QH-DDVU>] (archived Feb. 9, 2019); see also *Doping whistleblower Yulia Stepanova asks IOC to review her Rio ban*, DAILY MAIL (July 26, 2016), <http://www.dailymail.co.uk/wires/pa/article-3707428/Doping-whistleblower-Yuliya-Stepanova-asks-IOC-review-Rio-ban.html> [<https://perma.cc/4QJ8-8LBR>] (archived Feb. 9, 2019) [hereinafter *Doping Whistleblower*].

385. See Ford, *supra* note 384.

386. *Doping Whistleblower*, *supra* note 384.