

# Mind Your Flanks

## *Collateral Litigation Associated with FCPA Actions*

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When allegations of foreign bribery surface — whether from news reports, a whistleblower submission, or otherwise — companies move aggressively to address the many issues associated with a potential investigation by the U.S. Department of Justice (DOJ) and/or the U.S. Securities and Exchange Commission (SEC). With U.S. Foreign Corrupt Practices Act (FCPA) fines and penalties that can stretch into the hundreds of millions of dollars, and the U.S. government's well-documented increased enforcement of the FCPA reflecting a fervent commitment to root out corruption, such attention certainly is not misplaced.

However, addressing only the investigation and remediation of potential FCPA violations may not be enough to protect your client. In-house and outside counsel must also mind their flanks, because collateral litigation is a fact of life when FCPA investigations become public. Counsel's internal investigation and enforcement defense must take into account the likelihood of parallel litigation.

This article describes the range of potential collateral litigation and sets out a series of considerations for counsel as they manage FCPA actions.

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### THE OTHER GOVERNMENT

The collateral action most likely to cause difficulty along the lines of a U.S. FCPA enforcement inquiry is an investigation by the government of the country in which the conduct occurred. It is all but certain that the jurisdiction in which the conduct occurred prohibits improper payments to its government officials, and an FCPA violation likely would have ramifications under the local anti-bribery statute. Thus, while conducting an FCPA-related internal investigation or enforcement defense, counsel must be mindful of a number of issues, such as how (or even whether) a privilege protects communications between an attorney and a client in the applicable jurisdiction; and whether there is a route for a settlement or voluntary disclosure. The trend is clear on this point: Counsel should plan for a parallel enforcement defense coming from the local jurisdiction.

### SHAREHOLDER SUITS

Although the FCPA does not provide for a private right of action, creative civil plaintiffs have not been deterred from bringing lawsuits based on allegations of FCPA violations. Because of these opportunistic plaintiffs — most notably aggrieved shareholders who are eager to piggy-back on such reports by filing civil suits flowing from the same FCPA conduct at issue — collateral FCPA litigation risks must be considered at an early stage in order to assess the full scope of FCPA-related risks and to inform the strategy in dealing with FCPA enforcement authorities.

In particular, shareholders routinely bring securities fraud class actions and de-

rivative actions based on a company's alleged FCPA liability. In the securities fraud class action context, shareholders typically allege that the company's stock price was artificially inflated during the class period because the company either made false or misleading statements concerning the FCPA-related issues, failed to disclose the FCPA-related issues or had defective internal accounting or compliance controls. In other words, these cases take the form of a traditional 10b-5 securities class action.

Shareholders also frequently file derivative actions brought on behalf of the corporation, typically alleging that a company's directors and/or officers breached their fiduciary duties by failing to prevent the conduct under FCPA scrutiny because they lacked proper oversight of the company. Specifically, FCPA derivative actions may allege that the directors and officers failed to implement an effective FCPA compliance program or failed to ensure the FCPA compliance program was administered.

Despite the varying theories, shareholder plaintiffs waste little time in bringing one or both of these types of actions. For instance, in the SciClone Pharmaceuticals Inc. case, plaintiff shareholders filed a derivative suit less than 100 hours after SciClone disclosed in an SEC filing that both the SEC and DOJ had initiated FCPA investigations. Just weeks after the *New York Times* reported in April 2012 that the Mexican subsidiary of Wal-Mart Stores Inc., Wal-Mart de Mexico, had allegedly engaged in a bribery scheme to procure building permits more quickly, and that Wal-Mart had investigated such activity but then covered it up, Wal-Mart shareholders filed numerous lawsuits based on this purported activ-

ity. Those lawsuits took the form of both derivative actions against Wal-Mart's directors and officers, and securities fraud class actions against Wal-Mart and its directors and officers.

Most recently, in September 2013, it took less than 10 days for a class action securities fraud complaint to be filed in the Southern District of New York against Petrochina Company Ltd., after allegations of corruption surfaced about the company. Notably, the reports were that the Chinese government authorities were investigating potential corruption, not that there was a U.S. FCPA investigation. Thus, even in the absence of an identified U.S. government investigation, allegations of corruption alone may trigger a civil action. In other cases, collateral litigation has been instigated by shareholders following a company's disclosure of an FCPA resolution with the DOJ and/or SEC. The 2011 derivative actions against Johnson & Johnson and Tidewater Inc. are further examples of cases that followed the public disclosure of FCPA settlements.

#### OTHER CIVIL ACTIONS

Shareholder litigation is not the only collateral litigation risk that a company faces when allegations of FCPA violations surface. Plaintiffs have brought employment and whistleblower cases alleging wrongful discharge. In this category of cases, the former employee plaintiff may allege that he was retaliated against and fired because he disclosed unlawful FCPA-related activities. Given the Dodd-Frank Act's whistleblower provisions and the potential for large whistleblower bounties, it is likely that more whistleblower claims will surface.

Other follow-on FCPA litigation includes ERISA actions, RICO actions, Alien Tort Claims Act litigation, and unfair competition litigation. The U.S. government also has filed forfeiture actions based on underlying corrupt conduct. One such case has recently been resolved, and on May 31, 2013, a forfeiture judgment was entered by the U.S. District Court, District of Maryland against a home worth more than \$700,000 that was owned by a Nigerian government official.

#### TAKING ACTION

The near-certainty of collateral litigation related to FCPA allegations makes it critical that counsel quickly assess the scope and

implications of the potential violations and plan an investigation strategy that accounts for both the SEC and DOJ enforcement risks and the tag-along litigation risks. In the early hours and days of an internal investigation or enforcement action, counsel's appetite for fact-gathering is at its most acute. Determining whether there was a violation and whether it could be ongoing are paramount for shaping the work plan and direction of an engagement.

A critical element of the strategy involves preserving the company's legal privileges and work product protections. Given the prospect of future civil and/or enforcement litigation related to the FCPA engagement, protecting confidential attorney-client communications and attorney work product from disclosure takes on even greater significance to ensure that those protections are available in subsequent litigation. Counsel should take care to direct all aspects of the investigation throughout and exercise great care before sharing any work product (e.g., interview memoranda) with a third party. Although there may come a time where counsel wishes to share its investigation findings with the DOJ and/or SEC, counsel should be mindful of the risks associated with this and take measures to protect privileged and protected materials as much as possible.

Disclosure issues also must be addressed by counsel in order to protect the company in subsequent litigation. When a possible FCPA violation is discovered, counsel should assess who within the company knew about the conduct and whether any individuals at the company made public statements regarding the same conduct that could be asserted as false and misleading. When public disclosure is made regarding the fact of an FCPA-related investigation, counsel should analyze whether the disclosure encompassed the full breadth of the conduct at issue.

This is a continuing obligation, and counsel must repeatedly assess whether prior disclosures remain complete and correct to the extent more facts are uncovered. Failure to disclose additional conduct could subject the company to an additional class of plaintiff investors, who could claim that the company made intentional omissions or misleading statements. Moreover, the ramifications of all prior disclosures — in SEC filings, the news media, press releases or otherwise — should be

analyzed through a collateral litigation lens in order to inform the company's strategy in dealing both with enforcement authorities and on the civil litigation front.

Counsel also should examine the company's FCPA compliance program and policies concurrently with its investigation. Such analysis will aid the company in defending itself in subsequent litigation (if any). Indeed, robust compliance programs have been found to be defenses to civil suits ((Dow Chem. Co. Deriv. Litig., No. 4349-CC, slip op. at 35 n.85 (Del. Ch. Jan 11, 2010)). In the derivative context, a robust compliance program can negate allegations of improper oversight by management or the Board. In addition, to the extent deficiencies are identified within a company's FCPA compliance program, the company can implement enhancements concurrently with counsel's investigation and enforcement defense.

#### CONCLUSION

By taking these steps and responding swiftly and properly once an FCPA issue is uncovered, companies can mitigate potential payouts in civil actions by plaintiffs. Indeed, as the likelihood for parallel civil actions grow, it is even more imperative for counsel to remain aware of such actions during each step of an investigation or enforcement defense, beginning at counsel engagement. In some cases, such attentiveness may allow for a company to preempt defending a lawsuit and allow for the company to proactively assert wrongdoing against the individuals engaged in the FCPA-prohibited conduct.

The case of Wynn Resorts Ltd., illustrates this point: After Wynn dismissed Kazuo Okada from its board of directors following an internal investigation that uncovered bribery of gaming regulators in the Philippines, Wynn filed a lawsuit for breach of fiduciary duty against Okada. Such affirmative actions by Wynn would not have been possible if counsel was not fully mindful of all parallel FCPA litigation.