

# Multiplying the Risks: Parallel Civil Litigation in FCPA Investigations

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## *Introduction*

From the dramatic arrests of 21 individuals at the Shooting, Hunting, Outdoor Trade show in Las Vegas in January<sup>1</sup> to the record-breaking 87-month prison sentence for a defendant this April<sup>2</sup> and to the hundreds of millions of dollars in fines imposed against a slate of companies this year,<sup>3</sup> the story of Foreign Corrupt Practices Act (FCPA) enforcement in 2010 is one of aggressive prosecutions and creative new tactics. Yet the actions of the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are only one part of the FCPA landscape. FCPA investigations and enforcement actions are now serving as a backdrop for related civil litigation. While companies once may have breathed a sigh of relief at a Non-Prosecution Agreement with the DOJ, they increasingly face the risk of civil litigation once the criminal investigation is completed, if not before.

Parallel civil litigation related to FCPA issues can include suits by competitors, victims of the bribery, or shareholders. In particular, shareholder suits have increased significantly in the past several years. Announcements of shareholder suits now closely follow companies' disclosure of FCPA investigations, as evidenced by recent suits against Weatherford International, Avon Products, Pride International, SciClone Pharmaceuticals, and many others.<sup>4</sup> Such litigation based on alleged FCPA

violations has become a burgeoning field for plaintiffs' attorneys, who need only to monitor SEC filings to identify defendants and gather information for complaints.

## *FCPA Claims in Commercial Litigation*

There is no private right of action under the FCPA. In *Lamb v. Philip Morris, Inc.*,<sup>5</sup> the Sixth Circuit upheld the dismissal of an FCPA claim brought by Kentucky tobacco growers against Philip Morris, holding that Congress did not intend to create a private right of action in enacting the statute. Nevertheless, FCPA-related claims have arisen in several types of civil litigation as outlined below.

## *Suits by Competitors*

Litigants have used various theories to pursue claims against competitors for activity allegedly violating the FCPA, including: antitrust (*Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,<sup>6</sup> where, citing the Act of State Doctrine, the Ninth Circuit rejected an antitrust action against a competitor based on alleged payments to UAE officials to obtain an oil concession); Racketeer Influenced and Corrupt Organizations Act ("RICO") (*Environmental Tectronics Corp. Int'l v. W.S. Kirkpatrick & Co., Inc.*,<sup>7</sup> where the Supreme Court held that the Act of State Doctrine did not bar a losing bidder's RICO suit against winning bidder,

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alleging that a contract awarded by the Nigerian government was obtained through bribery); and state unfair competition claims (*Korea Supply Co. v. Lockheed Martin Corp.*,<sup>8</sup> where, in a suit brought by the representative of a losing bidder against the winning bidder for alleged payments to Korean officials to obtain a contract, the court found that activities that violate the FCPA can serve as the basis for causes of action under California's unfair competitive practices statute and for the tort of interference with prospective economic advantage). In one recent case, for example, NewMarket Corp. filed a complaint against Innospec Inc. in U.S. District Court in Richmond, Virginia, alleging that Innospec paid bribes to Iraqi and Indonesian officials to ensure the failure of a field test of a fuel additive produced by a NewMarket subsidiary.<sup>9</sup> NewMarket claims that Innospec engaged in conspiracy in violation of the Virginia Business Conspiracy Act and commercial bribery in violation of the Robinson-Patman Act and the Virginia Antitrust Act. Notably, the suit, which is ongoing, was filed only a few months after Innospec settled FCPA charges with the DOJ and SEC.<sup>10</sup>

#### *Suits by Foreign Sovereigns*

Foreign sovereigns have also entered the fray, filing claims against companies that allegedly made corrupt payments to their own officials. In June 2008, the Iraqi government filed a complaint against dozens of companies and two individuals that allegedly paid kickbacks to the Saddam Hussein regime in connection with the U.N. Oil-for-Food program.<sup>11</sup> The lawsuit, filed in the Southern District of New York, alleges that the defendants committed fraud, breach of fiduciary duties, and RICO violations,<sup>12</sup> among other claims. Several of the companies named in the suit, including Chevron, Daimler, Akzo Nobel, and Siemens, have already settled FCPA-related charges with the SEC and DOJ in connection with their involvement in the Oil-for-Food program. The complaint seeks more than \$10 billion in damages, and the case is ongoing.

In another example, the state-owned company Aluminum Bahrain BSC ("Alba") filed a suit against the Japanese trading company Sojitz Corporation and its U.S. subsidiary, Sojitz Corporation of America (collectively "Sojitz") in December 2009, alleging that Sojitz committed violations of RICO, conspiracy to violate RICO, fraud, and conspiracy to defraud.<sup>13</sup> According to Alba's complaint, officials at Nissho Iwai Corp., a predecessor company, paid almost \$15 million in kickbacks to two former employees of Alba in exchange for the purchase of aluminum at below-market rates. Alba is seeking compensatory damages of more than \$31 million in addition to punitive damages, costs, and fees. This is the second civil lawsuit filed by Alba alleging that a corporation made corrupt payments to Alba employees. In February 2008, Alba sued the aluminum producer Alcoa, Inc. ("Alcoa"), along with a senior executive and an agent, in connection with an alleged bribery scheme in which Alba paid hundreds of millions of dollars in overcharges to Alcoa over a fifteen year period.<sup>14</sup> In both cases, the DOJ intervened to request a stay while the agency investigated potential FCPA violations by the defendants.

#### *Securities Fraud Class Actions*

While suits by competitors or foreign governments are clearly a possibility in connection with FCPA violations, it seems that the fastest-growing categories of parallel litigation are securities fraud class actions and shareholder derivative suits. A securities class action is brought by shareholders against the corporation and/or its officers and directors alleging they suffered economic loss as a result of violations of the securities laws by the corporation and/or its officers and directors. By contrast, a derivative suit is brought by shareholders on behalf of the corporation against individuals who have injured the corporation's interests. In a derivative suit, the shareholders step into the shoes of the corporation to protect its interests and their own interests as shareholders. FCPA-related derivative suits typically assert claims

against individual directors and officers for breaches of fiduciary duty, alleging that they failed to implement policies and controls to ensure compliance with the FCPA.

The double blow of a civil suit may come almost immediately after a company discloses an FCPA investigation. For example, in August 2010, SciClone Pharmaceuticals announced in its Form 10-Q that the SEC and the DOJ had initiated FCPA investigations of the company related to sales in foreign countries, including China.<sup>15</sup> Only four days later, a law firm press release announced the filing of a securities fraud class action against SciClone, alleging "illegal and improper sales and marketing activities in China and abroad regarding its products."<sup>16</sup> The complaint filed in U.S. District Court for the Northern District of California asserts claims against the corporation and its CEO and CFO for violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 thereunder.<sup>17</sup>

Several settlements in class action cases demonstrate the financial incentive for follow-on securities litigation. In 2005, plaintiffs filed a securities class action against Willbros Group and its officers alleging corrupt payments to foreign officials in Bolivia, Nigeria, and Ecuador to obtain construction contracts.<sup>18</sup> The case was filed two days after Willbros announced the completion of an FCPA internal investigation and a restatement of several years of financial results. The company eventually settled the suit for \$10.5 million in 2007.<sup>19</sup> Willbros later settled FCPA charges with the DOJ and SEC in 2008, agreeing to pay a \$22 million criminal penalty. In another example, plaintiffs filed a securities class action in 2006 against Nature's Sunshine Products, Inc. and its officers, alleging false and misleading financial statements, failure to maintain adequate internal controls, and failure to disclose the CEO's approval of a payment in violation of the FCPA.<sup>20</sup> After three years in court, the company settled the suit for \$6 million, ten times the amount of the fine assessed by the SEC.<sup>21</sup> In other cases as well, settlements of shareholder

class action suits have greatly surpassed the amount of the fines imposed by the DOJ and SEC for the FCPA violations. In a class action suit against Faro Technologies, for example, the company settled for \$6.9 million, whereas the DOJ and SEC assessed only \$2.9 million in fines.<sup>22</sup>

However, not all shareholder class action suits have resulted in settlements for shareholders. In 2008, the Ninth Circuit Court of Appeals upheld the dismissal of a class action suit by shareholders of Invision Technologies, Inc.<sup>23</sup> The plaintiffs had alleged that Invision and its CEO and CFO made misrepresentations and omissions in the company's merger agreement with General Electric, which was attached to a Form 10-K filed with the SEC and contained representations and warranties with regard to FCPA compliance. Several months after the 10-K was filed, however, InVision disclosed that an internal investigation revealed possible FCPA violations and that InVision had voluntarily reported the issues to the SEC and DOJ. Invision later entered a non-prosecution agreement with the DOJ,<sup>24</sup> and the post-merger company, GE-Invision, settled with the SEC.<sup>25</sup> In the shareholder suit, the plaintiffs argued that InVision, and specifically its CEO and CFO, misled investors by misstating InVision's compliance with the FCPA in the representations and warranties contained in the merger agreement. The United States District Court for the Northern District of California dismissed the shareholders claim. In affirming the dismissal, the Ninth Circuit held that the shareholders had not adequately pleaded facts to support their securities fraud claim. In doing so, however, the court rejected InVision's argument that the alleged misstatements in the publicly disclosed representations and warranties could not support a shareholders' claim. Although the suit was dismissed, it serves as a cautionary tale for companies to ensure that disclosures regarding material contractual provisions such as FCPA representations are not misleading. Even if disclosures are merely attached to an SEC filing or incorporated by reference, they may create liability to a company's shareholders.<sup>26</sup>

### *Shareholder Derivative Actions*

Similar to the rise in securities fraud class actions, shareholder derivative actions are now a common occurrence following a company's disclosure of an FCPA internal investigation. In the past few months, for example, plaintiff firms have solicited shareholders of Innospec, Weatherford International, Parker Drilling, and Avon Products, among others, for possible derivative suits related to FCPA disclosures.<sup>27</sup>

Such cases continue to be filed despite the fact that many have not fared well in court. Two cases against directors and officers of Baker Hughes were dismissed on procedural grounds: a derivative suit filed by the Sheetmetal Workers' National Pension Fund was dismissed on jurisdictional grounds in 2008,<sup>28</sup> and a suit by the Midwestern Teamsters Pension Trust Fund was dismissed in 2009 based on the plaintiffs' failure to make a pre-suit demand on the company's board of directors.<sup>29</sup> Similarly, a suit against directors and officers of Alcoa by the Hawaii Structural Ironworkers Pension Trust Fund was also dismissed based on plaintiffs' failure to make a pre-suit demand on Alcoa's Board of Directors.<sup>30</sup>

A more substantive hurdle arose in a case against directors and officers of the Dow Chemical Company ("Dow") decided by the Delaware Chancery Court in January 2010.<sup>31</sup> Plaintiff shareholders filed the suit in February 2009, alleging that Dow directors and officers failed to detect and prevent bribery related to a failed joint venture between Dow and Kuwait's Petrochemicals Industries Company. The Court rejected the claim, finding that plaintiffs "fail[ed] to plead with particularity allegations that, if true, would give the Dow board cause for suspicion."<sup>32</sup> The Court disagreed with plaintiffs' assertion that the board of directors failed to carry out sufficient oversight to prevent and detect bribery. The Court took note of the anti-corruption program implemented by the Dow board prohibiting unethical payments to third parties. Because the program was in place, and

because the plaintiffs did not allege that the board "deliberately failed to monitor" the program, the plaintiffs could not show that the Dow board failed in its oversight duties.<sup>33</sup> The suit's dismissal highlights the value of adopting anti-corruption policies and procedures and monitoring them to ensure that the controls are effective.

### *Conclusion*

Setbacks in court do not appear to have slowed the pace of new cases filed against corporations and their directors after FCPA disclosures. As the DOJ and SEC bring more cases, and as more companies voluntarily disclose potential FCPA violations, the trend of related civil litigation is likely to continue. In attempting to satisfy the expectations of the DOJ and SEC, a company's thorough internal investigation may also serve as the roadmap for a civil litigant. Companies negotiating with the DOJ and SEC must therefore balance the government's requests for the results of internal investigations with the risk of waiver of privilege and subsequent production to civil litigants. As a result of these practical considerations, reputational risk, and expenses involved in litigation, companies targeted by civil suits will feel pressure to settle, potentially even before the DOJ or SEC takes action.

As with other FCPA risks, the risk of parallel civil litigation is best mitigated before such litigation occurs, through robust safeguards against corrupt payments, prompt responses to any red flags, and other strategies for reducing risks. While a shareholder suit may become an expected complement to disclosure of FCPA investigations, the implementation of a strong compliance program can help to prevent such suits in the first instance or defend against them if they do materialize.

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<sup>1</sup> Department of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

<sup>2</sup> Department of Justice, *Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials* (Apr. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>.

<sup>3</sup> For example, fines and disgorgement assessed by the DOJ and SEC in 2010 FCPA resolutions include \$185 million for Daimler AG, \$365 million for ENI S.p.A., and \$338 million for Technip S.A.

<sup>4</sup> See Nathan Vardi, *Plaintiff Lawyers Join the Bribery Racket*, *Forbes* (Aug. 16, 2010), available at <http://blogs.forbes.com/nathanvardi/2010/08/16/plaintiff-lawyers-fcpa-bribery-racket/?boxes=businesschannelsections>. See also FCPA Professor, *In The Blink Of An Eye ... Along Comes A Securities Fraud Suit* (Aug. 19, 2010), available at <http://fcpprofessor.blogspot.com/2010/08/in-blink-of-eye-along-comes-securities.html>.

<sup>5</sup> *Lamb v. Philip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), *cert. den.*, 498 U.S. 1086 (1991) (court dismissed U.S. tobacco supplier suit against manufacturer for donations to the charity of the wife of the President of Venezuela in exchange for price controls on tobacco).

<sup>6</sup> See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983).

<sup>7</sup> See *Environmental Tectronics Corp. Int'l v. W.S. Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381 (D.N.J. 1987), *aff'd in part and rev'd in part*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990).

<sup>8</sup> See *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003).

<sup>9</sup> See *NewMarket Corp. v. Innospec Inc.*, No. 10-cv-00503, Complaint (E.D. Va. filed July 23, 2010).

<sup>10</sup> See *United States v. Innospec Inc.*, No. 10-cr-00061 (D.D.C. filed Jan. 16, 2010); *Securities & Exchange Commission v. Innospec, Inc.*, No. 10-cv-00448 (D.D.C. filed Mar. 18, 2010).

<sup>11</sup> See *The Republic of Iraq v. ABB AG*, No. 08-cv-05951 (S.D.N.Y. filed Jun. 27, 2008).

<sup>12</sup> Bribery is included within the definition of "racketeering activity" in RICO, and an FCPA violation can

serve as a predicate act for a RICO claim. See 18 U.S.C. § 1961(1).

<sup>13</sup> See *Aluminum Bahrain B.S.C. v. Sojitz Corp.*, No. 09-cv-04032 (S.D. Tex. filed Dec. 18, 2009).

<sup>14</sup> See *Aluminium Bahrain B.S.C. v. Alcoa*, No. 08-cv-00299 (W.D. Pa. filed Feb. 27, 2008).

<sup>15</sup> See FCPA Professor, *In The Blink Of An Eye ... Along Comes A Securities Fraud Suit* (Aug. 19, 2010), available at <http://fcpprofessor.blogspot.com/2010/08/in-blink-of-eye-along-comes-securities.html>.

<sup>16</sup> See Kahn Swick & Foti LLC, *SciClone Pharmaceuticals, Inc. (SCLN)* (Aug. 13, 2010), available at <http://www.ksfcounsel.com/lawsuit/sciclone-pharmaceuticals-inc-scln-lawyer-C98>.

<sup>17</sup> See Complaint, *Karner v. SciClone Pharmaceuticals*, No. 10-cv-03991 (N.D. Ca. filed Sept. 7, 2010).

<sup>18</sup> See Complaint, *Legion Partners, LLP v. Willbros Group, Inc.*, No. 05-cv-1778 (S.D. Tex. filed May 18, 2005).

<sup>19</sup> See Final Judgment and Order of Dismissal With Prejudice, *In re Willbros Group, Inc. Sec. Litig.*, No. 05-cv-01778 (S.D. Tex. Feb. 15, 2007).

<sup>20</sup> See Complaint, *Hyman v. Nature's Sunshine Products*, No. 06-cv-00267 (D. Utah filed Apr. 3, 2006).

<sup>21</sup> See *SEC v. Nature's Sunshine Products, Inc.*, No. 09-cv-00672 (D. Utah filed Jul. 31, 2009) (the SEC assessed a civil penalty of \$600,000).

<sup>22</sup> See Order Preliminarily Approving Settlement and Providing for Notice, *In re Faro Technologies Sec. Litig.*, No. 05-cv-01810 (M.D. Fla. filed Jun. 2, 2008).

<sup>23</sup> See *Glazer Capital Management v. Magistri*, 549 F.3d 736 (9th Cir. 2006).

<sup>24</sup> See Department of Justice, *Invision Technologies, Inc. Enters Into Non-Prosecution Agreement with the United States* (Dec. 6, 2004), available at [http://www.justice.gov/opa/pr/2004/December/04\\_crm\\_780.htm](http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm).

<sup>25</sup> See Exchange Act Release No. 51199, Accounting and Auditing Enforcement Release No. 2186 (Feb. 14, 2005), available at <http://www.sec.gov/litigation/admin/34-51199.htm>.

<sup>26</sup> See also Exchange Act Release No. 51283 (Mar. 1, 2005), available at <http://www.sec.gov/litigation/investreport/34-51238.htm>.

<sup>27</sup> See, e.g., Daily Finance, *Robbins Umeda LLP Announces Investigation of Innospec Inc.* (July 6, 2010),

available at

<http://www.dailyfinance.com/rtn/pr/robbins-umeda-llp-announces-investigation-of-innospec-inc/rfid345269225/>, and Kendall Law Group, *Kendall Law Group Announces Derivative Action on Behalf of Weatherford International Ltd. Shareholders* (June 30, 2010), available at

<http://finance.yahoo.com/news/Kendall-Law-Group-Announces-bw-1248294168.html?x=0&.v=1>.

<sup>28</sup> See *Sheetmetal Workers' National Pension Fund v. Deaton*, No. 07-cv-01517 (S.D. Tex. filed May 4, 2007).

<sup>29</sup> See Final Judgment, *Midwestern Teamsters Pension Trust Fund v. Deaton*, No. 08-cv-01809.(S.D. Tex. filed May 26, 2009).

<sup>30</sup> See *Hawaii Structural Ironworkers Pension Trust Fund ex rel. Alcoa, Inc. v. Belda*, No. 07-cv-01517, (W.D. Pa. filed May 6, 2008).

<sup>31</sup> See *In Re The Dow Chemical Co. Derivative Litig.*, No. 4349-CC, 2010 BL 6758 (Del. Ch. Jan 11, 2010).

<sup>32</sup> See *id.* at 34.

<sup>33</sup> See *id.* at 35, n. 85.