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In This Issue:

Collateral Civil Litigation: Strategic Considerations During an FCPA Investigation
By Barrie L. Brejcha, Chicago, IL

How "Voluntary" is Your Disclosure?
Maximizing the Potential Benefits of Self-Reporting
By John P. Cunningham and Geoff Martin, Washington, DC

Baker & McKenzie's quarterly corporate compliance publication, "Inside the FCPA," is an electronic and hard copy newsletter dedicated to the critical examination of developments in U.S. and international anti-corruption compliance that are of particular concern to global companies (and their officers and employees). The newsletter is written with the intention of meshing specialized U.S. coverage with a select international viewpoint in order to meet the expectations of an international client base and a discriminating readership. We seek to make our guidance practical and informative in light of today's robust enforcement climate, and we encourage your feedback on this and future newsletters.

If you would like to provide comments, want further information about the matters discussed in this issue, or are aware of others who may be interested in receiving this newsletter, please contact Sue Boggs of Baker & McKenzie at sue.boggs@bakermckenzie.com or +1 214 965 7281. We look forward to hearing from you and to serving (or continuing to serve) your FCPA, international anti-corruption, and corporate compliance needs.

Collateral Civil Litigation: Strategic Considerations During an FCPA Investigation

By Barrie L. Brejcha, Chicago, IL

As Foreign Corrupt Practices Act ("FCPA") enforcement efforts by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") continue to increase, so too have shareholder lawsuits based upon the underlying bribery allegations. Indeed, the public announcement of the initiation or resolution of a government-led FCPA investigation almost invariably triggers a shareholder class action suit alleging issues with the company's public disclosures, or a derivative action charging that directors and officers breached fiduciary duties by failing to implement necessary internal controls and policies to ensure compliance with relevant anti-corruption laws.

While many "follow-on" lawsuits do not survive a defense motion to dismiss – because they are often lacking specific facts to establish the requisite state-of-mind on the part of directors/officers or demonstrate that the company's public statements were false or misleading -- the costs of settling FCPA-related litigation can be substantial. A number of FCPA-related securities lawsuits have settled for amounts in excess of the penalty paid to resolve the DOJ or SEC charges. By way of example:

- Nature's Sunshine paid a civil penalty of $600,000 in 2009 to settle SEC bribery charges, subsequently settling the related securities fraud class action for $6 million.

- FARO Technologies Inc. resolved its FCPA charges with the DOJ/SEC in 2008, paying a total of $2.95 million; the company settled the related securities class action lawsuit for $6.875 million.

- Immucor, Inc. consented to entry of a cease-and-desist order with the SEC to resolve bribery allegations in 2007, and paid $2.5 million to settle the related class action lawsuit.

In addition to the settlement amount, the cost of defending civil litigation − often on multiple fronts − can be substantial (and not necessarily covered by directors and officers liability insurance).

Given the financial stakes and reputational costs of collateral civil litigation, companies with global operations need to think strategically while navigating an FCPA investigation to mitigate further risk and limit potential exposure. This article highlights the key questions each company should ask before and during an investigation, and spotlights the resulting best practices for limiting collateral litigation risk.

Before an FCPA Investigation

Does the company have a robust FCPA compliance program?

Each company with potential collateral civil litigation exposure should be able to demonstrate that its compliance program embodies the essential elements of corporate compliance -- leadership (i.e., "tone at the top"), effective risk assessment, meaningful standards and internal controls, appropriate training and communication within the organization, and sufficient monitoring, auditing, and response capabilities. (For a detailed discussion of each of the five essential elements of corporate compliance, please see The Five Essential Elements of Corporate Compliance.)

Are the company's ongoing compliance efforts being disclosed?

The company's disclosures about its FCPA compliance efforts − especially actions that it may have taken prior to discovery of any wrongdoing − to evaluate, verify the effectiveness of, and/or enhance its anti-corruption program may be useful in the event the company needs to respond to a shareholder claim that, for example, board members breached fiduciary duties by failing to implement FCPA-related controls.

Have FCPA risks been sufficiently disclosed?

Before any FCPA issue arises, companies should evaluate the areas that potentially give rise to FCPA risks and, where risks are measurable, consider crafting appropriate disclosures for inclusion in 10-Qs, 10-Ks, etc. that will eliminate or limit the scope of follow-on claims that the company's SEC filings were materially misleading. Potential risk disclosures could discuss the following:

- Risks associated with doing business in countries with elevated perceived corruption risk (*i.e.*, China, Russia, Brazil, etc.);

- Risks associated with potential gaps in implementation of the compliance program; and

- Risks associated with violations of anti-corruption laws and regulations.

After Discovery (or Announcement) of a Potential FCPA Violation

Are progressive disclosures warranted to rebut shareholder allegations that material information was not disclosed in a timely manner?

Once potential wrongdoing has been discovered, a company should consider disclosing the steps that the company has undertaken − including internal efforts to uncover the issue, the thoroughness of any internal investigation, and the enlisting of external resources and support − to mitigate further damage in follow-on litigation. Identify any issues that the company may have encountered in the course of an investigation (*i.e.*, information that may have been withheld from management/the board, specific issues related to the geographic area in which the issue arose, etc.). Periodically evaluate disclosures made before and throughout the investigative process. Consider whether any disclosures previously issued may need to be updated and whether additional disclosures are warranted. Progressive disclosures, as material information becomes available, can help to rebut shareholder claims that shareholders were damaged by the withholding of material information.

Have disclosures been evaluated in light of privilege issues?

All FCPA investigations implicate potential privilege issues. Procedures must be established at the outset to ensure the preservation of applicable privileges. Cross-border internal investigations, in particular, give rise to challenging privilege issues including, but not limited to:

- Complexities with conducting witness interviews;
- Differences between U.S. privilege law and the laws of other jurisdictions;
- Considerations when communicating with foreign in-house counsel; and
- Problems associated with ignoring data privacy rules.

To the extent possible, companies must structure an internal investigation in a manner that protects privileged information from discovery while facilitating a comprehensive investigation.

While disclosure of privileged information in the context of a government investigation may at some point be deemed necessary or strategically appropriate, any such disclosure must also be evaluated in light of the potential impact it may have in collateral civil litigation. Voluntary waivers of privilege in a government investigation should be made with the assumption that any privilege with respect to the information will likely also be considered waived in subsequent lawsuits.

When negotiating the content of documents resolving an FCPA investigation, is there factual information that could help the company respond to follow-on claims?

Where a company is negotiating resolution of an FCPA investigation with the government, the information incorporated in the documents resolving the charges should be considered in a light that will best position the company to

respond to FCPA-related litigation. To the extent possible, consider including information to establish the following:

- The existence of internal controls and an FCPA anti-corruption compliance program in place prior to the discovery of the conduct at issue;

- The company's efforts to evaluate the effectiveness of the program and to improve or enhance any aspect (especially steps taken prior to resolution of the investigation);

- The manner in which the wrongful conduct was uncovered − particularly if it was the result of an internal probe;

- Challenges the company may have faced when investigating the wrongdoing (*i.e.*, material information that was concealed and which could not have been discovered sooner); and

- The company's response upon discovery of the problem and steps taken to combat against future FCPA violations.

While not bullet-proof, inclusion of the above information will substantiate arguments that the company may need to make in response to allegations in follow-on collateral litigation that directors and management failed to implement and effectively monitor the necessary anti-corruption controls and/or disregarded red flags that should have alerted the company (sooner) to the existence of a problem.

Conclusion

Companies with multinational operations cannot oversee every action taken by employees and business partners throughout the world. Rather, the company needs to be in a position to demonstrate − whether to the government in an investigation or to the court in related collateral litigation -- that it did everything it reasonably could have done to prevent an FCPA violation and to discharge fiduciary obligations owed to shareholders. Managing an FCPA investigation while being mindful of its potential to trigger and impact collateral civil litigation helps to facilitate optimal resolution of material issues on both fronts.

How “Voluntary” is Your Disclosure? Maximizing the Potential Benefits of Self-Reporting

By John P. Cunningham and Geoff Martin, Washington DC

Prosecutors and regulatory agencies in the U.S. and elsewhere have long set expectations that, in order to maximize the prospect of receiving full cooperation credit (including any associated reduction in monetary penalties), the voluntary disclosure of corporate and/or individual wrongdoing must be made timely, genuinely, and in good faith. Several recent enforcement developments highlight the benefits that may be achieved by companies making such disclosures, while also underscoring the potential risks and loss of goodwill that can result from half-hearted or disingenuous disclosures that, for example, only present favorable evidence to authorities in a one-sided attempt to support or exonerate the company.

Introduction to Voluntary Disclosure

Several criminal and regulatory regimes, most notably in the U.S. under the Foreign Corrupt Practices Act (“FCPA”), and more recently in the U.K. under the Bribery Act and in Brazil with the Clean Company Act, seek to incentivize companies to voluntarily come forward to self-report potential violations of these laws by the company, its officers, employees, subsidiaries, or other affiliates.

In each of these regimes there is no legal obligation for companies to disclose alleged criminal conduct and thereby incriminate themselves or their officers or employees. Any disclosure that is made in this way is therefore perceived as “voluntary.” Notwithstanding this, authorities have been keen to emphasize the benefits to companies of taking the step of voluntarily disclosing, with assurances of more lenient treatment, measurable reductions in penalty calculations, and even declinations.

Recent Examples of Voluntary Disclosure Credit

On October 27, 2014, the U.S. Securities and Exchange Commission (“SEC”) announced the settlement of FCPA charges brought against Layne Christensen, a global water management, construction, and drilling company headquartered in Texas. The charges resulted from the company having made improper payments to foreign officials in several African countries in order to obtain beneficial treatment and reductions in tax liability. Layne Christensen paid a total of over $5 million in fines, disgorgement, and pre-judgment interest to the SEC to settle the case.

In its public statements announcing the settlement with Layne Christensen, the SEC effusively praised the company’s decision to voluntary disclose the misconduct and the company’s extensive cooperation with the resulting investigation: “Layne self-reported its violations, cooperated fully with our investigation, and revamped its FCPA compliance program. Those measures were credited in determining the appropriate remedy.” Moreover, the U.S. Department of Justice (“DOJ”) declined to prosecute Layne Christensen altogether, due (at least in part) to the company’s decision to self-report and its exemplary cooperation and compliance program remediation.

The non-prosecution agreements Ralph Lauren secured from DOJ and SEC in April 2013 and the decision by both authorities to decline enforcement against Morgan Stanley in April 2012 are oft-cited as the benchmark cases for

the benefits of corporate voluntary disclosure and cooperation in U.S. FCPA matters. The *Resource Guide to the FCPA*, issued jointly by the DOJ and the SEC in November 2012, reiterates this approach, explaining that "both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."

Learning from Misguided Disclosure Practices

Instructively, DOJ and SEC have not hesitated to offer criticism of several companies (which later became the target of derivative class action securities lawsuits) as a result of the manner in which they have handled internal investigations and disclosures of potentially illegal conduct. Practices that have led to such censure include:

- Disclosures made only as a result of press reports about alleged corrupt conduct;
- Deliberate corporate concealment following discovery and an internal investigation; and
- Manipulation of the findings of an internal investigation so as to mislead the disclosure authorities about the comprehensiveness of an internal review or the significance of the findings.

An informed decision by a company not to disclose potential misconduct is one thing, but when a company deliberately alters, conceals, or diminishes information submitted to an authority it is likely to vitiate any credit gained by self-reporting in the first place, and potentially create additional liability (possibly criminal) further to the underlying offense that was the subject of the disclosure.

The U.K.'s Perspective

Assessing potential voluntary disclosure credit in the U.K. under the regime introduced in parallel to the U.K. Bribery Act in July 2011 is somewhat theoretical at this point, as no corporate matters have been prosecuted under the Act (from a voluntary disclosure or otherwise). However, a civil settlement resulted from a voluntary disclosure in Scotland under legislation predating the Bribery Act. This matter involved the Abbot Group, which in November 2012, submitted to a £5.6 million ($8.4 million) civil recovery settlement, connected to bribes allegedly paid by an unnamed foreign subsidiary abroad. Few additional details have been issued in connection with the case, its settlement, or any account taken of the disclosure. However, in commenting on the case, Ruaraidh Macniven, Head of the Crown Office's Civil Recovery Unit in Scotland, which brought the case, noted that "[the self-reporting] initiative enables responsible businesses to draw a line under previous conduct and, providing the criteria are met, affords the possibility of a civil settlement. Self-reporting is an important way to ensure that corruption is exposed and that companies put in place effective systems to prevent it."

Notwithstanding the limited enforcement activity under the Bribery Act, the U.K. Serious Fraud Office ("SFO") has published guidance on voluntary disclosures, which makes clear that credit will only be given where a disclosure is made in good faith and transparently:

> *[F]or a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their*

notice." Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.

David Green, the director of the SFO, recently shared his thoughts with *The Times* newspaper in London, revealing his concerns about the potential motivations for companies (and their advisors) in making disclosures. Green cautioned that the SFO would be skeptical in receiving reports that sought to "minimise the problem" or exonerate the subject company from wrongdoing. In such instances Green explained that the SFO "will never take a report at face value and will drill down into its evidence and conclusions."

Conclusion

After carefully weighing the business costs and legal risks against the potential benefits, a voluntary disclosure can yield positive results for companies confronting potential civil or criminal misconduct in the U.S., the U.K., and in other countries. The benefits of self-reporting can take the form of cooperation credit, leniency, reduced penalties, and sometimes declinations. In contemplating whether, when, and how to self-report potentially illegal conduct, however, companies should be wary of the potential pitfalls of making the disclosure in a manner inconsistent with the expectations of the relevant government authorities. Indeed, once a voluntary disclosure has been made, authorities will closely examine the accuracy, transparency, and motives behind it before considering (and ultimately granting) any of the aforementioned benefits.

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