ARTICLE

FOREIGN CORRUPT PRACTICES ACT RIPPLES

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An obvious reason to comply with the Foreign Corrupt Practices Act ("FCPA") is that non-compliance can expose a company to a criminal or civil FCPA enforcement action by the Department of Justice ("DOJ") and/or the Securities and Exchange Commission ("SEC"). However, this Article highlights that settlement amounts in an actual FCPA enforcement action are often only a relatively minor component of the overall financial consequences that can result from FCPA scrutiny or enforcement in this new era.

By coining a new term of art – the "three buckets" of FCPA financial exposure - and through various case studies and examples, this Article demonstrates how FCPA scrutiny and enforcement can impact a company's business operations and strategy in a variety of ways from: pre and post-enforcement action professional fees and expenses; to market capitalization; to cost of capital; to merger and acquisition activity; to impeding or distracting a company from achieving other business objectives; to private shareholder litigation; to offensive use of the FCPA by a competitor or adversary to achieve a business objective or to further advance a litigating position.

This Article thus shifts the FCPA conversation away from a purely legal

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issue to its more proper designation as a general business issue that needs to be on the radar screen of business managers operating in the global marketplace. By highlighting the many ripples of FCPA scrutiny and enforcement, it is hoped that more business managers can view the importance of FCPA compliance more holistically and not merely through the narrow lens of actual enforcement actions.

INTRODUCTION

An obvious reason to comply with the Foreign Corrupt Practices Act ("FCPA") is that non-compliance can expose a company to a criminal or civil FCPA enforcement action by the Department of Justice ("DOJ") and/or the Securities and Exchange Commission ("SEC").However, this Article highlights that settlement amounts in an actual FCPA enforcement action are often only a relatively minor component of the overall financial consequences that can result from FCPA scrutiny or enforcement in this new era.

This Article is guided by the below picture which best highlights the financial consequences that can result from FCPA scrutiny or enforcement. In short, think of the drop of water as being FCPA scrutiny or enforcement by the DOJ and/or SEC resulting in the many ripples discussed in this Article.

Part I of this Article coins a new term of art – the "three buckets" of FCPA financial exposure – and examines various financial consequences that directly result from FCPA scrutiny or enforcement. The "three buckets" are: (i) pre-enforcement action professional fees and expenses; (ii) settlement amounts in an actual FCPA enforcement action; and (iii) post-enforcement action professional fees and expenses. Of these "three buckets," while settlement amounts in an actual FCPA enforcement action tend to get the most attention, pre-enforcement action professional fees and expenses are often the most expensive aspect of FCPA scrutiny and enforcement largely because of the "where else" question.

Part II of this Article further adds to the overall financial consequences that can result from FCPA scrutiny or enforcement and uses various case studies and examples to demonstrate how FCPA scrutiny and enforcement can further negatively impact a company's business operations and strategy in a variety of ways from: market capitalization; to cost of capital; to merger and acquisition activity; to impeding or distracting a company from achieving other business objectives; to private shareholder litigation; to offensive use of the FCPA by a competitor or adversary to achieve a business objective or to further advance a litigating position.

This Article accepts the fact that FCPA scrutiny and enforcement results in many other ripples in this new era. Yet, throughout this Article many questions are posed regarding the legitimacy of certain ripples. Moreover, while it is beyond the focus of this Article, it must nevertheless be highlighted that because of the many ripples of FCPA enforcement, it is important that FCPA enforcement be subjected to meaningful judicial scrutiny and that enforcement actions represent legitimate instances of provable FCPA violations, not merely settlements entered into for reasons of risk aversion. This would seem like an obvious statement. However, the reality is that the majority of corporate FCPA enforcement actions in this new era are based on aggressive and controversial enforcement theories, yet resolved via non-prosecution and deferred prosecution agreements (NPAs / DPAs) not subjected to any meaningful judicial scrutiny by risk-averse business organizations mindful of the adverse consequences of putting the enforcement agencies to its burden of proof in an adversarial proceeding.[1]

Regardless, by examining the FCPA's many other ripples, this Article shifts the FCPA conversation away from being a purely legal issue to its more proper designation as a general business issue that needs to be on the radar screen of business managers operating in the global marketplace. By highlighting the many ripples of FCPA scrutiny and enforcement, it is hoped that more business managers can view the importance of FCPA compliance more holistically and not merely through the narrow lens of actual enforcement action.

I. THE "THREE BUCKETS" OF FCPA FINANCIAL EXPOSURE

An obvious reason to comply with the FCPA is that non-compliance can expose a company to a criminal or civil FCPA enforcement action by the DOJ and/or SEC. However, settlement amounts in an actual FCPA enforcement action are often only a relatively minor component of the overall financial consequences that can result from FCPA scrutiny or enforcement in this new era.

Part I of this Article coins a new term of art – the "three buckets" of FCPA financial exposure – and examines various financial consequences that directly result from FCPA scrutiny or enforcement in this new era. The below pictures best highlight the "three buckets" of FCPA financial exposure in terms of typical magnitude in relation to each other.

1. For additional reading on this troubling aspect of FCPA enforcement, *see, e.g.*, Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517; *see also*, *Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *Foreign Corrupt Practices Act*] (statement of Michael B. Mukasey, Partner, Debevoise & Plimpton LLP) *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Mukasey06142011.pdf; Mike Koehler, *Former Attorney General Alberto Gonzales Criticizes Various Aspects Of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), http://www.fcpaprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement; Mike Koehler, *DOJ Prosecution of Individuals – Are Other Factors at Play?*, FCPA PROFESSOR (Jan. 21, 2014), http://www.fcpaprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play-3.

Pre-enforcement action professional fees and expenses	*Enforcement action settlement amounts*	*Post-enforcement action professional fees and expenses*

A. Pre-Enforcement Action Professional Fees and Expenses

Every instance of FCPA scrutiny has a point of entry – in other words, a set of facts that give rise to the scrutiny in the first place. This point of entry is often the beginning of a long and expensive journey for the company under scrutiny and the first bucket of FCPA financial exposure is pre-enforcement action professional fees and expenses.

For instance, in 2008, beauty products company Avon disclosed that it was conducting an FCPA internal investigation regarding compliance in China.[2] As is typical, the investigation soon spread to other countries, and six years later the internal investigation is still active and the company has disclosed approximately $350 million in pre-enforcement action professional fees and expenses.[3]

Wal-Mart's FCPA scrutiny has resulted in even higher pre-enforcement action professional fees and expenses. In late 2011, Wal-Mart disclosed that it was conducting an FCPA internal investigation concerning certain permitting, licensing and inspection issues in Mexico.[4] Wal-Mart's scrutiny has likewise followed a typical pattern in that the company's internal review expanded beyond Mexico and the company's pre-enforcement action professional fees and expenses began to skyrocket. During 2013, the company made various disclosures regarding its FCPA scrutiny including the following:

> On FCPA, we continue to work closely with anticorruption compliance experts to review and to assess our programs and help us implement concrete steps for each particular market. In the various markets, these experts have spent tens of thousands of hours on anti-corruption support and training.[5]

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2. Avon Prods., Inc. Quarterly Report (Form 10 - Q) (Oct. 30, 2008) *available at* http://investor.avoncompany.com/Cache/22219072.pdf?IID=3009091&FID=22219072&O=3&OSID=9 (follow "SEC Filings" hyperlink: then search "10-Q for "2008").

3. *See, e.g.*, Peter Henning, *The Mounting Costs of Internal Investigations*, N.Y. TIMES, Mar. 5, 2012, http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/ (discussing pre-enforcement action professional fees and expenses as of March 2012).

4. Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q) (Dec. 8, 2011), *available at* http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=112761&fid=7888537.

5. *Wal-Mart Fourth Quarter Fiscal Year 2013 Earnings Call*, WAL-MART STORES, INC. (Feb. 21, 2013) [hereinafter *Wal-Mart Q4 Earnings Call]*, *available at* http://cdn.corporate.walmart.com/63/1a/461d1fa2470fa596b46198e72886/management-earnings-call-transcript.pdf.

Each quarter of 2013, Wal-Mart disclosed its pre-enforcement action professional fees and expenses and quarterly totals equated to the company spending approximately $1.25 million per working day on its FCPA scrutiny.[6] Most recently, Wal-Mart disclosed anticipated expenses in 2014 of $200 to $240 million in connection with its FCPA scrutiny.[7]

It is not just large multinationals subject to high-profile FCPA scrutiny that are spending millions of dollars in pre-enforcement action professional fees and expenses every year. For instance, beverage company Beam Inc. disclosed approximately $4.2 million in one year for "legal, forensic accounting, and other fees related to [its] internal investigation into FCPA compliance in [its] India operations."[8]

Comparing pre-enforcement action professional fees and expenses to settlement amounts is not possible in all cases as companies have different disclosure requirements and practices. However, where a comparison is possible, it is clear that pre-enforcement action professional fees and expenses are typically the greatest financial consequence to a company resolving an FCPA enforcement action. For instance, RAE Systems resolved a coordinated DOJ and SEC enforcement action by agreeing to pay a combined $2.95 million in settlement amounts.[9] In connection with this FCPA scrutiny, the company disclosed $4.2 million in pre-enforcement action professional fees and expenses.[10]

While the ratio of pre-enforcement action professional fees and expenses to enforcement action settlement amount in RAE Systems was relatively modest, such ratios have exceeded 10:1 or even greater. For instance, in the NATCO enforcement action the company agreed to pay a $65,000 civil penalty to resolve an SEC enforcement action. The company's pre-enforcement action professional fees and expenses were reported to be $11 million and caused the company cash-flow problems.[11] Likewise, in the Veraz Networks enforcement action, the company agreed to pay a $300,000 civil penalty to resolve an SEC enforcement action. The company's pre-enforcement action professional fees and expenses were

6. Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Aug. 16, 2013), http://www.fcpaprofessor.com/friday-roundup-88.

7. Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Feb. 21, 2014), http://www.fcpaprofessor.com/friday-roundup-109.

8. Beam Inc., Annual Report (Form 10-K) (Feb. 26, 2013), *available at* http://www.sec.gov/Archives/edgar/data/789073/000119312513076953/d457573d10k.htm.

9. Mike Koehler, *The Former CFO of RAE Systems Speaks*, FCPA PROFESSOR (Aug. 14, 2012), http://www.fcpaprofessor.com/the-former-cfo-of-rae-systems-speaks.

10. *Id.*

11. Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010, 12:00 AM), http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html.

approximately $3 million.[12]

The above examples highlight the fact that pre-enforcement action professional fees and expenses are typically the most expensive aspect of FCPA scrutiny and enforcement. The question is why are pre-enforcement action professional fees and expenses so expensive?

Resolution documents from an FCPA enforcement action against telecommunication company Alcatel-Lucent provide insight into the expansive nature of FCPA scrutiny. The DOJ noted:

> At the request of the government, [Alcatel-Lucent] undertook a 'Global Review' to evaluate its relationship with agents, interactions with government officials, and gifts, travel and entertainment provided in countries around the world. . . . In particular, Alcatel-Lucent and its outside counsel conducted investigations of 34 countries around the world to uncover potential misconduct. The internal investigation examined Alcatel-Lucent's agent and consultant approval, review, and termination processes, the activities of a number of terminated agents, and the knowledge and involvement of senior management in any potential wrongdoing. This effort was closely coordinated with the government. . . . [As part of its agent and consultant approval process review], Alcatel-Lucent retained an independent investigative firm to review all of Alcatel-Lucent's 300 then-existing agents and consultants. . . . Additionally, . . . Alcatel-Lucent commenced a review of its Board of Directors' and other senior management's knowledge of, and involvement in, any of the wrongdoing. As part of this review, interviews were conducted of 26 individuals who were either current high-ranking members of Alcatel-Lucent's management, former high-ranking members of Alcatel's management, or were in a position to provide information relevant to the review. Alcatel-Lucent and its counsel also reviewed documents collected from these individuals. . . . Overall, Alcatel-Lucent's outside counsel interviewed over 330 witnesses as part of these investigations, collected data from 201 individuals, and reviewed over 2 million documents, of which over 200,000 documents were produced to the government.[13]

As hinted at above, a main reason pre-enforcement action professional fees and expenses are typically the most expensive aspect of FCPA scrutiny and enforcement is because of the "where else" question. The "where else"

12. Mike Koehler, *Disconnected . . . Another Telecommunications Company Settles an FCPA Enforcement Action*, FCPA PROFESSOR (June 30, 2010), http://fcpaprofessor.blogspot.com/2010/06/disconnected-another-telecommunications.html.

13. Government's Memorandum in Support of the Proposed Plea Agreements and Deferred Prosecution Agreement, United States v. Alcatel-Lucent, S.A., No. 10-CR-20906, 2011 WL 2038435 (S.D. Fla. May 23, 2011).

question generally works as follows: A company voluntarily discloses to the enforcement agencies specific conduct that occurred in country X that could implicate the FCPA. Before the enforcement agencies will agree to resolve any enforcement action concerning the conduct in country X, the enforcement agencies will often ask "where else." In other words, if the conduct giving rise to FCPA scrutiny occurred in country X, how do the enforcement agencies know that similar conduct did not also occur in countries A, B, C, D, etc. In short, the "where else" question asked in instances of FCPA scrutiny often results in a company conducting a world-wide compliance review of its entire operations.

Because cooperation with the government's investigation is an important factor the enforcement agencies weigh in deciding whether to bring an enforcement action,[14] business organizations invariably, yet reluctantly, accept FCPA counsel's recommendation to broaden the internal investigation to best demonstrate cooperation. The next thing the company knows, it is paying for a team of lawyers (accompanied by forensic accountants and other specialists) to travel around the world to answer the "where else" question even though the voluntary disclosure that started the whole process involved specific conduct in a specific country.

Where an instance of FCPA scrutiny is prompted by board of director or senior executive conduct that raises the possibility of a culture of corruption within a company or conduct that otherwise suggests widespread and systematic practices, the "where else" question is a legitimate law enforcement question. However, the "where else" question is asked in nearly every instance of FCPA scrutiny as evidenced by FCPA resolution documents. For instance, the Magyar Telekom FCPA enforcement action focused on business conduct in Macedonia and Montenegro, but in resolving its FCPA scrutiny, the company, in the words of the DOJ, conducted a "thorough global internal investigation concerning bribery and related misconduct."[15] Likewise, the Tenaris FCPA enforcement action focused on business conduct in Uzbekistan, but in resolving the action the DOJ cited the company's "voluntary investigation of the Company's business operations throughout the world."[16]

The "where else" question is even asked in instances of FCPA scrutiny focused on conduct in foreign subsidiaries that comprise a meaningless percentage of the company's overall operations. For instance, the Tyson

14. PRINCIPLES OF FED. PROSECUTION OF BUS. ORGS., tit. 9, ch. 9-28.000 (U.S. Dep't of Justice 2008), *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

15. Mike Koehler, *A Q&A with Claudius Sokenu on "Where Else"*, FCPA PROFESSOR (Apr. 4, 2012), http://www.fcpaprofessor.com/a-qa-with-claudius-sokenu-on-where-else.

16. *Id.*

Foods FCPA enforcement action focused on conduct in Mexico involving a subsidiary company that "comprised less than one percent of Tyson's global net sales."[17] Even though approximately eighty-five to ninety percent of Tyson's sales were domestic, in resolving the enforcement action, Tyson subjected all of its wholly-owned production facilities, including those located outside of Mexico, "to rigorous FCPA reviews".[18]

An FCPA practitioner, formerly an SEC FCPA enforcement attorney, stated as follows regarding the "where else" question:

> [Q:] What percentage of FCPA enforcement actions that you have been involved in have resulted in the 'where else' question being asked?
> [A:] In my time as a regulator at the Securities and Exchange Commission's Division of Enforcement and in private practice, the 'where else' question has been asked in virtually every single FCPA matter in which I have been involved. I have asked it and it has been asked of me.
> [Q:] Do you believe the 'where else' question was appropriate in these instances?
> [A:] In some instances it was entirely appropriate for the SEC, the DOJ, and other regulators to ask the 'where else' question. In others, however, the allegations did not support a 'where else' question and it appeared to be more of a fishing expedition and boiler plate question than a well-reasoned question under the facts. 'Where else' is a reasonable and appropriate question when the alleged misconduct appears to be systemic and/or the company under investigation appears to lack the controls necessary to prevent the payment of bribes to foreign government officials. It is not, however, an appropriate question where it is intended to force companies to conduct multi country internal investigations with little more than the uninformed hunch of a government official who has little or no experience in how businesses work around the world.[19]

That the "where else" question is asked in the absence of any meaningful check or judicial oversight raises a host of problematic issues. Moreover, while the purpose of this Section is to demonstrate the *fact* that pre-enforcement action professional fees and expenses are typically the most expensive aspect of FCPA scrutiny and enforcement, it must nevertheless be highlighted that FCPA attorneys to whom the "where else" question is posed have little incentive to pushback as the question often leads to multi-year, multi-country billing bonanzas. As *Forbes* noted in an article titled "The Bribery Racket:"

> "A company that suspects bribery overseas hires a battery of lawyers,

17. *Id.*
18. *Id.*
19. *Id.*

> accountants and investigators who may then report any findings to Justice in hopes of some undefined leniency. More likely, the company pays out huge fines and then hires more lawyers as government-mandated compliance monitors, a job that can stretch into years of legal billing."[20]

The Wall Street Journal has observed:

> "[The FCPA] has become big business for the lawyers who delve into the operations of companies in response to an investigation by the Justice Department and the Securities and Exchange Commission—or to avoid one. The result is a mini-industry of investigators and white-collar criminal-law practices."[21]

Likewise, an article titled "Lawyers Need to Brake Their Bribe-Case Gravy Train" observed:

> "Lawyers need to pull the brake on their bribery-probe gravy train. Wal-Mart Stores shelled out about $80 million last quarter alone – some $1.25 million per working day – on an internal corruption investigation. [. . .] Wasteful scorched-earth legal tactics inflate costs, while potentially ruinous U.S. penalties make companies scared to skimp. Smarter lawyering could slow the runaway spending. Scrutiny under the FCPA typically throws multinationals into attorney-hiring overdrive. Having legal eagles delve into corporate innards helps a company look cooperative and thereby win leniency from the government. [. . .] There is a better way. A records search at a multinational's headquarters can quickly reveal how and, generally, where and to whom bribes are being paid, according to veterans of the Siemens case and others. Investigations in just a few countries can then ferret out the details of a global scheme. That's often enough to reach a reasonable settlement with Uncle Sam. Yet unnecessarily far-flung and costly probes persist. Not only does the prospect of enormous fees encourage lawyers running an investigation to engage in overkill. A company's officers also don't want to be seen to cut corners or get in the attorneys' way. The usual healthy corporate tendency to police costs carefully doesn't apply. For big companies the waste may not show, either. Even a legal bill of, say, $500 million is a drop in the bucket for a company like Wal-Mart with revenue nearly 1,000 times that figure every year. That shouldn't, however, let lawyers

20. Vardi, *supra* note 11.

21. Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J., Oct. 2, 2012, http://online.wsj.com/news/articles/SB10000872396390443862604578028462294611352.

> off the hook. Ethics rules require their fees to be reasonable. In bribery cases, that standard is at risk of becoming corrupted."[22]

As to sky-rocketing pre-enforcement action professional fees and expenses, it was notable that in 2013, the DOJ's FCPA Unit Chief called out the industry at an American Bar Association event and suggested that FCPA counsel is often seeking to "overdo it" through a global search of operations for FCPA issues.[23] He discussed a case in which a company and its professional advisors came to a meeting with a global search plan and he said "no, no, no, that is not what I want."[24] The FCPA Unit Chief indicated that the lawyers and other professional advisors in the room "looked unhappy," but that the general counsel of the company was happy.[25]

Regardless of the merits of the "where else" question in most instances, and regardless of the necessity of many pre-enforcement action professional fees and expenses, the take-away point from this section is the *fact* that such fees and expenses are often the most expensive aspect of FCPA scrutiny and enforcement in this new era. In fact, pre-enforcement action professional fees and expenses have become so pronounced that a marketplace has developed to provide insurance for such expenses.[26] Such insurance, of course, does not address the root causes of why pre-enforcement professional fees and expenses have skyrocketed, rather it merely seeks to capitalize on the *fact* that such pre-enforcement action professional fees and expenses have skyrocketed.

B. Enforcement Action Settlement Amounts

To state the obvious, failure to comply with the FCPA can expose a company to a criminal or civil enforcement action by the DOJ and/or SEC.[27] Because the focus of this Article is the many *other* ripples of FCPA

22. *Further to Wal-Mart's Pre-Enforcement Action Professional Fees and Expenses*, FCPA PROFESSOR (Aug. 28, 2013), http://www.fcpaprofessor.com/further-to-wal-marts-pre-enforcement-action-professional-fees-and-expenses.

23. *Friday Roundup*, FCPA PROFESSOR (Sept. 20, 2013), http://www.fcpaprofessor.com/friday-roundup-93.

24. *Id.*

25. *Id.*

26. *See, e.g.*, Mike Koehler, *FCPA Insurance*, FCPA PROFESSOR (Mar. 9, 2011), http://www.fcpaprofessor.com/fcpa-insurance; Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (July. 29, 2011), http://www.fcpaprofessor.com/friday-roundup-30; Mike Koehler, *A Q&A Regarding FCPA Insurance*, FCPA PROFESSOR (Apr. 10, 2012), http://www.fcpaprofessor.com/a-qa-regarding-fcpa-insurance-2.

27. There is substantial overlap between the DOJ and SEC's FCPA enforcement programs. FCPA enforcement actions against issuers (companies – domestic and foreign – with shares registered on a U.S. exchange or otherwise required to make filings with the SEC) typically involve related and coordinated enforcement actions by the DOJ for criminal FCPA violations (whether anti-bribery violations or books and records and internal control violations) and by the SEC for civil FCPA violations

scrutiny besides an actual FCPA enforcement action, this Section does not discuss in great detail the many legal and policy issues related to FCPA enforcement action settlement amounts.[28] However, to best understand the "three buckets" of FCPA financial exposure, it is nevertheless useful to highlight certain facts and figures concerning actual FCPA settlement amounts.

Table I contains the largest FCPA corporate settlement amounts in history.

Table I – Largest FCPA Corporate Settlements[29]

Company	**Amount**	**Year**
Siemens	$800 million (DOJ- $450 million)	2008

(whether anti-bribery violations or books and records and internal control violations). The overlap, however, between the DOJ and SEC's FCPA enforcement programs is not complete. As a general matter, the SEC has jurisdiction over issuers. In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain FCPA enforcement actions do not have an SEC component. As a general matter, the DOJ has criminal jurisdiction over issuers, domestic concerns, (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct "while in the territory of the U.S." In addition, the DOJ has a higher burden of proof in a criminal prosecution. As a result, and given the DOJ's prosecutorial discretion, certain FCPA enforcement actions may only include an SEC component. As to the DOJ's discretion, the DOJ has stated that it "has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence." *See* Criminal Div., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1, 75 (2012) [hereinafter THE GUIDANCE], *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf. Based on information in the DOJ and SEC authored Guidance, it appears that factors motivating a so-called declination include voluntary disclosure and cooperation, effective remedial measures, and small improper payments. *Id.* at 77-79. In addition, the DOJ has separately stated that it has declined prosecutions when, among other things, a single employee, and no other employee, was involved in the improper payments at issue; and the improper payments at issue involved minimal funds compared to the overall business revenues. *See DOJ Declines to Get Specific in Declination Responses*, FCPA PROFESSOR, (Oct. 12, 2011), http://www.fcpaprofessor.com/doj-declines-to-get-specific-in-declination-responses.

28. For instance, the composition of FCPA settlement amounts in many corporate enforcement actions is controversial. Many FCPA enforcement actions involving both a DOJ and SEC component include features of "double-dipping" (in which the company pays an amount representing the benefit received from the alleged improper payments twice – first to the DOJ and then to the SEC). *See Double-Dipping*, FCPA PROFESSOR (June 4, 2013), http://www.fcpaprofessor.com/double-dipping. Likewise, it is common in FCPA enforcement actions for the SEC to seek a disgorgement amount even in the absence of anti-bribery violations (a practice known as no-charged bribery disgorgement). *See "No-Charged Bribery Disgorgement*," FCPA PROFESSOR (Aug. 22, 2011), http://www.fcpaprofessor.com/no-charged-bribery-disgorgement.

29. As of February 18, 2014. http://www.fcpaprofessor.com/fcpa-101#q17

	(SEC- $350 million)	
KBR / Halliburton	$579 million (DOJ- $402 million) (SEC- $177 million)	2009
Total	$398 million (DOJ- $245 million) (SEC- $153 million)	2013
Alcoa	$384 million (DOJ- $209 million) (SEC- $175 million)	2014
Snamprogetti / ENI	$365 million (DOJ- $240 million) (SEC- $125 million)	2010
Technip	$338 million (DOJ- $240 million) (SEC- $98 million)	2010
JGC	$219 million (DOJ- $219 million)	2011
Daimler	$185 million (DOJ- $94 million) (SEC- $91 million)	2010
Weatherford Int'l	$153 million (DOJ- $87 million) (SEC- $66 million)	2013
Alcatel-Lucent	$137 million (DOJ- $92 million) (SEC- $45 million)	2010

Even though corporate FCPA enforcement actions in this new era have resulted in several large settlement amounts, it would be inaccurate to conclude from Table I that every corporate FCPA enforcement action in this new era yields nine-figure settlement amounts. To provide a more comprehensive view of FCPA enforcement action settlement amounts, Tables II and III highlight all corporate FCPA settlement amounts from 2013 and 2012.

Table II – 2013 FCPA Enforcement Action Settlement Amounts[30]

Company	**Amount**
ADM	$54.2 million (DOJ- $17.7 million) (SEC- $36.5 million)
Bilfinger	$32 million (DOJ- $32 million)
Weatherford Int'l	$153 million (DOJ- $87 million) (SEC- $66 million)
Stryker	$13.2 million (SEC- $13.2 million)
Diebold	$48.1 million (DOJ- $25.2 million) (SEC- $22.9 million)
Total	$398 million (DOJ- $245 million) (SEC- $153 million)
Ralph Lauren	$1.6 million (DOJ- $882,000) (SEC- $735,000)
Parker Drilling	$15.8 million (DOJ- $11.8 million)

30. *See DOJ Enforcement of the FCPA – Year in Review*, FCPA PROFESSOR (Jan. 8, 2014), http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-4 [hereinafter, *Year in Review – Jan. 8, 2014*]; *see also SEC Enforcement of the FCPA – Year in Review*, FCPA PROFESSOR (Jan. 6, 2014), http://www.fcpaprofessor.com/sec-enforcement-of-the-fcpa-year-in-review-3.

	(SEC- $4 million)
Philips Electronics	$4.5 million (SEC- $4.5 million)

Table III – 2012 FCPA Enforcement Action Settlement Amounts[31]

Company	**Amount**
Eli Lilly	$29.4 million (SEC- $29.4 million)
Allianz	$12.4 million (SEC- $12.4 million)
Tyco	$26.8 million (DOJ- $13.7 million) (SEC- $13.1 million)
Oracle	$2 million (SEC- $2 million)
Pfizer	$41.3 million (DOJ- $15 million) (SEC- $26.3 million)
NORDAM Group	$2 million (DOJ- $2 million)
Orthofix Int'l	$7.4 million (DOJ- $2.2 million) (SEC- $5.2 million)
Data Systems & Solutions	$8.8 million (DOJ- $8.8 million)

31. *See DOJ Enforcement of the FCPA – Year in Review*, FCPA PROFESSOR (Jan. 9, 2013), http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-3; *see also SEC Enforcement of the FCPA – Year in Review*, FCPA PROFESSOR (Jan. 8, 2013), http://www.fcpaprofessor.com/sec-enforcement-of-the-fcpa-year-in-review-2.

Biomet	$22.8 million (DOJ- $17.3 million) (SEC- $5.5 million)
BizJet / Lufthansa	$11.8 million (DOJ- $11.8 million)
Smith & Nephew	$22.2 million (DOJ- $16.8 million) (SEC- $5.4 million)
Marubeni	$54.6 million (DOJ- $54.6 million)

Settlement amounts in an actual FCPA enforcement action will obviously be specific to the unique facts and circumstances at issue. However, it is notable that seemingly routine FCPA enforcement actions in this new era of enforcement are being resolved for amounts that were record-setting just a few years ago. As FCPA practitioners have rightly observed: "an unmistakable characteristic of [2013] FCPA enforcement is that the market rate for resolving a corporate FCPA enforcement action spiked precipitously in 2013."[32]

Indeed, FCPA settlement amounts have come a long way in a short amount of time. For example, in 2007, Baker Hughes resolved the *largest* FCPA enforcement action of all-time by agreeing to pay a combined $44 million in DOJ and SEC enforcement actions.[33] According to the DOJ criminal information, the company made approximately $4.1 million in improper payments – via an agent – in connection with the Karachaganak Project in Kazakhstan, a "giant gas and oil field".[34] The DOJ's sentencing guidelines calculation stated that the "benefit received or to be received

32. 2013 *Year End FCPA Update*, GIBSON DUNN 1, 3 (Jan. 6, 2014), http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf.

33. *See* Press Release, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), *available at* http://www.justice.gov/opa/pr/2007/April/07_crm_296.html; *see also* Press Release, U.S. SEC, SEC Charges Baker Hughes With Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007) [hereinafter SEC Press Release], *available at* http://www.sec.gov/news/press/2007/2007-77.htm.

34. U.S. Attorney Charges at 4, United States v. Baker Hughes Servs. Int'l, Inc., No. H-07-129 (S.D. Tex. filed Apr. 11, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughesintl-info.pdf.

[from the alleged improper conduct was] approximately $19 million."[35]

The SEC enforcement action against Baker Hughes was based on the same core conduct and the SEC's release stated:

> Baker Hughes paid approximately $5.2 million to two agents while knowing that some or all of the money was intended to bribe government officials, specifically officials of State-owned companies, in Kazakhstan. . . . Baker Hughes engaged the agent and was awarded an oil services contract in the Karachaganak oil field in Kazakhstan that generated more than $219 million in gross revenues from 2001 through 2006.[36]

In addition, the SEC release stated:

> - from 1998 to 2004, Baker Hughes authorized commission payments of nearly $5.3 million to an agent (who worked in Kazakhstan, Russia and Uzbekistan) under circumstances in which the company failed to determine whether such payments were, in part, to be funneled to government officials in violation of the FCPA;
> - in Indonesia, between 2000 and 2003, Baker Hughes paid certain freight forwarders to import equipment into Indonesia using a "door-to-door" process under circumstances in which the company failed to adequately assure itself that such payments were not being passed on, in part, to Indonesian customs officials;
> - in Nigeria, between at least 2001 and 2005, Baker Hughes authorized payments to certain customs brokers to facilitate the resolution of alleged customs deficiencies under circumstances in which the company failed to adequately assure itself that such payments were not being passed on, in part, to Nigerian customs officials; and
> - in Angola, from 1998 to 2003, Baker Hughes paid an agent more than $10.3 million in commissions under circumstances in which the company failed to adequately assure itself that such payments were not being passed on to employees of Sonangol, Angola's state-owned oil company, to obtain or retain business in Angola.[37]

In 2013, comparatively minor FCPA enforcement actions, per the enforcement agencies' own allegations, were resolved for amounts larger than what was a record-setting amount just a few years ago.

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35. Plea Agreement at 9, United States v. Baker Hughes Servs. Int'l, Inc., No. H-07-129 (S.D. Tex. filed Apr. 11, 2007) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf.

36. SEC Press Release, *supra* note 33.

37. *Id.*

For instance, the Diebold enforcement action focused primarily on excessive travel and entertainment and DOJ allegations that company subsidiaries provided various things of value (such as Las Vegas sightseeing, a dance show, a Grand Canyon tour, a Universal Studios tour and a Napa Valley tour) totaling approximately $1.75 million to alleged Chinese and Indonesian “foreign officials” at state-owned banks over a five year period.[38] As to the core conduct, the DOJ’s sentencing guidelines calculation referenced a “value of benefit received [from the alleged improper conduct] of more than $7 million.”[39]

The SEC enforcement action against Diebold was based on the same core conduct and alleged that company subsidiaries in China and Indonesia spent approximately $1.8 million on travel, entertainment, and other improper gifts for senior officials with the ability to influence the alleged state-owned bank purchasing decisions.[40]

Thus, per the enforcement agencies’ own allegations, the Diebold enforcement action involved *significantly less egregious* conduct than the Baker Hughes enforcement action. Yet, the combined $48 million settlement amount in the Diebold was more than the record-setting $44 million Baker Hughes enforcement action from just a few years ago.[41]

The $32 million DOJ enforcement action against German engineering company Bilfinger S.E. is another instructive example from 2013 that demonstrates how FCPA settlement amounts have come a long way in a short amount of time. The DOJ criminal information alleged, in pertinent part, that Bilfinger conspired with others to obtain and retain contracts related to the Eastern Gas Gathering System (EGGS) project in Nigeria

38. Information, United States v. Diebold, Inc., No. 5:13CR464 (N.D. Ohio filed Oct. 22, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/information.pdf. The enforcement action also contained non-specific monetary allegations concerning relationships with private business customers in Russia. However, the DOJ’s sentencing guidelines calculation makes clear that the Russia conduct was a minor factor in determining the fine and penalty amount. *See* Deferred Prosecution Agreement, United States v. Diebold, Inc., No. 5:13CR464 (N.D. Ohio filed Oct. 22, 2013) [hereinafter Diebold DPA], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf.

39. Diebold DPA, *supra* note 38.

40. Complaint at 2, U.S. SEC v. Diebold, Inc., (D.D.C. filed Oct. 22, 2013), *available at* http://www.sec.gov/litigation/complaints/2013/comp-pr2013-225.pdf. (alleging further that Diebold falsified books and records to hide approximately $1.2 million of bribes paid to employees at privately owned banks in Russia).

41. Of course, factors beyond the core conduct at issue – such as voluntary disclosure, cooperation and a company’s past history – can influence settlement amounts in an FCPA enforcement action. However, the Baker Hughes and Diebold enforcement actions were substantively identical in these regards (i.e. both companies had a past history, both companies voluntarily disclosed and both companies cooperated).

through the promise and payment of over $6 million in bribes to various alleged Nigerian officials.[42] As noted in the DOJ's release, the enforcement action was directly related to a prior 2008 FCPA enforcement against Willbros Group, Bilfinger's joint venture partner in connection with the same EGGS project.[43]

The DOJ's DPA in the previous Willbros enforcement action did not set forth a detailed advisory Sentencing Guidelines calculation as is the norm in most current FCPA DPAs including the Bilfinger DPA. Nevertheless, the DOJ settlement amount in the Willbros action was *$22 million*.[44] This $22 million settlement amount was in connection with not only the EGGS project, but *also* DOJ allegations that "certain Willbros employees based in South America agreed to make approximately $300,000 in corrupt payments to Ecuadoran government officials of the state-owned oil company PetroEcuador and its subsidiary, PetroComercial, to assist in obtaining a gas pipeline project."[45]

In short, the Bilfinger enforcement action involved the same EGGS project at issue in the Willbros enforcement. Moreover, the Willbros enforcement action was broader in scope than the Bilfinger action as it involved alleged corrupt payments in connection with other projects in other countries. Yet, the 2013 Bilfinger enforcement action was resolved for $32 million whereas the 2008 Willbros enforcement action was resolved for $22 million. The key difference between the two enforcement actions seems to be merely the passage of time.

C. Post-Enforcement Action Professional Fees and Expenses

The financial exposure of FCPA scrutiny and enforcement often continues even after enforcement action day and this Section discusses the "third bucket" of FCPA financial exposure, post-enforcement action professional fees and expenses.

Nearly all corporate FCPA enforcement actions in this new era are resolved via NPAs or DPAs.[46] A common clause in such agreements is a

42. Information, United States v. Bilfinger SE., (S.D. Tex. filed Dec. 9, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bilfinger/bilfinger-information.pdf.

43. Press Release, U.S. Dep't of Justice, German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay $32 Million Criminal Penalty (Dec. 11, 2013) *available at* http://www.justice.gov/opa/pr/2013/December/13-crm-1297.html.

44. Deferred Prosecution Agreement at 9, United States v. Willbros Group, Inc., No. H-08-287 (S.D. Tex. filed May 14, 2008) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/willbros-group/05-14-08willbros-deferred.pdf.

45. U.S. Attorney Charges at 9, United States v. Willbros Group, Inc., No. H-08-287 (S.D. Tex. filed May 14, 2008) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/willbros-group/05-14-08willbros-info.pdf.

46. *See Year in Review – Jan. 8, 2014*, *supra* note 30.

requirement that the company report to the enforcement agencies during the usual 2-3 year term of the agreement regarding, among other things, its implementation of a FCPA compliance program and its on-going compliance efforts.[47] While such a requirement may seem simple and straight-forward, it often involves internal reviews, follow-up reviews, and written reports that occupy FCPA Inc. participants for hundreds of hours and often cost the company millions of dollars in post-enforcement action professional fees and expenses.[48]

In addition to the above standard post-enforcement action compliance obligations in a typical FCPA NPA or DPA, the enforcement agencies are also often imposing "enhanced compliance obligations" on companies as a condition of settlement. For instance, healthcare company Johnson & Johnson ("J&J") resolved an FCPA enforcement action focused on subsidiary conduct in Greece, Poland, and Romania. The enforcement action was resolved via a DPA and the DOJ specifically noted: "J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies."[49] The DPA contained the standard compliance obligations found in typical FCPA DPAs, but also included "enhanced compliance obligations" that J&J is required to abide by during the three-year term of the DPA.[50]

Even though the DPA stated that J&J, as part of the voluntary disclosure and cooperation process, "conducted an extensive, global review of all of its operations to determine if there were problems elsewhere," the "enhanced compliance obligations" nevertheless require J&J to "conduct risk assessments of markets where [the company] has government customers and/or other anticorruption compliance risks on a staggered, periodic basis."[51]

The DPA also required J&J to "identify no less than five operating

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47. *See, e.g.*, Plea Agreement Letter from U.S. Dep't of Justice to Archer Daniels Midland Co. B-2 (Dec. 20, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/archer-daniels-midland/adm-npa.pdf.

48. The author coined the term "FCPA Inc" in April 2010. *See Mike Koehler Takes on FCPA Inc.*, CORP. CRIME REP. 15 (2010), *available at* http://www.corporatecrimereporter.com/fcpainc041210.htm. While perhaps viewed by some as a derogatory term, it is not intended to be. Rather, FCPA Inc. is a short-hand term used to describe a vibrant, niche industry consisting of numerous market participants including law firms, accounting firms, and compliance and consulting firms.

49. Deferred Prosecution Agreement at 3, United States v. Depuy, Inc., No. 1:11-cr-00099-JDB (D.D.C. filed Apr. 8, 2011) [hereinafter Depuy DPA], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf.

50. *Id.*

51. *Id.*

companies that are high risk for corruption because of their sector and location and . . . conduct FCPA audits of those operating companies at least once every three years."[52] As stated in the DPA, "FCPA audits of other operating companies that pose corruption risk shall occur no less than once every five years."[53]

Pursuant to the DPA, "each FCPA audit shall include" the following:

> (i) on-site visits by an audit team comprised of qualified auditors who have received FCPA and anticorruption training; (ii) where appropriate, participation in the on-site visits by personnel from the compliance and legal functions; (iii) review of a statistically representative sample appropriately adjusted for the risks of the market, of contracts with and payments to individual health care providers; (iv) creation of action plans resulting from issues identified during audits; and (v) where appropriate, feasible, and permissible under local law, review of the books and records of distributors which, in the view of the audit team, may present corruption risk.[54]

Likewise, the FCPA enforcement action against pharmaceutical company Pfizer also required the company to adhere to "enhanced compliance obligations" notwithstanding the following pertinent facts alleged by the enforcement agencies:

> (i) the substantial bulk of the enforcement action concerned conduct by entities Pfizer acquired in 2003 and 2009; (ii) in the 18 months following its 2009 acquisition of an entity giving rise to its scrutiny, Pfizer conducted a due diligence and investigative review of the entity's business operations and integrated Pfizer's internal controls system into the business entities; (iii) there was no allegation or suggestion that anyone at corporate headquarters knew of or approved the conduct at issue; (iv) as soon as the problematic conduct came to the attention of Pfizer's corporate headquarters, it made a timely voluntary disclosure to the enforcement agencies; and (v) Pfizer's self-investigation was thorough and wide-ranging.[55]

As to this last point, the DOJ stated: "From 2004 to the present, Pfizer, using external counsel and forensic accountants, internal Legal, Compliance, and Corporate Audit personnel, conducted an extensive,

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52. *Id.*
53. *Id.*
54. *Id.*
55. Deferred Prosecution Agreement at A-4, United States v. Pfizer H.C.P. Corp., No. 12-CR-169 (D.D.C. filed Aug. 7, 2012), [hereinafter Pfizer DPA] *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf.

global review of its operations regarding allegations of improper payments to Government officials and government doctors[.]"[56] Likewise, the SEC stated: "[Since 2004, Pfizer] diligently and thoroughly undertook a global internal investigation of its operations in no less than 19 countries[.]"[57]

According to the enforcement agencies, Pfizer also undertook early and extensive remedial efforts and made substantial and continuing improvements to its global anti-corruption compliance policies and procedures. Specifically, the DOJ stated:

> [S]tarting immediately in 2004, Pfizer launched extensive remedial actions including: undertaken a comprehensive review of its compliance program, implementing enhanced anti-corruption compliance policies and procedures on a worldwide basis, developing global systems to support employee compliance with the enhanced procedures, adding FCPA-specific reviews to its internal audits, performing proactive anti-corruption compliance reviews in approximately ten markets annually, and conducting comprehensive anti-corruption training throughout the organization.[58]

In other words, since learning of potential FCPA issues and for approximately eight years thereafter, Pfizer did the right thing and when the enforcement agencies use words like thorough, wide-ranging, extensive, global, worldwide, diligent, comprehensive, proactive, significant, innovative and sophisticated, there can be no reasonable doubt about this. Yet, just as in the J&J enforcement action, the Pfizer DPA also required the company to adhere to similar "enhanced compliance obligations."

Similar to the above section concerning pre-enforcement action professional fees and expenses, the purpose of this Section is to demonstrate the *fact* that the financial consequences of FCPA scrutiny and enforcement often continue even after enforcement action day. Yet, just as in the previous Section, it must nevertheless be asked whether many post-enforcement action compliance requirements are necessary or whether such requirements imposed by government enforcement agencies in the absence of meaningful checks or judicial oversight turn into boondoggles as well.

For instance, given the enforcement agencies' allegations and findings as to J&J and Pfizer, were the "enhanced compliance obligations" truly necessary? After all, in the J&J action, the DOJ concluded that the company already had generally "effective" compliance policies and

56. *Id.*

57. Complaint, U.S. SEC v. Pfizer, Inc., (D.D.C.), *available at* http://www.sec.gov/litigation/complaints/2012/comp-pr2012-152-pfizer.pdf (last visited June 7, 2014).

58. Pfizer DPA, *supra* note 55.

procedures and that prior to resolving the enforcement action, J&J had already "conducted an extensive, global review of all of its operations to determine if there were problems elsewhere[.]"[59]

Or were the "enhanced compliance obligations" in the J&J and Pfizer enforcement actions examples of companies being required by the government (under risk of prosecution for failure to do so) to engage in fishing expeditions when the company had already gone fishing just for the sake of going fishing again? If so, they represent a boundless and unconstrained government-required transfer of shareholder wealth to FCPA Inc. Such fishing expeditions are of course lucrative for FCPA Inc. hence one reason not many in the industry have raised concerns about the emerging trend of "enhanced compliance obligations."

In addition to standard post-enforcement action compliance obligations or "enhanced compliance obligations" as a condition of resolving a corporate FCPA enforcement action, certain companies have also been required to engage an independent compliance monitor as a condition of settlement. For instance, in 2013, approximately 55% of corporate DOJ FCPA enforcement actions required the engagement of a compliance monitor, and in 2012, approximately 35% of corporate DOJ FCPA enforcement actions required the engagement of a monitor.[60]

As noted in the DOJ/SEC FCPA Guidance issued in 2012, "a monitor is an independent third party who assesses and monitors a company's adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company's misconduct."[61] The term monitor is a bit misleading as it suggests a single person. The reality is that a monitor is more like the conductor of a large orchestra and a monitorship can become an expensive and distracting requirement of resolving an FCPA enforcement action.

FCPA practitioners have rightly observed:

> Few penalties imposed on a corporate criminal offender cause as much consternation as do compliance monitors. After the late-night crisis management meetings, after the invasive and expensive internal investigation, after the shakeup of senior managers, and after the protracted negotiations with federal authorities, companies just want to get back to business. They want to sell their goods and services, be profitable, invest, and grow. In short, they want to move on. Fundamentally, the corporate compliance monitor stands in the way of forgetting the past and going back to 'business as usual'—at least when

59. Depuy DPA, *supra* note 49.

60. *See* DOJ Enforcement of the FCPA - Year in Review 4, *supra* note 30; *see also* DOJ Enforcement of the FCPA - Year In Review 3, *supra* note 31.

61. THE GUIDANCE, *supra* note 27.

> it comes to obeying the law. The monitor's purpose is to see that the company follows applicable laws and regulations going forward and institutes the proper policies and procedures to help ensure compliance. Corporations will never welcome this 'tail' to their criminal prosecutions. Monitorships inevitably involve significant expenditures of funds and time.[62]

According to the FCPA Guidance, the enforcement agencies consider the following factors when determining whether a compliance monitor is an appropriate requirement of a corporate FCPA enforcement action: seriousness of the offense; duration of the misconduct; pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; nature and size of the company; quality of the company's compliance program at the time of the misconduct; and subsequent remediation efforts.[63]

Based on these factors, it was not surprising that Siemens was required to engage a compliance monitor when resolving its FCPA enforcement action in 2008. In resolving the largest FCPA enforcement action of all-time, the enforcement agencies stated that "for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens" and that Siemens had a "corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company."[64]

In 2012, the term of Siemens' monitor ended and the DOJ determined that Siemens satisfied its settlement obligations with respect to the monitor. The DOJ's filing provides a rare insight into the extent of the monitor's work and stated:

> In accordance with the plea agreement, the Monitor conducted an initial review and three subsequent reviews of Siemens's anti-corruption compliance program, and documented the Monitor's findings and recommendations in four annual reports [. . .]. Over the course of those four years, the Monitor conducted on-site or remote reviews of Siemens' activities in 20 countries; conducted limited or issue-specific reviews in or relating to an additional 19 countries; reviewed over 51,000 documents totaling more than 973,000 pages in 11 languages; conducted interviews of or meetings with over 2,300 Siemens employees; observed over 180 regularly scheduled company events; and spent the equivalent

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62. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 322 (2011).

63. THE GUIDANCE, supra note 27.

64. Press Release, U.S. Dep't of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html.

of over 3,000 auditor days conducting financial studies and testing.[65]

Siemens has not disclosed its post-enforcement action professional fees and expenses, including monitor costs, but one can safely assume such fees and expenses were in the hundreds of millions of dollars and in addition to the approximate one billion dollars the company spent in pre-enforcement action professional fees and expenses (bucket #1) as well as the $800 million the company agreed to pay to resolve its FCPA scrutiny (bucket #2).[66]

Similar to pre-enforcement action professional fees and expenses, comparing post-enforcement action professional fees and expenses to settlement amounts is not possible in all cases as companies have different disclosure requirements and practices. However, where a comparison is possible, it is clear that post-enforcement action professional fees and expenses increase the overall financial consequences of FCPA scrutiny and enforcement as monitor costs can reach into the millions of dollars even in less high-profile FCPA enforcement actions.

For instance and as previously noted, oil and gas services company Willbros Group agreed to pay approximately $32 million in combined fines and penalties to resolve parallel DOJ and SEC FCPA enforcement actions. Pursuant to the DPA, the company was required to engage a compliance monitor and the company disclosed total monitor expenses of approximately $10 million.[67] Likewise, Faro Technologies agreed to pay approximately $3 million in combined fines and penalties to resolve parallel DOJ and SEC FCPA enforcement concerning conduct in China. Pursuant to the DPA, the company was required to engage a compliance monitor and the company disclosed monitor expenses of $1 million in just one quarter.[68] In short, the financial consequences of FCPA scrutiny and enforcement continue even after enforcement action day.

Regardless of which of the "three buckets" the money falls into, and regardless of the legitimacy and necessity of many of the professional fees and expenses discussed in this Section, the take-away point from Part I of this Article is understanding that the fines and penalties assessed in an actual FCPA enforcement action are often just the tip of the iceberg in

65. *The Work of a Monitor and Checking in on Siemens*, FCPA PROFESSOR (Jan. 22, 2013), http://www.fcpaprofessor.com/the-work-of-a-monitor-and-checking-in-on-siemens [hereinafter *Work of a Monitor*].

66. *See* Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES (May 06, 2010, 5:40 PM), http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html.

67. *Friday Roundup*, FCPA PROFESSOR (Apr. 13, 2012), http://www.fcpaprofessor.com/friday-roundup-37.

68. *Faro's Monitor – Late and Expensive*, FCPA PROFESSOR (Dec. 27, 2010), http://www.fcpaprofessor.com/faros-monitor-late-and-expensive.

terms of a company's overall financial exposure.

With a proper understanding of the "three buckets" of FCPA financial exposure, Part II of this Article further adds to the overall financial consequences that can result from FCPA scrutiny or enforcement by highlighting the many other negative business effects of FCPA scrutiny and enforcement.

II. THE BUSINESS EFFECTS OF FCPA SCRUTINY AND ENFORCEMENT

This Part uses various case studies and examples to demonstrate how FCPA scrutiny and enforcement can further negatively impact a company's business operations and strategy in a variety of ways from: market capitalization; to cost of capital; to merger and acquisition activity; to impeding or distracting a company from achieving other business objectives; to private shareholder litigation; to offensive use of the FCPA to achieve a business objective or to further advance a litigating position.

By examining the FCPA's many other ripples, this section shifts the FCPA conversation away from a purely legal issue to its more proper designation as a general business issue that needs to be on the radar screen of business managers operating in the global marketplace. By highlighting the many ripples of FCPA scrutiny and enforcement, it is hoped that more business managers can view the importance of FCPA compliance more holistically and not merely through the narrow lens of actual enforcement actions.

A. Market Capitalization

Market capitalization refers to the total market value of a public company's outstanding shares and is calculated by multiplying a company's shares by the current market price of one share. Market capitalization is an important data point for investors and an important metric by which business manager performance is judged. Because FCPA scrutiny or an enforcement action can impact a company's share price, a company's market capitalization can likewise be impacted by the scrutiny. Two examples of FCPA scrutiny – one involving a large well-known company and the other involving a small lesser-known company – highlight this issue.

Wal-Mart's previously discussed FCPA scrutiny was front-page news in 2012 when the *New York Times* published an article concerning alleged conduct in Mexico.[69] Even though Wal-Mart disclosed its FCPA scrutiny in a 2011 SEC filing, the market reacted swiftly to the *Times* article. On

69. *See* David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top Level Struggle*, N.Y. TIMES, Apr. 21, 2012, http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?_r=2&hp&.

the last trading day before the *Times* article, Wal-Mart's stock closed at $62.45. The first trading day after the *Times* article, the stock dropped 4.7 percent and continued a downward trend for several days eclipsing approximately $20 billion in shareholder value.[70] Investors were likely spooked by the intense media coverage and likely became paranoid by comments that Wal-Mart could face approximately $13 billion in ultimate fines and penalties as a result of its FCPA scrutiny.[71] Such comments, of course, were widely speculative and entirely off base as the largest FCPA settlement in history is the $800 million action against Siemens.

In 2010, shares of SciClone Pharmaceuticals Inc. (a U.S.-based, China-focused specialty pharmaceutical company) were likewise impacted by the company's FCPA scrutiny as the company's shares plunged approximately 40% and closed down approximately 32% from its previous trading day.[72] Such a dramatic decline in a company's stock price is normally associated with a Chief Executive Officer resigning, a declaration of bankruptcy, or other crisis-like events. However, the decline in SciClone's stock price was likely due to the following disclosure made by the company:

> SciClone was contacted by the SEC and advised that the SEC has initiated a formal, non-public investigation of SciClone. In connection with this investigation, the SEC issued a subpoena to SciClone requesting a variety of documents and other information. The subpoena requests documents relating to a range of matters including interactions with regulators and government-owned entities in China, activities relating to sales in China and documents relating to certain company financial and other disclosures. The Company [also] received a letter from the DOJ indicating that the DOJ was investigating FCPA issues in the pharmaceutical industry generally, and had received information about the Company's practices suggesting possible violations.[73]

The dramatic decline in SciClone's share price was thus merely based on disclosure that the company had received an SEC subpoena and a letter of inquiry from the DOJ as part of an industry-wide investigation of the pharmaceutical industry.

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70. Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, 7 WHITE COLLAR CRIME REP. no. 19, 2012, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678.

71. Eric Platt, *How a Walmart Bribery Fine Could Spiral Up over $13 Billion*, BUSINESS INSIDER (Apr. 23, 2012 2:42 PM), http://www.businessinsider.com/how-walmarts-fine-could-spiral-up-to-144-billion-2012-4.

72. *Update 1-SciClone Shares Plunge on SEC, DOJ Probe*, REUTERS (Aug. 10, 2010, 12:19 PM), http://www.reuters.com/article/2010/08/10/sciclone-idUSSGE6790K320100810.

73. SciClone Pharmaceuticals, Inc., Annual Report (Form 10-K) (Mar. 16, 2010), *available at* http://investor.sciclone.com/secfiling.cfm?filingID=1193125-10-58363.

A company's stock price, and thus its market capitalization, can also be negatively impacted by investment analyst downgrades due to FCPA scrutiny. For instance, the shares of technology company NCR Corp. fell approximately 8% after an investment analyst downgraded the company's stock to neutral from outperform because of the company's FCPA scrutiny.[74] Among the concerns noted in the analyst report were: a multi-quarter investigation; potential fines and penalties from the single millions to tens of million; much of the company's share gains over the last two years came in emerging markets and such growth may be at risk if an FCPA investigation restricts current business practices; and that companies uninhibited by the FCPA, such as China-based competitors, could gain market share.[75]

Whether FCPA scrutiny will impact a company's market capitalization often depends on the nature of the company (for instance, SciClone is a China-focused pharmaceutical company with a substantial portion of its revenue tied to that country making FCPA scrutiny in China a significant event) or the means by which the FCPA scrutiny is communicated (such as a front-page article in the *Times* about Wal-Mart).

Indeed, investor reaction to FCPA scrutiny or enforcement is not often as dramatic as the above examples suggest. For instance, a *Wall Street Journal* analysis sought to measure market reaction to an FCPA investigation by asking "whether and to what extent shareholders trade on the announcements of FCPA investigations (internal or government) and settlements."[76] The analysis, based on more than 40 corporate cases since 2004, found "a lot of shrugging on the part of investors" and that "the average change in stock price from the day before to the day after the disclosure of an FCPA investigation was a decrease of 1%."[77] An analysis by Nera Economic Consulting drew a similar conclusion. Using a market model analysis that measured the relationship between stock price movement of companies that resolved FCPA enforcement actions against the S&P 500 index prior to the first apparent announcement of FCPA-related allegations, the analysis found that "in some instances the implication of an alleged FCPA violation is considered serious by the market."[78] However, for most companies that resolve an FCPA

74. Notable Calls, *NCR Corp (NCR): Downgraded as Potential FCPA Issues Add Meaningful Risk – Wedbush*, WALL STREET PIT (Aug. 14, 2012 8:34 AM), http://wallstreetpit.com/95128-ncr-corp-ncr-downgraded-as-potential-fcpa-issues-add-meaningful-risk-wedbush/.

75. *Id.*

76. Joe Palazzolo, *Does the FCPA Move Markets*, WALL ST. J. L. BLOG (Oct. 2, 2012 11:12 AM), http://blogs.wsj.com/law/2012/10/02/does-the-fcpa-move-markets/.

77. *Id.*

78. Raymond Wong & Patrick Conroy, *FCPA Settlements: It's a Small World After*

enforcement action, the analysis found that "there was no statistically significant price reaction" by the market upon apparent first announcement of FCPA-related allegations.[79]

Even if the stock of certain companies decline upon news of FCPA scrutiny, business managers may find comfort in the short duration of the FCPA induced dip. For instance, even SciClone's stock soon recovered its lost value and began trading at a higher price.[80] Likewise, Wal-Mart's stock soon recovered all of its value and outperformed the market after its FCPA-induced dip.[81]

These examples suggest that FCPA-induced dips in stock prices may be the result of misinformed doomsday scenarios and not financial fundamentals. Based upon the above studies, it appears that in most instances of FCPA scrutiny markets care little and that investment professionals may realize how diluted FCPA enforcement has become in this new era. Indeed, commenting on the rapid rise in Wal-Mart's stock price after the *New York Times* induced FCPA dip, a Forbes commentator stated:

> My 30 years of experience in the markets has repeatedly shown to me that whenever a company is accused of violations of FCPA, headlines are always scary, but in the end, the downdraft in the stock invariably becomes a buying opportunity.[82]

Even if a company's FCPA-induced stock dip is short-lived and even if a company's stock price declines on average only 1% after disclosure of FCPA scrutiny, one business effect of FCPA enforcement, or merely the mention of FCPA scrutiny, can be a negative impact on a company's market capitalization.

B. Cost of Capital

FCPA scrutiny can also negatively impact a company's cost of capital, specifically a company's credit rating. A company's credit rating matters for a number of reasons. For instance, a company with a lower credit rating may be faced with a smaller pool of potential investors and thus may

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All, NERA ECONOMIC CONSULTING (Jan. 28, 2009), http://www.nera.com/extImage/Pub_FCPA_Settlements_0109_Final2.pdf.

79. *Id.*

80. *See The Silver Lining*, FCPA PROFESSOR (June 7, 2012), http://www.fcpaprofessor.com/the-silver-lining.

81. *Id.*

82. Nigam Arora, *Mexican Bribery Gave Me a Chance to Make Money in Wal-Mart*, FORBES (May 17, 2012 12:44 PM)), http://www.forbes.com/sites/greatspeculations/2012/05/17/mexican-bribery-gave-me-a-chance-to-make-money-in-wal-mart/.

have to offer those investors a higher interest rate. Likewise, a company's credit rating will determine the interest rate at which the company can borrow money and certain institutional investors may be barred from owning non-investment grade corporate bonds.

A report by ratings agency Fitch Ratings, titled "U.S. Foreign Corrupt Practices Act-No Minor Matter," highlights the variety of cost of capital effects that can arise from FCPA scrutiny or enforcement.[83] The report noted that FCPA scrutiny can have ratings implications for companies with modest free cash flow ("FCF") and/or liquidity constraints. The report further noted "that it can take years from the discovery of a violation to the time of a plea agreement is reached" and stated:

> In the interim, corporate credit profiles, liquidity, and ratings may weaken. The fine that could be easily paid with cash on hand today might not be readily payable years down the road if a company's credit profile has weakened and liquidity becomes constrained.[84]

As to the financial effect of "deferring the legal consequences" of alleged FCPA violations via NPAs and DPAs, the report noted that prosecutions declined or deferred pursuant to these agreements could be activated if the company fails to adhere to its obligations under the agreements, meaning "that investors and analysts cannot take a deep breath or relax until" the time period in the NPA or DPA has expired.[85]

The Fitch report also highlighted the significant amount of pre-enforcement action professional fees and expenses typically incurred by companies under FCPA scrutiny. Indeed, Avon's bond rating has been downgraded due to "expenses related to the ongoing investigation under the FCPA."[86]

Although the Fitch report noted that many FCPA fines are "imposed on large investment grade corporations whose substantial cash balances easily afforded them the ability to absorb the payments with no or minimal increases in leverage," the report also noted that "there have also been [FCPA] violations by non-investment grade companies."[87] One instance discussed in the Fitch report was the previously mentioned Willbros Group Inc. enforcement action. It was noted that: Willbros borrowed from banks on a secured basis; when the company became aware of its FCPA issues

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83. FITCH RATINGS, U.S. FOREIGN CORRUPT PRACTICES ACT – NO MINOR MATTER, (2010).

84. *Id.*

85. *Id.*

86. *S&P Cuts Avon Products, Inc*, REUTERS (Mar. 16, 2012 2:48 PM), http://www.reuters.com/article/2012/03/16/idUSWNA272720120316.

87. FITCH RATINGS, *supra* note 83.

the scrutiny and related issues resulted in the restatement of its annual financial statements; and that the scrutiny required "several amendments on its bank credit facility" which was reduced from $150 million to $100 million.[88]

In short, as the above examples highlight, FCPA scrutiny and enforcement can also negatively impact a company's cost of capital and set into motion multiple negative financial consequences.

C. Mergers and Acquisitions

In addition to market capitalization and cost of capital, FCPA scrutiny and enforcement can also negatively impact merger or acquisition activity. Such negative impacts range from terminating planned merger or acquisition activity, to restructuring the terms and conditions of the planned transaction, to reducing the expected financial benefits of the transaction.

1. Termination

The failed merger between aerospace company Lockheed Martin Corporation and Titan Corporation best demonstrates this ripple of FCPA scrutiny and enforcement. In announcing the planned acquisition, Lockheed's Chairman and CEO stated:

> Titan provides additional presence within the U.S. Government customer base and expands our competencies. Titan is an excellent fit with Lockheed Martin, and its acquisition is consistent with our disciplined growth and cash deployment strategies. Titan's outstanding record of sales growth and the quality of its workforce made this transaction very attractive to us. This workforce, together with our highly skilled people, allows us to provide more cost effective and robust solutions to customers of both companies.[89]

However, soon thereafter, Lockheed announced that it "learned of allegations that improper payments were made, or items of value were provided, by consultants for Titan Corporation or its subsidiaries to foreign officials."[90] Lockheed stated:

> The allegations were identified as part of a review conducted with Titan of payments to Titan's international consultants in connection with the proposed acquisition of Titan. The alleged payments and provision of

88. *Id.*

89. Press Release, U.S. SEC, Lockheed Martin Announces Agreement to Acquire Titan Corporation (Sept. 15, 2003), *available at* http://www.sec.gov/Archives/edgar/data/936468/000119312503050218/dex991.htm.

90. Press Release, U.S. SEC, Titan Updates Status of Review of International Consultants (Mar. 5, 2004), *available at* http://www,sec.gov/Archives/edgar/data/31158/000119312504065745/d425.htm.

> items of value, if true, raise questions concerning whether there has been a violation of the FCPA. . . . The review is ongoing. Titan is cooperating with this effort, as well as conducting its own review. Lockheed Martin and Titan have met with the SEC and the DOJ to discuss the allegations of improper payments. . . . Closing of the Titan transaction is subject to approval of Titan's stockholders, the absence of any material adverse change in Titan and other conditions set forth in the merger agreement. . . . Lockheed Martin will need to determine whether the conditions to the merger have been satisfied.[91]

Titan's FCPA scrutiny, which Lockheed could have inherited upon completion of the merger, resulted in a delay of the shareholder vote to approve the merger as well as an amended merger agreement extending the time period for the merger to occur. The amended merger agreement provided that "as a condition to the closing of the transaction, Titan must obtain written confirmation that the DOJ considers its investigation of these allegations resolved and does not intend to pursue any claims against Titan, or Titan must have entered into a plea agreement with the DOJ and completed the sentencing process."[92]

Ultimately, Titan's unresolved FCPA scrutiny caused Lockheed to abandon the merger because Titan "did not satisfy all the closing conditions."[93] Lockheed stated:

> Under the terms of the amended merger agreement, either party could terminate the merger agreement if Titan either (i) had not obtained written confirmation from the DOJ that the investigation of alleged FCPA violations was resolved as to Titan and the Department did not intend to pursue any claims against Titan; or (ii) Titan had not entered into a plea agreement [by a certain date] . . . Titan did not satisfy either requirement. . . . The corporation declined Titan's request for a further extension.[94]

In announcing termination of the merger, a Lockheed spokesperson said that the company "made every possible effort to make this happen, but it just reached a point where we didn't want the uncertainty surrounding this to continue indefinitely."[95]

Termination of the merger had several adverse consequences for Titan as

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91. *Id.*

92. *Id.*

93. Press Release, U.S. SEC Lockheed Martin Terminates Merger Agreement with the Titan Corporation (June 26, 2004).

94. *Id.*

95. *Lockheed Drops Titan Merger After Delays by Bribery Probe*, L.A. TIMES, June 27, 2004, http://articles.latimes.com/2004/jun/27/nation/na-titan27.

well. In addition to losing an acquirer, news of the merger termination caused Titan's shares to fall by approximately 20% and investment analysts downgraded the company's stock.[96] Titan's FCPA scrutiny, of course, did not disappear and the company ultimately plead guilty to FCPA charges for, among other things, making payments through an agent of more than $2 million to the election campaign of Benin's then-incumbent president. In resolving its FCPA scrutiny, Titan agreed to pay approximately $28 million in combined fine and penalty amounts, the largest FCPA settlement in history at the time.[97]

Termination of the Lockheed – Titan merger has lessons for both an acquiring company and a target company. For an acquiring company, FCPA-related due diligence of a target company should be part of the merger due diligence agenda so that potential FCPA issues can be learned in advance of closing. For a target company, implementing proactive FCPA compliance policies and procedures to minimize risk can increase the value of the company and its attractiveness to a potential acquiring company.

Not all instances of FCPA scrutiny have as severe an effect on merger activity as in the Lockheed – Titan example. However, as demonstrated by the below examples, FCPA scrutiny and enforcement actions can also result in restructuring of the terms and conditions of planned transactions and reduce the expected financial benefits of the transaction.

2. *Restructuring*

An instructive case study for how FCPA scrutiny can significantly impact the terms and conditions of a planned merger involved engineering companies PBSJ Corporation and WS Atkins. In 2010, PBSJ disclosed an FCPA internal investigation in connection with certain projects undertaken by its subsidiary.[98] A few months later, PBSJ disclosed that its "Audit Committee completed the internal investigation [and] [t]he results of that investigation suggest that FCPA violations may have occurred."[99]

Shortly thereafter, PBSJ announced that it had entered into a definitive merger agreement in which WS Atkins planned to acquire PBSJ in an all-cash transaction. Proxy materials filed by PBSJ in connection with the merger provided an informative insight into how the FCPA issues impacted the terms and conditions by which PBSJ would attempt to sell itself.

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96. *Id.*

97. Press Release, Office of the U.S. Attorney S. Dist. of Cal. (Mar. 1, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/titan-corp/03-01-05titan-pr-plea.pdf.

98. *The FCPA's Long Tentacles*, FCPA PROFESSOR (Aug. 3, 2010), http://www.fcpaprofessor.com/the-fcpas-long-tentacles.

99. *Id.*

Among other things, the proxy materials highlighted the actions of interested purchasers of PBSJ including: holding meetings with PBSJ's outside counsel and its in-house counsel to discuss the FCPA investigation; requesting the opportunity to meet with DOJ representatives regarding the FCPA investigation; and requesting access to attorney-client privileged documents regarding the FCPA investigation.[100]

In the end, PBSJ's board approved a merger agreement with Atkins even though PBSJ had received a higher offer from another company. However, the other company sought more stringent closing conditions regarding PBSJ's FCPA scrutiny. In approving Atkin's bid, the PBSJ proxy materials stated:

> Positive factors considered by the [PBSJ] board of directors included: . . . the terms of the merger agreement and the related agreements, including: the limited number and nature of the conditions to Atkins' obligation to consummate the merger, including its willingness not to impose special conditions related to our previously disclosed FCPA investigation beyond those developments that would independently constitute a material adverse effect.[101]

3. *Reduced Financial Benefits*

FCPA scrutiny or an enforcement action can also reduce the full financial benefits expected from a merger by imposing significant post-closing expenses on the acquiring company for the target company's pre-closing FCPA scrutiny.

For instance, facilities services company ABM Industries Inc. disclosed:

> [The] Company [has] began an internal investigation into matters relating to compliance with the FCPA and the Company's internal policies in connection with services provided by a foreign entity affiliated with a Linc joint venture partner. Such services commenced prior to the Company's acquisition of Linc. As a result of the investigation, the Company has caused Linc to terminate its association with the arrangement. The Company [has] contacted the DOJ and the SEC to voluntarily disclose the results of its internal investigation to date. The Company cannot reasonably estimate the potential liability, if any, related to these matters.[102]

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100. *Id.*

101. *Id.*

102. *ABM Industries Discloses Merger Related Issue*, FCPA PROFESSOR (Dec. 26, 2011), http://www.fcpaprofessor.com/abm-industries-discloses-merger-related-issue

As indicated by the disclosure, ABM's FCPA scrutiny does not involve anything it did. Rather, ABM's scrutiny is based on a foreign entity affiliated with a joint venture partner of a company ABM acquired. The value of the merger was approximately $300 million and it is already being reduced by the acquired company's FCPA scrutiny as ABM has spent approximately $6.2 million in pre-enforcement action professional fees and expenses.[103] Factoring in ABM's potential exposure based on an actual FCPA enforcement action, 5% of the merger value could easily evaporate due to the acquired company's FCPA scrutiny.

In addition, post-enforcement action professional fees and expenses can further reduce the expected financial benefits of a merger. For instance, Alliance One International resolved an FCPA enforcement action by agreeing to pay $19.5 million in combined fines and penalties.[104] The entire enforcement action was based on the pre-merger conduct of acquired entities and pursuant to the NPA Alliance One was required to engage a compliance monitor for three years. Two years into the NPA, Alliance One has disclosed approximately $10 million in post-enforcement action monitoring costs.[105]

D. Lost or Delayed Opportunities

FCPA scrutiny or enforcement can also result in several other wide-ranging negative business effects such as lost or delayed opportunities.

For instance, for several years Swiss logistics company Panalpina was under FCPA scrutiny for business conduct in Nigeria and in 2010 the company agreed to pay approximately $82 million to resolve DOJ and SEC enforcement actions.[106]

In the midst of this scrutiny, during the company's annual meeting a shareholder demanded that someone "step up and take responsibility" for the company's poor performance.[107] In response, Panalpina's CEO stated,

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(containing links to original source documents).

103. ABM Industries, Inc., Annual Report (Form 10-K) (Dec. 18, 2013); ABM Industries, Inc., Annual Report (Form 10-K) (Dec. 20, 2012).

104. Press Release, U.S. Attorney's Office, E District of Va., *Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials* (Jan. 1, 2011), *available at* http://www.justice.gov/usao/vae/news/2010/08/20100806allianceonenr.html.

105. *FCPA Issues Can Reduce the Value of a Merger*, FCPA PROFESSOR (June 14, 2012), http://www.fcpaprofessor.com/fcpa-issues-can-reduce-the-value-of-a-merger.

106. Press Release, U.S. Dep't of Justice, *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties* (Nov. 4, 2010), http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

107. *"It's Not Easy Being Under Investigation for Two Years …,"* FCPA PROFESSOR (Mar. 15, 2010), http://www.fcpaprofessor.com/its-not-easy-being-under-investigation-

among other things, that "it is not easy being under investigation for two years, and [the FCPA investigation] is not making the situation any easier."[108] The company's Chief Operating Officer added:

> You can say the whole FCPA and Nigeria situation reflects badly on the management, but the fact is that as long as we are still involved in the investigation we will continue to lose market share, because our customers have internal regulations which prevent them from doing business with companies which are under investigation by the DOJ. As soon as this investigation is over, we will win some of this business back. Customers have told us 'as soon as you have settled the FCPA, we will do business with you again.'[109]

The lost business opportunities that can flow from FCPA scrutiny is perhaps best demonstrated by JPMorgan's FCPA scrutiny. In August 2013, the *New York Times* reported that "[f]ederal authorities have opened a bribery investigation into whether JPMorgan Chase hired the children of powerful Chinese officials to help the bank win lucrative business."[110] The *Times* article stated:

> In one instance, the bank hired the son of a former Chinese banking regulator who is now the chairman of the China Everbright Group, a state-controlled financial conglomerate . . . After the chairman's son came on board, JPMorgan secured multiple coveted assignments from the Chinese conglomerate, including advising a subsidiary of the company on a stock offering, records show. The Hong Kong office of JPMorgan also hired the daughter of a Chinese railway official. That official was later detained on accusations of doling out government contracts in exchange for cash bribes, the government document and public records show. The former official's daughter came to JPMorgan at an opportune time for the New York-based bank: The China Railway Group, a state-controlled construction company that builds railways for the Chinese government, was in the process of selecting JPMorgan to advise on its plans to become a public company, a common move in China for businesses affiliated with the government.[111]

There have been FCPA enforcement actions that have included

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for-two-years.

108. *Id.*

109. *Id.*

110. Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES, Aug. 17, 2013, http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/.

111. *Id.*

allegations regarding the hiring of children or spouses of alleged "foreign officials,"[112] and the *Times* article caused JPMorgan, and other companies in the financial sector, to conduct internal reviews of hiring practices in China and elsewhere.

As a result of JPMorgan's FCPA scrutiny, the company has withdrawn from several lucrative financial deals. For instance, it was reported by the *Wall Street Journal* that JPMorgan "has withdrawn from underwriting midtier lender China Everbright Bank Co.'s $2 billion initial public offering in Hong Kong."[113] The reason given was that since its FCPA scrutiny surfaced, "deals have faced intense scrutiny from the U.S. bank's compliance division."[114] Similarly, it was soon thereafter reported that JPMorgan "has pulled out of a $1 billion initial public offering of a Chinese chemical company and won't seek a role in the IPO of a Chinese state-owned train maker, as the bank walks away from deals that could come under scrutiny from U.S. investigators probing its hiring practices in China."[115]

Investment bank IPO fees are typically 1.5% to 3% of the deal's size and JPMorgan's FCPA scrutiny has thus already caused it, mere months after its scrutiny arose, to withdraw from, or not pursue, business opportunities in excess of $100 million.[116] This lost business, along with pre-enforcement action professional fees and expenses, is likely to be the greatest financial consequence of JPMorgan's FCPA scrutiny.

FCPA scrutiny can also delay company growth and make general business conditions more difficult as further demonstrated by Wal-Mart's scrutiny. According to the *Wall Street Journal*, three years ago Wal-Mart set out to be India's top retailer by 2015. However, the article noted that "Wal-Mart's advance on India is barely moving" and one of the "biggest reasons has been a compliance crackdown at Wal-Mart" following its FCPA scrutiny.[117] The article stated that "developing and operating stores in India is complicated, even for locals" because "dozens of permits and

112. *JPMorgan's Hiring Practices in China Under Scrutiny*, FCPA PROFESSOR (Aug. 19, 2013), http://www.fcpaprofessor.com/jpmorgans-hiring-practices-in-china-under-scrutiny.

113. Prudence Ho & Yvonne Lee, *J.P. Morgan Exits China IPO*, WALL ST. J. Nov. 19, 2013, http://online.wsj.com/news/articles/SB10001424052702303531204579207192426039728.

114. *Id.*

115. Prudence Ho, *J.P. Morgan Avoids Some Deals in China, Fearing U.S. Investigations*, WALL ST. J., Jan. 21, 2014, http://online.wsj.com/news/articles/SB10001424052702304757004579334393664105198.

116. Ho & Lee, *supra* note 113.

117. Megha Bahree, *Wal-Mart's Path to Power in India Hits Its Limits: The Lawyers*, WALL ST. J., Apr. 1, 2013, http://online.wsj.com/news/articles/SB10001424127887324373204578373830411211410.

licenses are required from various agencies down to the municipal level."[118] In response to its FCPA scrutiny, the article noted that Wal-Mart has "enlisted a phalanx of lawyers from a U.S. firm to develop compliance procedures and train employees in India," and that "the company also has begun requiring its Indian landlords to attest that they haven't greased any government palms."[119] In short, "[r]unning people through those hoops has slowed" Wal-Mart's expansion plans in India.[120]

E. Other Effects

FCPA scrutiny can also be distracting for company management forced to focus on FCPA issues instead of other core business issues. For instance, Wal-Mart has disclosed that its FCPA issues "may require the involvement of certain members of the Company's senior management that could impinge on the time they have available to devote to other matters relating to the business."[121] In addition, Wal-Mart disclosed that its FCPA investigation "resulted in a significant increase in the workload" of its Audit Committee members and during 2014 the Audit Committee "conducted 13 additional meetings related to the investigation and compliance matters . . .".[122]

Another instructive example involved gas detection company RAE Systems. As previously highlighted, the company resolved related DOJ and SEC enforcement actions by agreeing to pay a combined $2.95 million in settlement amounts. In a revealing interview, the CFO at the time of the investigation and enforcement action discussed how the company's FCPA scrutiny came to derail his other job duties and caused him to have a falling out with the company's CEO.[123]

FCPA scrutiny can also negatively impact an executive's compensation. For instance, in the midst of Diebold's FCPA scrutiny the company's Compensation Committee reduced the cash bonus of the President and CEO concluding that "given the CEO's ultimate responsibility for the oversight of the company, as a result of the impact to the company of the global FCPA investigation it was appropriate that [his] cash bonus be reduced."[124]

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Scrutiny Alerts and Updates*, FCPA PROFESSOR (April 3, 2013), http://www.fcpaprofessor.com/scrutiny-alerts-and-updates.

122. *Friday Roundup*, FCPA PROFESSOR (Apr. 25, 2014), http://www.fcpaprofessor.com/friday-roundup-118.

123. *The Former CFO of RAE Systems Speaks*, FCPA PROFESSOR (Aug. 14, 2012), http://www.fcpaprofessor.com/the-former-cfo-of-rae-systems-speaks.

124. *Business Effects*, FCPA PROFESSOR (Mar. 21, 2012), http://www.fcpaprofessor.com/business-effects.

Whether it's a negative impact on market capitalization or cost of capital, a variety of negative effects on merger and acquisition activity, causing a company to lose or delay business opportunities, or impeding or distracting a company from achieving other business objectives, as highlighted in this Section, FCPA scrutiny and enforcement can negatively impact a business in a variety of ways separate and distinct from any actual enforcement action.

Because of these many ripples of FCPA scrutiny and enforcement, FCPA compliance needs to be on the radar screen of business managers operating in the global marketplace. By highlighting the many ripples of FCPA scrutiny and enforcement, the FCPA conversation should shift away from a purely legal issue to its more proper designation as a general business issue and more business managers should view the importance of FCPA compliance more holistically and not merely through the narrow lens of actual enforcement actions.

Indeed, the business effects of FCPA scrutiny and enforcement in this new era have become so pronounced that FCPA and associated risks have come to be included in the generic risks (such as loss of key personnel, global economic conditions, and currency fluctuations) companies disclose to investors as required in most SEC filings. The annual report of manufacturer Gardner Denver, Inc. provides a representative example. In its annual report filed with the SEC, the company disclosed, among other risk factors, the following:

> The risk of non-compliance with U.S. and foreign laws and regulations applicable to our international operations could have a significant impact on our results of operations, financial condition or strategic objectives. Our global operations subject us to regulation by U.S. federal and state laws and multiple foreign laws, regulations and policies, which could result in conflicting legal requirements. These laws and regulations are complex, change frequently, have tended to become more stringent over time and increase our cost of doing business. These laws and regulations include . . . anti-corruption and bribery laws such as the [FCPA] . . . and local laws prohibiting corrupt payments to government officials. We are subject to the risk that we, our employees, our affiliated entities, contractors, agents or their respective officers, directors, employees and agents may take actions determined to be in violation of any of these laws, particularly as we expand our operations geographically through organic growth and acquisitions. An actual or alleged violation could result in substantial fines, sanctions, civil or criminal penalties, debarment from government contracts, curtailment of operations in certain jurisdictions, competitive or reputational harm, litigation or regulatory action and other consequences that might adversely affect our

> results of operations, financial condition or strategic objectives.[125]

Regardless of the FCPA's many ripples, business managers can at least find solace in the following: while FCPA scrutiny and enforcement does indeed have several direct and indirect negative effects on a company and is distracting to management, there is often a silver lining that results from FCPA scrutiny or enforcement.

Business managers involved in an FCPA investigation often learn detailed information about a variety of meaningful corporate issues including: the company's business in foreign countries; how the company operates in foreign countries; the personnel who run the business units and make the key decisions in foreign countries; and whether the company has effective internal controls.

During the stress and strain of FCPA scrutiny, company management (assuming they themselves are not culpable) often grow closer and develop a deeper trust of each other. In addition, the company's commitment to FCPA compliance (and compliance in general) often grows stronger. Given the motivation to improve, a company may try new things, such as aligning management compensation more closely to compliance metrics, and/or rewarding employees for compliance-related achievements. Nothing, of course, prevents company management from learning of these issues or taking these actions in the absence of FCPA scrutiny. However, the realities of the business world often put these proactive issues on the backburner.

Even Wal-Mart's FCPA scrutiny, likely the most high-profile and expensive instance of FCPA scrutiny in history, has a silver lining. For instance, during an investor conference call the following exchange occurred between an investment analyst and Wal-Mart's CEO.

> Analyst: ". . . I'm going to step into the FCPA issue, if I can . . . I think the investment community's already voted that it's not really an issue from our standpoint, in terms of financial issues, but it's obviously a big one reputationally and a big one that you had to deal with from a standpoint of the media and all of that . . . Which really, we think, are probably unfair because of a lot of good things that Wal-Mart has been involved in over the last decade and continues to be involved in. How do you use this opportunity? How do you think about it? I know [Wal-Mart executive vice president, general counsel] has got to think about it from protecting the Company and that's what that outside investigation is. But [CEO], you have to think about it from a standpoint of transparency, and how do you lift this up and then show the entire world how you handle this situation and crisis, which has come to the Company and not at your

125. Gardner Denver, Inc., Annual Report (Form 10-K) (Feb. 27, 2013).

> desire, but from just those events that have transpired?
> CEO: "One thing that's clear is that we will be a better company because of this. Sometimes when there's a situation, like this, you can treat it as a challenge or create an opportunity. And frankly, you can see we're already taking this as an opportunity to be a better company. And so even the focus on doing business the right way, and the initiatives of outreach to communities is something we're just going to be — you might say just doubling the efforts to be a better company in everything that we do. And frankly, I think it will just lead to long-term being a better company serving communities and serving customers. So yes, a short-term challenge; long-term, it creates us a greater opportunity to be even better.[126]

F. Shareholder Litigation

Although courts have held that the FCPA does not provide a private right of action,[127] plaintiffs' lawyers representing shareholders often target directors and executive officers of companies subject to FCPA scrutiny with civil suits alleging, among other things, breach of fiduciary duty or securities fraud. In other words, as this Section highlights, the FCPA's ripples can also reach individuals and not just business organizations.

Two types of FCPA-related shareholder lawsuits are discussed: derivative claims alleging director and officer breach of fiduciary duty and securities fraud class action claims. Before analyzing these two types of claims, it is instructive to understand how such claims often follow a predictable pattern. In the days and weeks following an FCPA enforcement action, or even a company disclosing or otherwise being the subject of FCPA scrutiny, purported investigations are launched by plaintiffs' firms representing shareholders and lawsuits often begin to rain down on the company, its board of directors or executive officers.

For instance, as discussed earlier in connection with market capitalization issues, shares of SciClone Pharmaceuticals plunged approximately 40% and closed down approximately 32% from its previous trading day based on the company's disclosure that it had received an SEC subpoena and a letter of inquiry from the DOJ as part of an industry-wide FCPA investigation of the pharmaceutical industry. A feeding frenzy followed, and on the *same day*, four separate plaintiffs' firms announced investigations of SciClone on behalf of shareholders to determine whether securities laws were violated. The *next day* four additional plaintiffs' firm announced similar investigations. The following days saw numerous other investigations and within *three days* of the disclosure, the first securities

126. *The Silver Lining*, FCPA PROFESSOR (June 7, 2012), http://www.fcpaprofessor.com/the-silver-lining.

127. Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

class action lawsuit was filed on behalf of certain SciClone shareholders. The plaintiffs' lawyers stated:

> The Complaint alleges that throughout the Class Period, defendants were engaged in illegal and improper sales and marketing activities in China and abroad regarding its products. This ultimately caused the Company to become the focus of a joint investigation by the [SEC and DOJ] for possible violations of the [FCPA]. It was only at the end of the Class Period, however, that investors ultimately learned the truth about the Company's operations after it was reported that the SEC and DOJ were investigating the Company for violations of the FCPA. At that time, shares of the Company declined almost 40% in the single trading day, on abnormally large trading volume.[128]

In the following days and weeks, numerous other plaintiffs' firms announced investigations and/or filed lawsuits against the company, its board of directors or executive officers.[129]

A similar feeding frenzy also followed the *New York Times* article regarding Wal-Mart's alleged conduct in Mexico. Within 48 hours, several plaintiffs' firms announced investigations on behalf of shareholders and within ten days shareholder civil suits tracking the *Times* article began to pour in against the company and its directors and executive officers. Approximately one month after the *Times* article, Wal-Mart disclosed:

> The Company is a defendant in several recently-filed lawsuits in which the complaints closely track the allegations set forth in a news story that appeared in the *New York Times*. One of these is a securities lawsuit . . . in which the plaintiff alleges various violations of the [FCPA] beginning in 2005, and asserts violations of [the securities laws] relating to certain prior disclosures of the Company. . . . In addition, eleven derivative complaints were filed . . . also tracking the allegations of the *Times* story, and naming various current and former officers and directors as additional defendants. The plaintiffs in the derivative suits . . . allege, among other things, that the defendants who are or were directors or officers of the Company breached their fiduciary duties in connection with oversight of FCPA compliance.[130]

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128. *In the Blink of an Eye ... Along Comes a Securities Fraud Suit*, FCPA PROFESSOR (Aug. 19, 2010), http://www.fcpaprofessor.com/in-the-blink-of-an-eye-along-comes-a-securities-fraud-suit.

129. *See SciClone - An FCPA Feeding Frenzy*, FCPA PROFESSOR (Oct. 13, 2010), http://www.fcpaprofessor.com/sciclone-an-fcpa-feeding-frenzy (listing 18 firms who released statements concerning SciClone in the two weeks after the FCPA disclosure).
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130. *Friday Roundup*, FCPA PROFESSOR (June 8, 2012), http://www.fcpaprofessor.com/friday-roundup-43.

1. Derivative Actions

The internal affairs of a corporation, such as the rights and responsibilities of corporate directors, are governed by state law. State law, including most prominently Delaware law, provides directors broad discretion to manage the corporation subject to their fiduciary duties to the corporation and its shareholders. A director's fiduciary duties include the duty of care and the duty of loyalty, including its subsidiary component the duty of good faith.

In a notable case in the corporate director context, a court observed:

> The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect . . . Shareholders have a right to expect that directors will exercise reasonable supervision and control over the policies and practices of a corporation. The institutional integrity of a corporation depends upon the proper discharge by directors of those duties.[131]

A corporate director's duty of good faith has evolved over time to include an obligation to attempt in good faith to assure that an adequate corporate information and reporting system exists. In the notable *Caremark* decision by the influential Delaware Court of Chancery, the court held that a director's failure to do so, in certain circumstances, may give rise to individual director liability for breach of fiduciary duty.[132]

In *Stone v. Ritter*, the Delaware Supreme Court provided the following necessary conditions for director oversight liability under the so-called *Caremark* standard: (i) a director utterly failed to implement any reporting or information system or controls; or (ii) having implemented such systems or controls, a director failed to monitor or oversee the corporation's operations.[133] The court held that both situations require a showing that a director knew that they were not discharging their fiduciary obligations and courts have widely recognize that a director's good faith exercise of oversight responsibility may not necessarily prevent employees from violating criminal laws or from causing the corporation to incur significant financial liability or both.[134]

Derivative claims in the FCPA context "are often based on one or more of the following alleged actions or failures of directors and/or officers:

- participation in, concealment of, or failure to prevent the FCPA violations;
- preparation, review, and/or signing of false and misleading public

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131. Francis v. United Jersey Bank, 432 A.2d 814, 822-24 (N.J. 1981).
132. *In re* Caremark Int'l Inc., 698 A.2d 959, 967 (Del. Ch. 1996).
133. Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006).
134. *Id.* (quoting Guttman v. Huang, 823 A.2d 492, 506 n. 34 (Del. Ch. 2003)).

> statements;
>
> • failure to comply with the company's code of business conduct or similar policy requiring FCPA compliance;
>
> • failure to require the company to implement internal controls in compliance with the FCPA's antibribery provisions or books, records, and internal accounting provisions;
>
> • failure to monitor the company's compliance with, or implement mechanisms for enforcement of, the company's anti-corruption policies and procedures;
>
> • failure to implement information and reporting systems to ensure senior management and the board of directors have adequate information about the company's business and operations, material events, and compliance;
>
> • failure to fulfill the responsibilities and duties of membership on committees of the company's board of directors;
>
> • failure to remedy any illegal conduct or direct the company to institute suit against current or former board members and officers for permitting FCPA violations; and
>
> • failure to oversee, manage, and operate the company in a lawful and ethical manner."[135]

A derivative claim against directors and officers of oil and gas services company Tidewater Inc. after the company resolved an FCPA enforcement is representative of the type of derivative claims frequently brought in the FCPA context.[136] In dismissing the complaint against the individual

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135. Jeffrey S. Johnston & Erika A. Tristán, *The Next FCPA Battleground: Private Civil Lawsuits Following Foreign Corrupt Practices Act Settlements with U.S. Government Authorities*, VINSON & ELKINS LITIG. NEWS, Winter 2011 at 8, *available at* http://www.velaw.com/uploadedFiles/VEsite/Resources/VELitigationNewsWinter2011.pdf.

136. Press Release, U.S. Dep't. of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html. There are unique pleading requirements associated with derivative claims. Ordinarily, a company's board of directors has the exclusive authority to institute corporate action such as filing a lawsuit on behalf of the corporation when it has been harmed. However, when the harm to the corporation is the result of an alleged breach of fiduciary duty by the directors, the law recognizes that the board of directors is unlikely to sue itself in such a situation. Thus, the law provides a mechanism for shareholders to bring a lawsuit, not in their individual capacity, but on behalf of the corporation to recover monetary damages for the corporation. Because this derivative action usurps a traditional board of directors function and can be subject to harassment and abuse, state law often requires shareholders to first make a demand on the corporation to file suit or to plead with particularity so-called demand futility, meaning that demand on the board would be futile because the board is incapable of making an independent judgment concerning the conduct at issue. Most derivative actions, including those in the FCPA context, are brought as demand futility cases because if a shareholder makes a demand on the board of directors to bring the claim it will be assumed that the shareholder views the board of directors as sufficiently independent to analyze the claim and the board's decision will be analyzed under the board-friendly business judgment rule. To survive a motion to dismiss, a shareholder pleading demand futility must allege more than conclusory

defendants, the court concluded:

> The Complaint merely recites instances whereby certain Individual Defendants, notably not a majority of them, signed financial forms and that audit committee meetings took place. Even taking these as true, nowhere in these allegations is there any indication of a knowing discharge of their fiduciary duties or a conscious disregard of those duties. To have a substantial likelihood of director liability on an oversight claim, a plaintiff must plead the existence of facts suggesting that the board knew that internal controls were inadequate, that the inadequacies could leave room for illegal or materially harmful behavior, and that the board chose to do nothing about the control deficiencies that it knew existed. The Plaintiff has not alleged any acts to suggest that Tidewater's internal controls were deficient, much the less that the board or the Audit Committee had any reason to suspect that they were so. The conclusory allegation that because illegal behavior occurred, internal controls must have been deficient and the board must have known so has been routinely rejected. Ultimately, the Complaint falls woefully short of pleading facts that are sufficient to show that there was any knowledge or conscious disregard on behalf of the directors. As a result, the Plaintiff has failed to plead its claim with particularity and demand is not excused. . . . While Plaintiff's allegations are sufficient to show that Tidewater was evidently violating both the FCPA and the Exchange Act, nowhere in the Complaint do Plaintiff's allegations meet the specificity to show that the Individual Defendants were acting with the intent to violate these laws. The mere fact that a violation occurred does not demonstrate that the board acted in bad faith. Alleging that 'upon information and belief' the 'Headquarters' made the decision to avoid tax assessments in violation of the FCPA falls woefully short of the pleading requirements. Nowhere can this Court find who made this decision, how this decision was made or that there was an intent to violate any law. Moreover, the Court finds it significant that Tidewater's directors voted and voluntarily initiated an FCPA investigation and advised the federal government of their violations before the government even suspected any violations.[137]

Not only was the Tidewater derivative claim representative of the type of derivative claims frequently brought in the FCPA context, it was also representative of the outcome. According to an analysis by Professor Amy Westbrook, "the majority of the recent shareholder derivative suits filed in

allegations regarding a breach of fiduciary duty. Rather, the shareholder must allege with particularly facts suggesting that the majority of directors were interested; that the directors failed to inform themselves; or that the directors failed to exercise due care as to the conduct at issue.

137. Strong v. Taylor, 877 F.Supp.2d 433 (E.D. La. 2012).

the wake of FCPA actions have been dismissed, a handful have settled, and none have been fully litigated on the merits."[138]

2. Securities Fraud Actions

As previously highlighted, FCPA scrutiny can impact a company's share price. Thus, it is not surprising that securities fraud class actions are another frequent form of shareholder litigation following an instance of FCPA scrutiny.

The securities laws are based on the general premise that issuers must make full and complete disclosure of all material facts relevant to its business. Although materiality is a murky concept, courts have construed this key concept to mean all information, whether positive or negative, that might be relevant to an investor's decision to buy, sell, or hold a security.[139]

The securities laws' foundation of full and complete disclosure of all material facts is enforced through, among other provisions, Section 10(b) of the Exchange Act and its associated Rule 10b-5. Section 10(b) generally prohibits the use of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the SEC may prescribe as necessary or appropriate in the public interest or for the protection of investors." Rule 10b-5 supplements Section 10(b) by making it unlawful for any person, directly or indirectly – (i) to employ any device, scheme or artifice to defraud; (ii) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements not misleading; or (iii) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person – in connection with the purchase or sale of any security.

Securities fraud claims in the FCPA context generally "allege that a company's public disclosures regarding potential FCPA violations and/or the potential settlement with the DOJ or the SEC were misleading in themselves or were proof of material misstatements in the company's prior public statements regarding one or more of the following topics:

> • the nonexistence of FCPA violations and improper accounting of funds used in illegal activity;
> • the quality of the company's internal controls;
> • the company's general compliance with corporate policies, the FCPA, and other applicable laws;
> • the risks and costs associated with an FCPA investigation, including legal and consulting fees and disruptions to the company's operations;
> • predictions regarding the results, effects, or ultimate materiality of a

138. Amy Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1228 (2012).

139. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

> FCPA-related investigation;
> • the company's profitability or financial performance following the cessation of illegal activity and/or any decision to suspend certain operations due to illegal conduct; and
> • the financial impact of increased monitoring expenses."[140]

In such cases plaintiffs typically allege that because of the issuer's false statements or omissions "(1) the market price of the company's securities was artificially inflated and maintained, and (2) shareholders suffered losses when the stock price fell following the issuance of corrective disclosures and the materialization of risks previously concealed by the defendants (i.e., then the "truth" was revealed)."[141]

If an FCPA-related securities fraud class action is fully litigated, plaintiffs face a heightened pleading standard that is often difficult to satisfy.[142] For instance, an institutional investor alleged that InVision Technologies, along with its CEO and CFO, violated section 10(b) of the Exchange Act and Rule 10b–5 in connection with alleged misstatements in its merger agreement.[143] The civil action followed InVision's settlement of an FCPA enforcement action based on payments to foreign sales agents in China, the Philippines, and Thailand.[144] The enforcement agencies alleged that InVision knew of the "high probability" that the payments to the agents would be used to make improper payments to foreign officials and also alleged that InVision failed to maintain proper internal controls and failed to adequately train its foreign third parties.[145]

In the civil action, plaintiff alleged that the merger agreement contained the following misstatements:

> First, . . . the agreement broadly warrants that InVision is 'in compliance in all material respects with all lawsFalse' Second, . . . the agreement provides that InVision was in compliance with the [FCPA's] books and records provisions. Finally, . . . the agreement provides: 'neither the Company . . . nor, to the knowledge of the Company, any director,

140. Johnston & Tristan, *supra* note 135, at 8.

141. *Id.*

142. Under the heightened pleading standard in the Private Securities Litigation Reform Act ("PSLRA") complaints alleging misrepresentations or omissions under Rule 10b-5 must specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularlity all facts on which that belief is formed.

143. Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 739 (9th Cir. 2008).

144. *See generally*, Agreement Between the U.S. Dep't of Justice, Criminal Div., Fraud Section & InVisionTechs., Inc. (Dec. 3, 2004), *available at* http://www.justice .gov/criminal/fraud/fcpa/cases/invision-tech/12-03-04invisiontech-agree.pdf.

145. *See id.* at App. A at 2.

> officer, agent, employee or other person acting on behalf of the Company' has violated the [FCPA's] anti-bribery provisions[.][146]

The court noted the heightened pleading requirements applicable to the securities fraud claim and the requirement that, among other things, the plaintiff state with particularly facts giving rise to a strong inference that the defendants acted with intent to deceive, manipulate or defraud. A disputed issue was whether the plaintiff "was required to plead scienter as [to specific individuals], or whether it can rely on a theory of 'collective scienter,' which would hold the company as a whole responsible for the statements contained in the merger agreement."

The appellate court held that the plaintiff was required to "plead scienter with respect to the individuals who actually made the false statements in the merger agreement." In so holding, the court also observed:

> [Plaintiff] argues that the settlement agreements InVision entered into with the DOJ and SEC are sufficient to create a strong inference of scienter. In those agreements, InVision accepted responsibility for misconduct and admitted that the company 'was aware of the high probability that its foreign sales agents or distributors paid or offered to pay something of value to government officials in order to obtain or retain business for InVision.' The company further admitted that it 'improperly accounted for certain payments . . . in its books and records in violation of the FCPA.' The district court correctly held that these agreements were not sufficient to meet the pleading requirements of the PSLRA. First, the admissions in these settlement agreements were largely legal conclusions, rather than particularized facts giving rise to a strong inference of scienter. More importantly, even if InVision accepted the SEC's and DOJ's statements of fact, there is nothing in either settlement agreement that would support the conclusion that [any specific individuals] had actual knowledge of the violations. As discussed earlier, the mere fact that someone at InVision had knowledge of the illegal transactions is not sufficient to satisfy the scienter pleading requirements of the PSLRA, given the context and limited nature of the misrepresentations at issue.[147]

Although plaintiffs face a heightened pleading requirement in an FCPA-related securities fraud action that is often difficult to satisfy, few such cases are actually litigated. Rather, most cases settle and according to an analysis by Professor Westbrook, "a number of FCPA-related securities fraud suits have settled for amounts in excess of the penalty assessed by the

146. *Glazer Capital*, 549 F.3d at 741–42.
147. *Id.* at 748–49.

DOJ and/or SEC" in the underlying FCPA enforcement action.[148]

However, just because certain FCPA-related securities fraud class actions have settled does not mean that such actions would have succeeded on the merits. Companies often make the business decision to settle shareholder litigation (whether derivative actions or securities fraud class actions in the FCPA context or otherwise) for nuisance value and backed by insurance coverage.

A typical corporate position concerning settlement of FCPA-related shareholder litigation was articulated by the Chief Financial Officer of Maxwell Technologies, a company that resolved an FCPA enforcement action in 2011.[149] During an investor call, the CFO stated:

> As we have disclosed in past public filings in 2010, two shareholders had alleged that certain of our past and current officers and directors failed to prevent us from violating the [FCPA]. . . . [M]ediation was held and a proposed settlement was reached wherein $3 million would be paid to plaintiff's counsels, with $2.7 million to be paid by our insurance carrier, and $290,000 would be paid by the Company. In addition, we would be required to insure that certain corporate governance measures are in place and in force. The agreement is subject to among other things, court approval and notice to our shareholders. Without admitting any wrongdoing, the defendants to this suit are willing to enter into this settlement in order to expedite resolution of the matter, and to relieve the defendants and the Company from further financial burden. We are pleased that this suit is near final settlement, and look forward to putting this matter behind us.[150]

As highlighted in this Section, another of the FCPA's many ripples in this new era is plaintiffs' civil suits against directors and executive officers of companies subject to FCPA scrutiny or enforcement. This is a fact. However, just as with many other FCPA ripples discussed in this Article, probing questions need to be asked whether the majority of shareholder litigation in the FCPA context serves a purpose or is merely a parasitic attempt to feed-off of FCPA scrutiny and enforcement in this new era.

Indeed, in this new era of FCPA enforcement a component of FCPA Inc. includes plaintiffs' firms who frequently pounce on FCPA enforcement actions or instances of FCPA scrutiny. Commenting on this trend, a Forbes columnist wrote under the title "Plaintiff Lawyers Join The Bribery

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148. Westbrook, *supra* note 138, at 1246.

149. Press Release, U.S. Dep't. of Justice, Maxwell Technologies Inc. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $8 Million Criminal Penalty (Jan. 31, 2011), http://www.justice.gov/opa/pr/2011/January/11-crm-129.html.

150. *Friday Roundup*, FCPA PROFESSOR (Mar. 2, 2012), http://www.fcpaprofessor.com/friday-roundup-33.

Racket" as follows:

> The Justice Department's unprecedented campaign to enforce a once-backwater statute called the [FCPA] has made corporate lawyers and accountants rich as big companies pay big law and accounting firms to investigate and defend potential violations. Plaintiff lawyers have noticed the enormous fees, which are often reaching into the hundreds of millions of dollars, enhanced FCPA enforcement is generating and are moving to extract their own cut. . . . The unintended consequences of the Justice Department's FCPA policy simply continue to mount. . . . Now the plaintiff lawyers are trying to join the fun. . . . What is clear is that the cost of enhanced FCPA enforcement on U.S. corporations keeps going up. And that more lawyers are finding ways to get rich off of it.[151]

When a company's FCPA violations are the result of board of director or executive officer conduct, or the condoning or encouraging of such conduct by those with fiduciary duties, such civil suits or investigations would seem to be warranted and in the public interest. While there have been a few FCPA enforcement actions alleging such conduct[152], in the vast majority of FCPA enforcement actions the enforcement agencies do not allege any knowledge, participation, or acquiescence in the conduct at issue by the board of directors or executive officers.[153]

Rather, based on respondeat superior, a company faces FCPA exposure because of the actions of a single or small group of employees whose conduct was often in violation of the company's pre-existing FCPA compliance policies and procedures and the company's good faith efforts to comply with the law. In this typical scenario, shareholder litigation would seem to be merely an attempt by plaintiffs' lawyers to feed-off this new era of FCPA enforcement.

Testimony at a 2011 House Judiciary Committee hearing by a witness appearing on behalf of the Chamber of Commerce highlighted the parasitic nature of much shareholder litigation in the FCPA context and its negative effects. At the hearing, the witness highlighted specific areas of "substantial litigation abuse," including "private lawsuits that piggyback on government investigations."[154] The majority of the testimony focused on

151. Nathan Vardi, *Plaintiff Lawyers Join The Bribery Racket*, FORBES (Aug. 16, 2010 9:04 AM), http://www.forbes.com/sites/nathanvardi/2010/08/16/plaintiff-lawyers-fcpa-bribery-racket/.

152 Information, United States v. Siemens Aktiengesellschaft (D.D.C filed Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensakt-info.pdf.

153. *See, e.g.*, Alcoa Inc, Exchange Act Release No. 3525, 2014 WL 69457 at *9 (Jan. 9 2014) (stating that there were "no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme.").

154. *Can We Sue Our Way to Prosperity?: Litigation's Effect on America's Global*

the FCPA and the witness stated:

> More recently, the piggyback-litigation phenomenon has been most noticeable with respect to [FCPA] enforcement proceedings brought by the [DOJ and SEC]. These piggyback cases tend to fall into two categories: (1) shareholder class actions alleging that a company did not adequately disclose its FCPA exposure; and (2) derivative actions against officers and directors alleging that they failed to prevent a company from bribing foreign officials.
>
> Follow-on FCPA cases target companies at a difficult time. Companies going through DOJ or SEC FCPA enforcement proceedings often spend tens of millions of dollars, if not more, on attorneys and forensic accountants – on top of potentially multimillion-dollar criminal and civil fines and disgorgement – in order to determine whether their employees (often at a relatively low level) acted improperly. Enforcement proceedings also interrupt normal business operations, as companies make employees and documents available to lawyers, and take action against truly culpable employees. The investigations themselves are disclosable events and are almost always 'bad news,' resulting in negative publicity. Shareholder suits against companies involved in enforcement proceedings threaten to further delay the companies' ability to return to normal operations and to further damage shareholder value. These suits serve no purpose but to take money from current shareholders and transfer it to former (or other) shareholders – with a hefty slice cut out for the plaintiffs' lawyers.
>
> Derivative shareholder suits are equally problematic in this arena. These suits tend to target senior officers and directors, not the employees who actually paid any bribes or condoned others paying them. The reason is simple enough: directors and officers are backed by the deep pockets of the company's [Director and Officer's] insurer; culpable employees have little money to pay in private civil damages, especially if they themselves have been the target of an individual enforcement proceeding.
>
> Often, lawyers filing shareholder class actions against companies under investigation or derivative actions against directors and officers of a company under investigation do not even wait until the government investigation is complete. Such tactics are particularly egregious, because they necessarily involve the company and senior management in defending against a private civil suit – and in making strategic judgments regarding such defense – when their focus should be on resolving the government's investigation. Both the DOJ and the SEC have developed

Competitiveness: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 29 (2011) (statement of John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP).

> leniency policies for companies that actively assist in government investigations. These policies acknowledge that U.S. government resources are limited, and that cooperating companies can materially assist the government in enforcing the law and protecting shareholders. As part of cooperating with the government, companies in FCPA investigations frequently investigate their own potential wrongdoing and self-report misconduct to the government. When companies and their senior officers and directors face personal civil liability in addition to any exposure to the DOJ and SEC, their judgments regarding what issues to investigate and what results to report to the DOJ and SEC necessarily will be affected, possibly to the detriment of the integrity of the government's investigation.[155]

As with many issues in this new era of FCPA enforcement, FCPA-related shareholder litigation seems to have spiraled out of control and an FCPA practitioner rightly observed:

> 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.[156]

Regardless of the substantive merits of much FCPA-related shareholder litigation, the fact remains that such civil litigation following an FCPA enforcement action or instance of FCPA scrutiny represents yet another instance of the FCPA's many ripples.

G. Offensive Use of the FCPA

Whether it's a DOJ or SEC FCPA enforcement action or an FCPA-related civil suit by plaintiffs' lawyers representing shareholders,

155. *Id.*

156. James G. Tillen and Lauren H. Torbett, *Multiplying the Risks: Parallel Civil Litigation in FCPA Investigations*, 2 BLOOMBERG L. REPS. – White Collar Crime, no. 10, 2010, *available at* http://www.millerchevalier.com/portalresource/lookup/poid/ZltOl9NP10LTYnMQZ56TfzcRVPMQiLsSwG3Em83!/document.name=/miller_chevalier_tillen_torbett_article.pdf.

companies are ordinarily in a defensive posture when it comes to the FCPA. Even if a company is not involved in an FCPA investigation or related litigation, the FCPA still usually frustrates a business objective such as not acquiring a foreign target or not engaging a foreign agent because of FCPA risk. While such defensive positions continue to dominate, this Section highlights how the FCPA is increasingly being used offensively by companies to achieve a business objective or to further advance a litigating position.

For instance, in 2013, Dish Network and Tokyo-based SoftBank were battling for control of wireless carrier Sprint Nextel. Among the regulatory approvals needed for SoftBank to complete the transaction was Federal Communications Commission's ("FCC") approval of a license transfer from Sprint Nextel to SoftBank. In opposing the transfer, Dish Network cited a 2009 FCPA enforcement action against UTStarcom in which the company agreed to pay $3 million via a DOJ NPA and SEC civil settlement "for the actions of UTS-China (its wholly-owned subsidiary) and its employees and agents, who arranged and paid for employees of Chinese state-owned telecommunications companies to travel to popular tourist destinations in the United States, including Hawaii, Las Vegas and New York City."[157]

The link Dish Network made between the FCPA enforcement action and its battle with SoftBank for Sprint Nextel was that Softbank's founder Masayoshi Son was on the board of UTStarcom during certain time periods relevant to the conduct at issue in the FCPA enforcement action. Dish Network asserted that the UTStarcom enforcement action was "relevant to the public interest analysis of the proposed transaction."[158] In reply, Softbank stated that the UTStarcom enforcement action was not relevant to its attempt to gain control of Sprint Nextel and asserted:

> [The enforcement action did] not involve SoftBank or Mr. Masayoshi Son, Chairman and CEO of SoftBank. The settlement documents do not name, implicate, or otherwise relate to SoftBank or Mr. Son, and are legally and factually irrelevant to this proceeding."
>
> "DISH suggests that these settlements raise a potential issue in this proceeding because Mr. Son at one time served as the Chairman of the Board of UTSI. Neither the DOJ or SEC settlement documents, however, even mention SoftBank or Mr. Son. This is hardly surprising. Mr. Son was not an operating officer of UTStarcom at any time and the alleged violations came to light years after Mr. Son left the Board, which he did in 2004. The FCPA-related misconduct, according to the

157. *"Offensive" Use of the FCPA*, FCPA PROFESSOR (June 6, 2013), http://www.fcpaprofessor.com/offensive-use-of-the-fcpa.

158. *Id.*

settlement documents, involved an executive of the company's Chinese subsidiary, UTStarcom China Co., Ltd.[159]

Another example of offensive use of the FCPA in a battle for corporate control involved Central European Distribution Corporation ("CEDC"), a large vodka producer headquartered in the U.S. In 2012, CEDC disclosed:

> There has been a breach of the books and records provisions of the [FCPA] and potentially other breaches of the FCPA. It was determined that payments or gifts were made in a foreign jurisdiction in which the Company operates, and that there was a failure to maintain documentation in respect of certain of these payments or gifts adequate to establish whether there was a valid business purpose in making the payments or gifts. Furthermore, our management also identified a material weakness in our internal control over financial reporting regarding the implementation of our policy on compliance with applicable laws. . . . Our conclusion that this deficiency is a material weakness in our internal control over financial reporting is not based on misstatements in our historical consolidated financial statements or our consolidated financial statements, . . . but instead on the determination that we did not design or maintain sufficient policies, procedures, controls, communications or training to deter or prevent the risk of violations of law, including the [FCPA].[160]

Shortly thereafter, Russian billionaire Roustam Tariko, the founder of CEDC's rival Russian Standard and CEDC's largest shareholder, claimed that CEDC executives themselves were the subject of an FCPA investigation. The claims of CEDC's largest shareholder caused the company to issue a letter to shareholders that stated:

> As you may be aware . . . Mr. Roustam Tariko, Chairman of Russian Standard, published a letter to CEDC investors that has created anxiety and confusion in the marketplace. What you may not be aware of is that Mr. Tariko's letter was published less than 48 hours after the CEDC Board voted 5 to 3 (the 3 being Mr. Tariko and his Board designees) against Mr. Tariko's request that he be given total control over CEDC's operations and finance. This request follows repeated attempts by Russian Standard to remove the interim CEO. The purpose of this letter is to provide you with [among other things] correct information regarding FCPA matters.[161]

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159. *Id.*

160. *Friday Roundup*, FCPA PROFESSOR (Oct. 12, 2012), http://www.fcpaprofessor.com/friday-roundup-61.

161 *See id.*

The letter then stated that "despite suggestions in the Russian Standard letter to the contrary, the company is NOT on notice that any of its current executives are under investigation with respect to FCPA violations or otherwise."[162]

Perhaps the most high-profile instance of offensive use of the FCPA involved the boardroom battle between Wynn Resorts and its board member Kazuo Okada. In early 2012, Wynn Resorts disclosed:

> In May 2011, Wynn Macau, a majority owned subsidiary of Wynn Resorts, Limited (the "Company"), made a commitment to the University of Macau Development Foundation in support of the new Asia-Pacific Academy of Economics and Management. This contribution consists of a $25 million payment made in May 2011 and a commitment for additional donations of $10 million each year for the calendar years 2012 through 2022 inclusive. The pledge was consistent with the Company's longstanding practice of providing philanthropic support for deserving institutions in the markets in which it operates. The pledge was made following an extensive analysis which concluded that the gift was made in accordance with all applicable laws. The pledge was considered by the Boards of Directors of both the Company and Wynn Macau and approved by 15 of the 16 directors who serve on those boards. The sole dissenting vote was Mr. Kazuo Okada whose stated objection was to the length of time over which the donation would occur, not its propriety. Also as previously disclosed, Mr. Okada commenced litigation . . . in Nevada seeking to compel the Company to produce information relating to the donation to the University of Macau, among other things. . . . Following Mr. Okada's lawsuit, the Company received a letter from the [SEC] requesting that, in connection with an informal inquiry by the SEC, the Company preserve information relating to the donation to the University of Macau, any donations by the Company to any other educational charitable institutions, including the University of Macau Development Foundation, and the Company's casino or concession gaming licenses or renewals in Macau. The Company intends to fully comply with the SEC's request.[163]

While Wynn's disclosure did not specifically mention the FCPA, given that the company's disclosure of the SEC inquiry appeared to link the donation to the "Company's casino or concession gaming licenses or

162. *Id.*

163. *Wynn Resorts $135 Million University of Macau Donation the Subject of SEC Scrutiny*, FCPA PROFESSOR (Feb. 14, 2012), http://www.fcpaprofessor.com/wynn-resorts-whopping-135-million-university-of-macau-donation-the-subject-of-sec-scrutiny.

renewals in Macau," the disclosure implicated the FCPA. As Okada alleged in his complaint "Wynn Macau's gaming concession expires in June 2022 – the last year of Wynn's donation commitment." According to Okada's complaint, he objected to the donation, called it unprecedented in University history, and claimed that the Chinese government owned the land on which the University is located.

Shortly thereafter, Wynn accused Okada of separate and distinct conduct that could implicate the FCPA. In a press release, Wynn announced that its "Compliance Committee has concluded a year-long investigation after receiving an independent report detailing numerous apparent violations of the [FCPA] by Aruze USA, Inc., its parent company Universal Entertainment Corporation, and its principal shareholder, Kazuo Okada."[164]

In the release, Wynn noted that its Compliance Committee engaged a variety of experts, including Louis Freeh (the former Director of the FBI), who conducted "a thorough independent investigation" which "uncovered and documented more than three dozen instances over a three-year period in which Mr. Okada and his associates engaged in improper activities for their own benefit in apparent violation of U.S. anti-corruption laws and gross disregard for the Company's Code of Conduct."[165] According to the release, "Mr. Okada and his associates and companies appear to have engaged in a longstanding practice of making payments and gifts to his two chief gaming regulators at the Philippines Amusement and Gaming Corporation, who directly oversaw and regulated Mr. Okada's Provisional Licensing Agreement to operate in that country."[166]

The Wynn releases further stated:

> The Board has requested that Mr. Okada resign as a Director of Wynn Resorts. The Company will immediately inform the Board of Directors of its Hong Kong listed subsidiary, Wynn Macau, Limited, of its actions and will recommend that Mr. Okada be removed from the Wynn Macau Board. . . . The Freeh Report is the culmination of a year-long investigation by the Compliance Committee based on increasing concerns the Board had relating to the activities of Mr. Okada and Aruze USA, Inc. in the Philippines and statements made by Mr. Okada to Wynn Resorts' Directors that gifts to regulators are permissible in Asia. Mr. Okada is the only Director of Wynn Resorts who has continued to refuse to sign the Company's Code of Conduct or participate in mandatory Foreign Corrupt Practices Act training for Directors."[167]

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164. *Wynn's Boardroom Battle Royale*, FCPA PROFESSOR (Feb. 20, 2012), http://www.fcpaprofessor.com/wynns-boardroom-battle-royale.

165. *Id.*

166. *Id.*

167. *Id.*

Wynn's FCPA allegations against Okada were used by the company to support its finding that Okada was an "unsuitable person" under Nevada gaming regulations thus justifying Okada's removal from Wynn's board.[168] Moreover, the boardroom battle occurred in the context of Wynn's attempt to purchase Okada's 20% stake in Wynn at an approximate 30% discount. Okada ultimately resigned from Wynn's board and in doing so stated: "I no longer believe it is appropriate for me to serve on the Board of Directors of a company that is behaving in a manner that I deeply believe to be unethical."[169]

In addition to the FCPA being used offensively to achieve a business objective, the FCPA is also being used offensively to advance litigating positions. As previously indicated, while certain courts have held that the FCPA does not contain a private right of action, plaintiffs have nevertheless frequently brought causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for bribery-related conduct.[170]

For instance, in 2008 Aluminum Bahrain BSC ("Alba"), one of the largest aluminum smelters in the world owned by, among others, the government of Bahrain, filed a civil lawsuit against Alcoa Inc., the world's leading producer of primary aluminum products, and others alleging RICO violations. The complaint alleged that certain Alcoa entities and their agents engaged in a conspiracy over a 15 year period to defraud Alba and specifically alleged that the defendants: (i) illegally bribed officials of the government of Bahrain and /or officers of Alba in order to force Alba to purchase alumina at excessively high prices; (ii) illegally bribed officials of the government of Bahrain and /or officers of Alba and issued threats in

168. Chris Sieroty, *Okada Claims Against Wynn Resorts Ruled Baseless*, LAS VEGAS REV.-J. Feb. 4, 2013, http://www.reviewjournal.com/business/casinos-gamong/okada-claims-against-wynn-resorts-ruled-baseless.

169. Chris Sieroty, *Kazuo Okada Resigns from Wynn Resorts Board of Directors*, LAS VEGAS REV.-J. Feb. 16, 2013, http://www.reviewjournal.com/business/casinos-gaming/kazuo-okada-resigns-wynn-resorts-board-directors.

170. To establish a violation of any of the substantive offenses under RICO, a plaintiff must show that defendants engaged in a "pattern of racketeering," which requires at least two acts of racketeering activity. *See* 18 U.S.C. § 1961 (2012) A violation of the Travel Act is one of the enumerated predicate offenses under RICO. The Travel Act, enacted prior to the FCPA, is part of the racketeering chapter of the criminal code and prohibits interstate and foreign travel or transportation in aid of racketeering enterprises. Specifically, the Travel Act prohibits travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce with intent to, among other things, carry on "any unlawful activity" which is defined to include bribery in violation of state law. *See* 18 U.S.C. § 1952 (2012). In short, conduct in violation of the FCPA is often in violation of state law, which in turn implicates the Travel Act, which in turn can implicate RICO given that a Travel Act violation is a predicate act under RICO.

order to pressure Alba to enter into an agreement by which Alcoa would purchase an equity interest in Alba; and (iii) assigned portions of existing supply contracts between Alcoa and Alba for the sole purpose of facilitating alleged bribes and unlawful commissions.[171]

After the judge denied the defendants' motion to dismiss, Alcoa agreed to settle the case by paying Alba approximately $85 million and the action represented the "first time that a foreign-owned corporation has successfully sued a U.S. company in a federal court to recover losses suffered due to allegations of corrupt activity."[172]

While FCPA-related civil litigation often involves RICO claims, such civil cases have also involved other causes of action as well. For instance, after Innospec resolved an FCPA enforcement action, NewMarket Corp., a competitor company, learned of Innospec's conduct from the DOJ and SEC resolution documents, including allegations that Innospec's bribe payments in Iraq ensured that a field test of a competitor's product failed.[173] Based on Innospec's acknowledgment of this conduct in resolving the FCPA enforcement action, NewMarket filed a civil case against Innospec alleging violations of the Robinson-Patman Act, the Virginia Antitrust Act, and the Virginia Business Conspiracy Act.[174] Innospec agreed to resolve the case by agreeing to pay NewMarket approximately $45 million.[175]

The trend of offensive use of the FCPA to advance litigating positions is not just limited to business organizations. Individuals are also increasingly citing the FCPA to support claims of wrongful termination of employment.

For instance, Khaled Asadi, a former employee of a wholly-owned subsidiary of General Electric Company ("G.E."), filed a civil complaint alleging that G.E. harassed and pressured him to vacate his position and ultimately terminated him after he informed his supervisor and G.E.'s Ombudsperson "regarding potential violations of the FCPA committed by G.E. during negotiations for a lucrative, multi-year deal with the Iraqi Ministry of Electricity."[176]

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171. *See Alcoa Agent Charged in the U.K.*, FCPA PROFESSOR (Oct. 25, 2011), http://www.fcpaprofessor.com/alcoa-agent-charged-in-the-u-k.

172. Press Release, Akin Gump Strauss Hauer & Feld LLP, Akin Gump Secures Settlement Valued at $447 Million in First-Ever RICO Claim by Foreign Company, (Oct. 9, 2012), *available at* http://www.akingump.com/en/news-publications/akin-gump-secures-settlement-valued-at-447-million-in-first-ever.html.

173. *Innospec Related News*, FCPA PROFESSOR (Aug. 10, 2010), http://www.fcpaprofessor.com/innospec-related-news.

174. *Id.*

175. *See Innospec – Were the DOJ and SEC Duped?*, FCPA PROFESSOR (Sept. 29, 2011), http://www.fcpaprofessor.com/innospec-were-the-doj-and-sec-duped.

176. Christopher M. Matthews, *Former GE Exec Claims He Was Fired for Relaying FCPA Concerns*, WALL ST. J. BLOG: CORRUPTION CURRENTS (Feb. 7, 2012 6:43 PM), http://blogs.wsj.com/corruption-currents/2012/02/07/former-ge-exec-claims-he-was-

Likewise, Stephen Lowe, a former Allison Transmission Managing Director for operations in China, Japan, and Korea, filed a civil complaint against the company alleging that Allison fired him because he "refused to engage in violations of the FCPA." Among other things, Lowe alleged that: (i) he witnessed Allison's Commercial Director of Asia Strategy deliver a cash filled envelope to Beijing City Bus officials during dinner; (ii) he heard the Commercial Director describe how he purchased silver jewelry for Chinese government officials "in order to please the officials;" (iii) the Commercial Director bragged about winning a Beijing City Bus Olympics contract by doing "whatever it took to please the officials" "including giving gifts, money and prostitutes;" and (iv) the Commercial Director "deliberately lost" high-stakes card games to "key Beijing City Bus officials." According to Lowe's complaint, Allison's Vice President of International Sales and Marketing knew and approved of certain of the Commercial Director's conduct and Lowe further alleged that "a month before Allison fired him" he disclosed his concerns about the Commercial Director and the Vice President to Allison's Marketing Manager.[177]

Such "noisy exits" by employees alleging wrongful termination of employment can also be the origins of high-profile FCPA scrutiny of the company involved. For instance, casino company Las Vegas Sands has been the subject of FCPA scrutiny since 2010 when Steven Jacobs, the former President of the company's Macau operations, filed a civil complaint against the company alleging breach of contract and tort-based causes of action.[178] Jacobs alleged, among other things, that the company's "notoriously bellicose" CEO and majority shareholder made several "outrageous demands" upon him, including "demands that Sands China continue to use the legal services of a Macau attorney . . . despite concerns that the individual's retention posed serious risks" under the FCPA.[179] The civil lawsuit has led to enforcement agency scrutiny of Las Vegas Sands under the FCPA and other laws.

While the FCPA is a law exclusively enforced by the DOJ and SEC, the take-away point from Part II of this Article is that the FCPA has many other ripples as well. Whether it is the many negative business effects of FCPA scrutiny, FCPA-related civil litigation against corporate directors or executives, or offensive use of the FCPA to achieve a business objective or advance litigating positions, actual FCPA enforcement actions by the enforcement agencies are often only a relatively minor component of the

fired-for-relaying-fcpa-concerns/.

177. *Still Yet Another Noisy Exit*, FCPA PROFESSOR (Dec. 23, 2010), http://www.fcpaprofessor.com/still-yet-another-noisy-exit.

178. *Another Noisy Exit*, FCPA PROFESSOR (Nov. 2, 2010), http://www.fcpaprofessor.com/another-noisy-exit.

179. *Id.*

overall business consequences that can result from FCPA scrutiny or enforcement in this new era.

CONCLUSION

This Article has examined the many ripples of FCPA scrutiny and enforcement in this new era. By highlighting that settlement amounts in an actual FCPA enforcement action are often only a relatively minor component of the overall financial consequences that can result from FCPA scrutiny or enforcement, this Article shifts the FCPA conversation away from being a purely legal issue to its more proper designation as a general business issue that needs to be on the radar screen of various business managers operating in the global marketplace. In shifting the conversation, business managers should view the importance of FCPA compliance more holistically and not merely through the narrow lens of actual enforcement actions.