NEWSLETTER

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The technical improvements of the law are many, although the practice of the last four or five years has proven that there are still aspects to be improved, like the clear advantages that public entities have over normal creditors regarding assets of the bankrupt companies subject to mortgage or seizure prior to the bankruptcy. However, those improvements are hindered by the present situation of the bankruptcy courts, which have been dealt a heavy blow by the financial meltdown, which has led to a string of bankruptcies throughout Spain which has strained already overworked courts.

The solutions at this point are unclear: the creation of new bankruptcy courts seems a must but, given the sombre prospects of the Spanish economy in the short term, and many demands faced by the Spanish Government, it remains to be seen whether trying to untangle the collapse of the Spanish bankruptcy courts is a priority.

Private actions under the US Foreign Corrupt Practices Act: an imminent front?

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The international war on corruption currently being waged by the US Government and its international colleagues reached new heights in December 2008 with the announcement of a negotiated record-breaking Foreign Corrupt Practices Act (FCPA) settlement with Siemens totalling US$1.6 billion in fines and penalties. Of course, even before this latest announcement, anti-bribery prosecutions – both in the United States and abroad – were experiencing a steep, and well-publicised, rise.

The numbers are eye-opening. In the past two years alone, companies seeking to avoid criminal and regulatory action have announced settlements with US authorities totalling US$44.1 million, US$32.3 million, US$30 million, US$26 million, US$22 million, US$19.6 million, and the list goes on. There is no question that the fight against corruption is very real, very global and, for companies under investigation, very expensive.

But does this international police blotter tell the entire story? Or is there a more subtle, yet also potent, aftershock awaiting companies caught in the anti-corruption web. The truth is, that while an increasing band of global prosecutorial authorities are taking the spotlight with big headlines, a new trend appears to be developing behind the scenes, led by private parties claiming to be the victims of corruption.

This part of the story begins with a basic premise. Although certain international anti-bribery conventions (including the UN Convention on Bribery) mandate that member countries enact laws providing for a private cause of action, there is no such private right of action under the FCPA. Litigants unsuccessfully have tried to convince courts to read such a right into the statute, but the theory was laid to rest in 1990 when a US appellate court found that this sort of 'post-violation enforcement', by private plaintiffs, as opposed to 'pre-violation compliance', would 'hinder congressional efforts to protect companies and their employees concerned about FCPA liability'.[1]

This same reasoning resonates in prosecutorial patterns today. US prosecutors routinely and publicly highlight the leniency afforded to companies who voluntarily report findings of suspicious activities and take remedial measures within their organisations. Also consistent with this theme is the overwhelming predominance of non-prosecution agreements in the United States in lieu of formal prosecution. The US Department of Justice (DOJ) also touts its opinion release procedure[2] as one method of encouraging companies proactively to take measures on their own to

eliminate corruption as a 'way of doing business'.

However, let there be no mistake. The final word on private actions citing violations of the FCPA has not been spoken, as private litigants (and now even the US Congress) are seeking new opportunities to leverage the recent explosion of anti-corruption prosecution and regulatory action into the private, civil arena. Thus, while use of the FCPA in private litigation has been sparse and has gone largely unnoticed since 1990, recent events and developments leave no question that the issue once again is percolating, and the potential risks heightened for companies engaged in (or under suspicion of) corrupt activities.

This new generation of private FCPA enforcement efforts has been multidimensional and compels a closer look from all fronts.

Securities fraud

When a company reports bad news, the securities plaintiffs' bar is rarely far behind. Not surprisingly, the recent spate of FCPA investigations and settlements has spawned a series of securities class actions alleging that companies made material false statements evidenced by subsequent disclosures of FCPA violations. These cases have met with varying degrees of success.

In three recent cases, companies publicly disclosed potential FCPA violations and shareholders quickly struck with class actions alleging that prior corporate statements were rendered materially false by these subsequent disclosures. The companies moved to dismiss the claims, but the courts allowed them to go forward.[3] Faced ultimately with the prospect of increasing litigation costs and potential significant damages awards, two of the companies settled their cases in 2007 for US$6.75 million and US$2.5 million, respectively. The third is scheduled to go to trial in 2009.

Not all cases have met with the same shareholder-friendly results. In November 2008, the US Court of Appeals for the Ninth Circuit upheld the dismissal of claims against Invision Technologies and two senior executives, finding that statements made in settlement agreements with US prosecutors and regulators were insufficient to support a claim under the US federal securities laws.[4] Still, even in victory, Invision was forced to defend costly private litigation arising from allegations of FCPA violations – all of this after already having paid nearly US$2 million in fines and penalties to the US Government.[5]

Breach of fiduciary duties

Also on the rise are claims by shareholders that company executives breached their fiduciary duties by making (or failing to prevent) corrupt payments to foreign government officials. In 2008, two US federal district courts dismissed shareholder derivative suits on procedural grounds (in one case, because the plaintiffs failed to make a pre-suit demand upon the company; in the other, because the plaintiffs lacked standing under applicable UK law).[6] Even ERISA health plan beneficiaries have sought to capitalise on FCPA disclosures, in one case suing the corporate plan fiduciary and company executives for investing in the company's stock while it was engaged in an illegal bribery scheme. In February 2008, the Ninth Circuit Court of Appeals reversed summary judgment in the case in favour of the defendants and remanded the case for further proceedings.[7]

FCPA violations as a 'predicate act'

However, as the FCPA continues to make front-page news, plaintiffs have gone beyond these more 'traditional' litigation approaches, seeking new and creative ways to parley allegations of foreign bribery into large private settlements or damages awards. In some cases, the plaintiffs seem simply to drop an FCPA allegation into their complaint to add eye-grabbing colour to their substantive allegations.[8] US courts have continued to reject such 'FCPA claims' as independent rights of action. Still, companies should not be so naïve as to underestimate the potential impact of the allegations alone. FCPA prosecutors are constantly mining both public news sources and court dockets for any leads from which to jump-start new FCPA investigations. Also, plaintiffs making these allegations may be eager to spawn government investigations in order to take advantage (at no cost to themselves) of the information discovered by prosecutors and regulators conducting their own inquiries.

Perhaps the most notable trend in 2008 was the stream of new cases brought by businessmen, corporations, and even foreign governments under the Racketeering Influenced Corrupt Organisations Act (RICO), commercial fraud statutes, and common law tort, alleging that foreign bribes directly interfered with their business, costing them millions of dollars in lost opportunities and monetary damages. Two such cases were brought by oil and gas developer Jack Grynberg against large oil, gas and energy companies (including BP, Statoil, British Gas, and Ivanhoe Energy), alleging that the defendants bribed foreign government officials to win exploration rights that compromised Grynberg's pre-existing interests. One of Grynberg's cases was dismissed in November because of a clause requiring that the dispute be submitted to arbitration. The other case remains pending. And Grynberg is not alone. In October 2008, an international fuel supplier sued a prominent US political fundraiser and his oil trading company for participating in a conspiracy to bribe Jordanian Government officials to give the company exclusive access to over US$1 billion in US Government contracts for the supply of fuels to the US military in Iraq.

Indeed, foreign governments themselves have begun to use the US courts to pursue companies alleged to have bribed their own officials. In one such case, the Iraqi Government filed suit against a 'who's who' of companies for their involvement in the oil-for-food corruption scandal that has permeated the FCPA landscape. Litigation also has been initiated by foreign government-owned entities seeking damages arising from alleged bribes of government officials. With foreign governments (and their agencies and instrumentalities) willing to open themselves to civil discovery in the United States in order to pursue alleged bribers, the FCPA's 'private' side certainly has taken a sharp turn.

A federal private cause of action under the FCPA?

Perhaps sensing this increase in private FCPA-based litigation, Congressmen Ed Perlmutter and Mark Udall of Colorado (Jack Grynberg's home state) introduced in June 2008 the bill for the Foreign Business Bribery Prohibition Act of 2008. The bill purported to 'authorise certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations by foreign concerns that damage domestic businesses'. It would have permitted actions only against 'foreign concerns' – defined to exclude certain 'issuers' of US securities, US 'domestic concerns', and any 'United States person' – but would have allowed litigants to seek treble damages for violations of the statute. The bill was referred in June 2008 to the House Committee on Energy and Commerce, as well as the Committee on the Judiciary, but was never introduced for debate. Now that a new session of Congress has begun, the bill would need to be re-introduced for consideration. Given the historic resistance in the United States to private actions combating foreign bribery, this new legislation is a development worth watching to see if the United States follows the international community's lead by opening its courts to such litigation.

The forecast

Companies around the globe no longer are able to ignore the multimillion dollar exposure of a vigilant global anti-corruption regime, driven in large part by US authorities, but increasingly joined by their international prosecutorial counterparts. The staggering cost of investigations alone has been sufficient to bring FCPA and anti-bribery compliance to the forefront of corporate legal departments' agendas.

In response, companies increasingly are reviewing and enhancing their FCPA compliance programmes, or even building new programmes from the ground up. But a new front has emerged that may further intensify these efforts, as private litigants, foreign governments, and now the US Congress, all are part of a developing trend that has the potential to raise the risk levels for non-compliance to new heights. Already, the line appears to be forming of plaintiffs claiming to be victims of foreign bribery, either proactively invoking the FCPA, or waiting for plea agreements or convictions to open the door to an easy-to-prove civil case.

There is no denying that FCPA risks are on the rise, especially for those who lack a comprehensive or effective compliance programme. With private parties now joining the fight against corruption, companies more than ever must be prepared.

Notes

1 *Lamb v Phillip Morris, Inc*, 915 F 2d 1024, 1029-1030 (6th Cir 1990).

2 Pursuant to the DOJ 'Opinion Procedure', any US company or national may seek advance guidance regarding the DOJ enforcement views on any proposed business conduct. See **www.usdoj.gov/criminal/fraud/fcpa/opinion/frgncrpt.html**.

3 *In re Faro Technologies Sec Litig*, 534 F Supp 2d 1248 (MD Fla 2007); *In re Nature's Sunshine Products Sec Litig*, 486 F Supp. 2d 1301 (D Utah 2007); *In re Immucor Inc Sec Litig*, No 1:05-CV-2276-WSD, 2006 WL 3000133 (ND Ga 4 October 2006). *Immucor* and *Nature's Sunshine* investigations are ongoing. Faro settled its case with the DOJ and SEC by paying nearly US$3 million in fines and penalties (**www.usdoj.gov/opa/pr/2008/June/08-crm-505.html**; **www.sec.gov/litigation/admin/2008/34-57933.pdf**).

4 *Glazer Capital Management, LP v Magistri*, — F 3d —, 2008 WL 5003306 (9th Cir 26 November 2008).

5 **www.usdoj.gov/opa/pr/2004/December/04_crm_780.htm**; **http://ftp.sec.gov/litigation/litreleases/lr19078.htm**.

6 *City of Harper Woods Employees' Retirement System v Oliver*, 577 F Supp 2d 124 (DDC 2008); *Hawaii Structural Ironworkers Pension Trust Fund v Belda*, No 08-0614, 2008 WL 2705548 (WD Pa 9 July 2008). The *Belda* case was brought by a pension trust fund, following the filing of a civil RICO action by the Government of Bahrain against Alcoa in February 2008. That case is discussed more fully below.

7 *In re Syncor ERISA Litig*, 516 F 3d 1095 (9th Cir 2008).

8 *Karim v AWB Limited*, No 06 Civ 15400, 2008 WL 4450265 (SDNY 30 September 2008); *Castellanos v Pfizer, Inc*, No 07-60646-CIV, 2008 WL 2323876 (SD Fla 29 May 2008); *Shoaga v Maersk, Inc*, Nos C 08-786 SBA, C-05-2213 SBA, 2008 WL 4615445 (ND Cal 17 October 2008); but see *RSM Production Corp v Fridman*, No 06 Civ 11512, 2007 WL 2295897 (SDNY 10 August 2007) (allowing plaintiff to pursue litigation based on alleged tortious interference with contract between plaintiff and the Government of Grenada).