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COLLATERAL LITIGATION

Civil Litigation in the Aftermath of FCPA and U.K. Bribery Act Investigations

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Increasingly over the past decade, securing a settlement agreement with government authorities does not signal the end of what may have been a drawn-out (and expensive) anti-bribery investigation. Instead, the threat of subsequent civil litigation by private third parties will often extend the uncertainty and financial risk related to anti-bribery violations.

Where FCPA investigations have uncovered corrupt activity, stakeholders have sought to obtain relief for perceived (and, in some cases, real) harms suffered as a result of a company's misconduct using various legal avenues: (1) securities fraud actions, (2) derivative lawsuits, (3) ERISA claims, (4) restitution claims and (5) state law commercial contract and tort claims. Significantly, such follow-on claims are not unique to the U.S. legal system. Claims can arise after U.K. anti-bribery investigations as well, although they are relatively rare.

This piece offers an introduction of the most common claims a corporation can face in the aftermath of an anti-bribery investigation in the U.S. and the U.K. and describes the significant losses that may be associated with those claims.

See "In Latest Chapter of the Och-Ziff FCPA Saga, Court Rules That It Pay Restitution to Victims of Bribery" (Jan. 8, 2020).

Securities Fraud Claims

In the United States, shareholders may first seek to recover alleged losses from negative price reactions to FCPA news by filing securities class actions. These plaintiffs typically bring claims under Rule 10b-5 – promulgated under the Securities Exchange Act of 1934 – which provides shareholders a private right of action to recover damages resulting from "fraud, misrepresentation, and deceit in the sale of securities." A 10b-5 action requires the following elements: (1) a material misstatement or omission, (2) scienter, (3) a connection to the purchase or sale of securities, (4) reliance, (5) economic loss and (6) a causal link between the material misrepresentation and the loss.

Heightened Standard

The Private Securities Litigation Reform Act, enacted in 1995, expressly heightened the standard for pleading scienter in an effort to discourage baseless lawsuits. Under this law, the complaint must state with particularity facts that give rise to a strong inference that the defendants acted intentionally when making or failing to make a specific public disclosure. As securities fraud typically requires conduct by individuals whose actions can be attributed to the issuer, plaintiffs must allege involvement by senior corporate actors in the making of the false or misleading statements.

In many cases, this presents significant obstacles. For example, as reflected in the company's pending motion to dismiss, the plaintiffs in the Cognizant Technology Solutions case are likely to have difficulty successfully alleging securities fraud against the company after finding that the bribery scheme was hidden from the board of directors and other senior management.[1]

Plaintiffs also encounter difficulties in linking loss to specific misrepresentations. To meet that challenge, they often allege that the relevant misrepresentation occurred much earlier than the disclosure of the government investigation or the resulting settlement, with plaintiffs claiming that issuers knowingly or intentionally failed to disclose that the company's profits were generated through corruptly obtained contracts or that the company was exposed to financial and reputational risk as a result of insufficient internal controls.

Embraer

For example, plaintiffs turned to the courts to remedy a significant drop in value of Embraer S.A.'s American Depositary Receipts immediately following news that the company was under investigation for allegedly corrupt conduct in the Dominican Republic, claiming that the company's financial statements were false and misleading because they did not disclose the illicit source of some of the company's earnings.[2] The court, however, rejected this claim, finding that the company's financial statements accurately reflected revenues received – albeit from illicit conduct. It also found that Embraer S.A. did not have a duty to disclose (or publicly admit) uncharged wrongdoing as long as the company sufficiently addressed the risks that could result from the government investigation.

See "The Strategy That Helped a Former Embraer Sales Manager Avoid Jail Time" (Mar. 20, 2019).

General Cable

In the General Cable securities fraud case, filed exactly a week after the DOJ and SEC announced settlement agreements with the company, plaintiffs relied on a different theory of misrepresentation, claiming that the company's claims that it had implemented programs and internal controls designed to ensure FCPA compliance was misleading in light of the corrupt conduct set forth in the settlement agreements. The court, however, rejected this argument as well, finding that the company had not made any assertions as to the *effectiveness* of such programs and internal controls.

Despite the difficulty of meeting the high threshold for pleading securities fraud, class action settlements in such cases are not uncommon.[3] The Petrobras Securities Litigation[4] highlights the financial risk potentially associated with securities fraud litigation based on admissions in a FCPA settlement.

After successive failures to dismiss its shareholders' class action complaint and decertify the class in the district court and court of appeals, Petrobras and its codefendants agreed to pay nearly $3 billion in a class action settlement to remedy allegations that they failed to disclose systemic and widespread bribery practices and subsequent investigations in the United States and Brazil. As such, corporations can ill afford to ignore potential securities fraud claims in response to an FCPA settlement.

See "General Cable Pays $75 Million to Settle Wide-Ranging Bribery Scheme Based on Agents and Distributors" (Jan. 18, 2017).

Derivative Claims

Derivative lawsuits allow shareholders to sue on behalf of a corporation for harms suffered by that corporation. In theory, shareholders seek to recoup corporate losses from officers and directors for breaches of fiduciary duties and securities law violations, placing the burden of the financial loss with those individuals rather than the corporation (although, of course, for the most part such loss is covered by D&O insurance purchased by the corporation or indemnity agreements in executives' employment agreements).

Common Requirements

Based on state law, the requisite elements of a derivative lawsuit differ slightly depending on the relevant jurisdiction of the corporation. Nevertheless, across state laws some common requirements emerge. The shareholder in a derivative suit must generally meet a set of qualifications to ensure proper standing, including demonstrating that she held a minimum value of shares for a set amount of time and had previously filed an unsuccessful demand on the company's board of directors to act (or show that such a demand would have been futile), and provide a bond sufficient to reimburse the corporation for costs accrued in defending against the lawsuit should the suit fail.

Qualcomm

Like the direct actions against companies for securities fraud, derivative action following FCPA settlements have encountered significant obstacles. For example, in the Qualcomm, Inc. FCPA Stockholder Derivative Litigation[5] – filed in 2015 against officers and directors of the corporation for breaches of fiduciary duty, corporate waste and unjust enrichment – shareholders sought monetary damages from the company's directors for allegedly consciously disregarding red flags that led to violations of the FCPA.

They argued that a demand on the Qualcomm Board would have been futile because the underlying FCPA claims exposed the majority of the members of the board to personal liability which would, in theory, hamper the board's willingness to act in the best interest of the company. The court, however, dismissed the complaint, finding that the complaint did not sufficiently plead that the directors acted in bad faith or with knowledge of the red flags that led to the company's FCPA violations and, thus, were unlikely to be biased by any risk of personal liability.

Other derivative cases have often failed because of the difficulty of alleging officer or director involvement in or knowledge of the bribery.[6] Nevertheless, despite an overwhelming lack of success, these cases continue to be filed and result in additional expense and distraction as the corporation and its executives defend against such claims.

See "Qualcomm's $7.5 Million Settlement for Princeling Hirings Enabled by Three Key Compliance Failures" (Mar. 9, 2016).

ERISA Claims

Plaintiffs may also seek to remedy decreases in stock value tied to FCPA-related conduct by suing pursuant to the provisions of the Employee Retirement Income Security Act (ERISA). ERISA affords a limited cause of action to certain retirement programs, including for breaches of fiduciary duties.

Avon

For example, in 2015, beneficiaries of Avon Products, Inc.'s retirement account program sued and claimed that the company harmed their retirement accounts by concealing FCPA violations.[7] Plaintiffs in that case alleged that the administrator of the retirement program, and members of the company's investment committee and benefits board, kept funds invested in Avon stock while they were aware of the misconduct and the artificially high price at which the stock was traded as a result of their attempted cover-up of the FCPA violations. The parties ultimately settled the ERISA claim for $6.25 million – relatively minor compared to Avon's total combined FCPA sanction of $135 million.

Additionally, more than a quarter of the Avon ERISA settlement went to attorneys' fees. Significantly, to date, only one other post-FCPA investigation ERISA case has led to a monetary settlement – a case filed against Syncor International Corporation in 2004 – and in that case the $4-million ERISA settlement exceeded the $2.5-million FCPA sanction that U.S. authorities assessed against the company.[8]

Scrutiny of Nexus Between Duties, Damages and Corruption

As with the claims outlined above, ERISA lawsuits require careful analysis of the specific duties owed by corporate representatives and the damages suffered by the company's stakeholders as a result of fallout from past corrupt conduct.

See "Avon Settles FCPA Follow-On Suit for $6.25 Million" (Aug. 10, 2016).

Restitution Claims

On April 24, 2020, Juan Guaidó, whose claim to the Venezuelan presidency is contested, submitted a petition on behalf of Venezuela's state-owned oil company (PDVSA) for court-ordered restitution in excess of $560-million against a former PDVSA employee for damages related to the employee's role in a widespread corruption scheme.

Guaidó's petition relies on the compensatory mechanisms of the Mandatory Victims Restitution Act (MVRA), which requires courts to issue restitution orders to victims as a remedy for harms suffered from the criminal conduct of convicted defendants. Until recently, the MVRA has not been a significant factor in FCPA cases, although a Costa Rican state-owned telecommunication company[9] and a subsidiary of PDVSA[10] both unsuccessfully sought restitution for the harm they suffered as a result of their officials' corruption.

Och-Ziff

More recently, however, competitors or investors have received a more hospitable hearing from the court, if not from the government or the defendant. In a prominent example, shareholders of a Canadian mining company sought a court order of restitution from a subsidiary of Och-Ziff Capital Management Group Inc. that pleaded guilty in 2016 to one FCPA count. Och-Ziff's subsidiary had agreed to settle charges with the DOJ and SEC for a combined monetary penalty of $412 million, but the shareholders of the mining company claimed its investment in an African mine would have been worth over $1.8 billion if Och-Ziff had properly developed the mine without corruption.

The plaintiffs therefore requested more than $1.8 billion in damages – which could lead to a court order for restitution of more than four times the FCPA settlement amount. Although the court has not yet ruled on the amount of restitution owed, the very fact that any restitution might be ordered was obviously not something contemplated by *either* the government or the company when they negotiated the settlement. Indeed, had it been, the government has, in the past, shown a willingness to offset private litigation damages in its assessment of penalties.

Petrobras

For example, in the Petrobras settlement, the parties agreed that payment to the SEC would be offset by any payments Petrobras made in a related securities class action. Petrobras settled the class action for nearly $3 billion and thus was able to offset the $933 million owed to the SEC in full.

MVRA: Conviction or Guilty Plea

Principally, the MVRA requires a conviction or a guilty plea, a victim tied to a category of criminal conduct and discernible related damages. That alone, of course, narrows the universe of companies exposed to this risk, as the vast majority of the DOJ's criminal FCPA enforcement actions against corporations are resolved through deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in which the company does not enter a guilty plea or have a judgment of conviction. This signals the importance of taking into account follow-up civil litigation claims when negotiating both the amount and the mode of the settlement with federal authorities.

Commercial Contract & Tort Claims

A patchwork of state laws can give rise to additional claims in the aftermath of an anti-bribery investigation in the United States. Depending on the facts and circumstances of the corruption alleged, stakeholders may raise a number of claims. For example, plaintiffs may bring claims for tortious interference with prospective or existing contracts, or unfair competition based on the loss of a contract bid due to bribery by another bidder.

Corporations may also be sued for their mistreatment of, or retaliation against, employees that initiate or comply with federal anti-bribery investigations, or for common law fraud claims tied to the alleged corruption – including misrepresentation and concealment. Diverse and wide-ranging, these state law claims further complicate efforts to move forward from the investigated conduct – requiring a comprehensive litigation strategy.

See "Balancing Employment Law Considerations During Corruption Investigations" (Sep. 20, 2017).

U.K. Follow-On Litigation

Follow-on litigation is far less common in the U.K. This is due, at least in part, to the mechanisms within deferred prosecution agreements and criminal proceedings to provide compensation to those who have suffered a demonstrable loss as a result of a corporate body's wrongdoing. However, like in the U.S., there are circumstances in which corporate bodies may become entangled in civil litigation premised on alleged losses resulting from a bribery investigation.

The most common civil actions are likely to be brought between the parties directly connected with the alleged wrongdoing (*i.e.*, those paying bribes and those receiving bribes, and their respective employees and agents) to recover bribes paid and losses suffered. However, there may also be circumstances in which private third parties may sue corporate bodies who have been the subject of investigations. Broadly speaking, these proceedings will fall into three categories.

See "Collateral Consequences of Bribery: When Can Ethical Competitors Initiate Suit in the U.S. and U.K.?" (May 15, 2013).

Shareholder Claims

Shareholders or secondary market participants may seek to recover alleged losses resulting from negative price reactions brought about by an investigation into any wrongdoing or by any subsequent findings. However, such claims are rare, in large part because of the practical and legal challenges faced by claimants. The first significant hurdle is establishing a cause of action recognized under English law such as the existence of a contractual relationship, fiduciary duty or duty of care that provides the basis for a claim.

Another major hurdle faced by claimants is demonstrating causation – that a quantifiable loss was suffered as a result of the wrongdoing in question. Finally, a significant practical hurdle is funding such litigation. Compared to the U.S., the law concerning class actions, or representative actions as they are known in England and Wales, is far less developed. There are signs that English courts are warming to the idea, but it is too early to say whether recent decisions in unrelated areas, such as consumer protection and data privacy, may make it easier for claimants to pursue representative actions generally.

At present, all eyes are on the ongoing civil proceedings brought by investors against Tesco plc, the U.K. supermarket chain, which entered into a deferred prosecution agreement with the Serious Fraud Office and agreed to the terms of a Final Notice with the Financial Conduct Authority in 2017 relating to the publication of misleading financial statements. The investors have sued under section 90A of the Financial Services and Markets Act 2000, which, similar to Rule 10b-5 in the U.S., allows investors to seek compensation from the issuers of securities if they have suffered loss as a result of (i) a misleading statement or dishonest omission in certain published information relating to the securities or (ii) a dishonest delay in publishing such information.

These are the first claims brought under section 90A and, if they are successful, they may pave the way for the greater use of this provision, which could be used by investors to seek redress from companies who have engaged in bribery and corruption. Under English law, investors would need to show that the bribery and corruption was covered up or otherwise colluded in by management so as to result in the misleading or dishonest publishing of information by the company. This hurdle may well be easier to overcome in cases in which the issuer has made admissions in the course of settling with the U.K. enforcement authorities.

The underlying wrongdoing in the Tesco matter does not relate to bribery and corruption, but the case serves as a timely reminder that reaching a settlement in one set of proceedings may well have consequences in others.

Derivatives Claims

Second, as in the U.S., shareholders may bring derivatives claims under the Companies Act 2006. Generally, shareholders can, subject to obtaining court approval, bring a derivative claim on behalf of the company (against a director, third party or both) for an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. The proper claimant in wrongs committed against a company is the company itself and any sums recovered will belong to the company. Like in U.S. claims, demonstrating that a director had involvement in or knowledge of the bribery in question is likely to be a significant challenge. The fact that few directors have even been charged, let alone successfully prosecuted under the Bribery Act 2010, highlights that this is a very real challenge.

Claims by Competitors

Competitors who claim that they have suffered a loss as a result of the wrongdoing (*e.g.*, failing to secure a contract) may also seek redress. Again, such claims are rare because of the practical and legal challenges faced by claimants. As competitors are unlikely to have a contractual relationship with, or be owed a fiduciary duty or duty of care by, the corporate entity in question, they will likely have trouble establishing that they have a cause of action at all. In addition, like those pursuing claims for losses suffered as a result of negative share price reactions, a major hurdle will be demonstrating causation – that a quantifiable loss was suffered as a result of the wrongdoing in question.

Of course, while the chances of such proceedings being brought may be relatively low and the chances of those succeeding lower still, corporate bodies nevertheless should be alive to the possibility of such proceedings.

Conclusion

As shown above, securing a settlement with investigating authorities will not curb follow-up litigation by victims of corporate misconduct; it may instead encourage it. Ultimately, resolving an FCPA or U.K. Bribery Act investigation is only half the battle; companies should be ready to zealously defend against subsequent lawsuits or, at least, be prepared to incur additional litigation and settlement costs beyond the penalties already paid to the authorities.

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[1] *Park v. Cognizant Tech. Solutions Corp., et al.*, No. 2:16-cv-06509 (D.N.J. 2016).

[2] *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-CV-06277 (S.D.N.Y. 2018).

[3] For example, in the aftermath of an FCPA investigation, plaintiffs recently have settled securities fraud actions with the following companies: Avon Products, Inc., Wal-Mart Stores, Inc., Juniper Networks, Inc, Cobalt International Energy, Inc., Petrobras, Braskem S.A., and Alere Inc.

[4] *In re Petrobras Sec. Litig.*, No. 1:14-cv-09662 (S.D.N.Y. 2014).

[5] *In re Qualcomm, Inc. FCPA Stockholder Derivative Litig.*, No. 11152-VCMR (Del. Ch. 2017).

[6] *La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 2:12-cv-509, 2013 WL 431339 at *6 (D. Nev. Feb. 1, 2013).

[7] *In re 2014 Avon Prods., Inc. ERISA Litig.*, No. 1:14-cv-10083 (S.D.N.Y. 2015).

[8] *In re Syncor Int'l Corp. Sec. Litig.*, No. 2:02-cv-8560 (C.D. Cal. 2004).

[9] *United States v. Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla. 2010).

[10] *United States v. Rincon-Fernandez et al.*, No. 4:15-cr-00654 (S.D. Tex. 2015)