FCPA VIOLATIONS AND COLLATERAL LITIGATION

Michael Volkov, Partner, Mayer Brown LLP, Washington, D.C.

Corruption, Crime & Compliance: http://corruptioncrimecompliance.com

The fear factor for FCPA enforcement is a criminal case brought by the Justice Department and a parallel civil case brought by the SEC. In the last few years, collateral litigation filed by shareholders has increased against companies who are alleged to have violated the FCPA.

The FCPA does not explicitly create a private right of action against companies. That has not stopped plaintiffs' bar from coming up with ways to seek compensation from companies. It is not unusual for a company to disclose possible FCPA violation and for twenty to thirty private actions to be filed against the company within the next thirty days. Shareholder derivative suits and class actions ae usually filed by shareholders, competitors, employees, and pensions plans.

The collateral litigation involves several "typical" causes of action: (1) class actions under ERISA against the company and directors for breach of fiduciary duties to the company and pension holders; (2) shareholder derivative actions brought against directors and officers for breach of fiduciary duties; (3) shareholder class actions against company and directors for failures to disclose or inaccurate disclosures of material information under section 10(b) and Rule 10b-5; and (4) RICO actions alleging racketeering activity.

Most securities fraud class actions involve misrepresentations relating to compliance with anti-bribery laws, the quality of internal controls, profitability and assessments of potential FCPA violations. Securities fraud class actions are difficult to win and recent court decisions have raised the *scienter* requirements. In *Glazer Capital Management, LP v. Magisti,* the Ninth Circuit affirmed the dismissal of a securities fraud class action based on FCPA violations because plaintiffs failed to adequately allege the individual directors or officers who actually made the false statements.

An alternative strategy used by plaintiffs is shareholder derivative suits for FCPA violations based on the failure of officers and directors to satisfy their monitoring obligations under *Caremark International, Inc. Derivative Litigation.* This strategy is difficult because courts have found that officers and directors satisfy their *Caremark* obligations by ensuring that the company has an anti-corruption compliance program in place. .

Notwithstanding the legal obstacles to collateral litigation, plaintiffs have secured significant settlements in FCPA violation cases. Defendant companies are able to settle the cases and avoid protracted litigation at a high cost. As a result, the cases rarely proceed to trial.

Plaintiffs are now turning to a new alternative theory for civil liability – federal and state RICO statutes. Civil RICO actions based on FCPA violations are attractive because of potential treble damages and award of attorneys fees. RICO liability turns on the issue of whether foreign bribery conduct satisfies the "pattern of racketeering" requirement. Plaintiffs have had some success in this area by alleging that foreign bribery violates the Travel Act or mail and wire fraud

statutes. Plaintiffs also have had difficulty overcoming defense arguments that the RICO statutes do not have extraterritorial application.

Plaintiffs benefit from the Justice Department's aggressive FCPA enforcement program. The more cases that the Justice Department prosecute, the more cases plaintiffs can bring. But more importantly, as the Justice Department employs more aggressive prosecution strategies and theories (e.g. Travel Act), plaintiffs can use these theories of liability to support their claims.