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3 Ways Civil Plaintiffs Could Fill An FCPA Enforcement Gap

By **Eric Nitz** (March 10, 2025, 4:21 PM EDT)

The Trump administration has moved quickly to reshape the landscape of enforcement under the Foreign Corrupt Practices Act and its much younger sibling, the Foreign Extortion Prevention Act.

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On Feb. 6, her first day in office, Attorney General Pam Bondi directed the U.S. Department of Justice's FCPA unit to prioritize investigation and prosecution "related to foreign bribery that facilitates the criminal operations of" cartels and transnational criminal organizations.

A few days later, President Trump signed an executive order instituting a 180-day pause of all FCPA enforcement activity. The Feb. 10 order directs that, during this time, the attorney general must review the DOJ's policies and guidelines governing FCPA enforcement — and, presumably, modify and amend those guidelines to reshape FCPA enforcement going forward.

The executive order erects other barriers to FCPA enforcement, too. Any FCPA investigation initiated or continued under the new guidelines must be "specifically authorized by the Attorney General."

Even with this shift, companies would be wise to maintain their anticorruption policies and compliance programs. Indeed, as other commentators have noted, the executive order does not apply to the U.S. Securities and Exchange Commission, which may continue its enforcement of the FCPA — although a less aggressive application by the SEC would not be surprising. And foreign countries can continue to enforce their own anticorruption laws.

But one other risk looms large: private enforcement of the FCPA through civil suits seeking damages. Although the FCPA itself contains no private right of action, an aggrieved plaintiff might seek to hold a company accountable for foreign corruption using at least three different legal tools: the Racketeering Influenced and Corrupt Organizations Act, shareholder derivative enforcement of securities laws and the False Claims Act.

1. Civil RICO Claims

RICO generally prohibits "any person" — which includes companies — from conducting the affairs of an "enterprise … through a pattern of racketeering activity," among other prohibited activities.[1]

A "'pattern of racketeering activity' requires at least two acts of racketeering activity" within a 10-year span.[2] "Racketeering activity" is broadly defined to include a number of different predicate offenses, several of which encompass the sort of activity punishable under FEPA and the FCPA.[3]

For example, wire and mail fraud as codified in Title 18 of the U.S. Code, Sections 1341 and 1343; money laundering as codified in Sections 1956 and 1957; and violations of the Travel Act as codified in Section 1952 are all predicate offenses under RICO.[4] All statutes are commonly used to bring charges in foreign bribery cases, and fact patterns that support FCPA violations will frequently support violations of those RICO predicate offenses as well.

The RICO statute also independently prohibits racketeering conspiracy.[5] Because any person "injured in his business or property by reason of" a RICO violation can sue for treble damages and attorney fees and costs,[6] foreign corruption that might violate the FCPA can therefore likely also support a civil RICO claim.

A civil RICO claim, however, does pose extra hurdles that the government need not surmount when charging a pure FCPA violation. For example a plaintiff must also establish the existence of the enterprise, the pattern of activity, the commission of each predicate and an impact on interstate or foreign commerce. The plaintiff must also have standing to sue which, in many cases, could limit the universe of potential plaintiffs to industry competitors squeezed out of potential deals because of the corrupt activity.

But if the DOJ's FCPA enforcement efforts wane, companies struggling to compete may turn to civil RICO claims in an effort to level the playing field when they believe competitors have secured business through corrupt activity.

2. Shareholder Derivative Suits and Securities Fraud

Shareholder litigation presents another potential avenue for private enforcement of corporate conduct violating the FCPA. Securities fraud occurs when a company knowingly makes an untrue or misleading statement of material fact in connection with the sale or purchase of securities, and plaintiffs rely on that statement to their detriment.[7]

Under that standard, according to the U.S. District Court for the Southern District of New York's 2016 order in Menaldi v. Och-Ziff Capital Management Group LLC, a company can be "compelled to disclose uncharged wrongdoing if its statements are or become materially misleading in the absence of disclosure."[8] In the 2017 decision in that case, the court said this occurs primarily in three circumstances:

> (1) when a corporation puts the reasons for its success at issue but fails to disclose that a material source of its success is the use of improper or illegal business practices; (2) when a defendant makes a statement that can be understood, by a reasonable investor, to deny that the illegal conduct is occurring; or (3) when a defendant states an opinion that, absent disclosure, misleads investors about material facts underlying that belief.[9]

Under those circumstances, a company's failure to disclose the existence of a foreign bribery scheme can subject it to liability for securities fraud. Directors and officers might further face liability for breach of fiduciary duty based on a failure to provide adequate oversight.

The DOJ's less aggressive approach to FCPA enforcement, however, may result in lower damages for such securities fraud. In securities litigation, the damages often derive from a sharp decrease in the company's stock price — usually precipitated by the announcement of a DOJ investigation, an anticorruption settlement or even the ultimate disclosure of the company's wrongdoing.

With the DOJ's shift in FCPA enforcement priorities, these events will likely occur with less frequency and, to the extent they occur at all, may elicit a more muted response from the financial markets. But the risks are not completely eliminated.

Enforcement actions by foreign governments, the cancellation of contracts and potential business opportunities, as well as costs associated with addressing and responding to the allegations can all lead to damages sufficient to support a shareholder claim.

3. Qui Tam Claims Under the False Claims Act

While both civil RICO and shareholder claims require standing — that the plaintiff have actually suffered an injury as a result of the foreign corruption — the FCA's relator provisions allow nearly any individual to pursue allegations of foreign corruption, in certain circumstances.[10] The FCA generally prohibits individuals and companies from submitting false or fraudulent claims for payment to the federal government.[11] In some cases, foreign corruption can cause government claims to be false or fraudulent.

For example, some government contracts require the contractor to establish and maintain a code of business ethics and conduct, as well as to exercise due diligence to prevent and detect criminal conduct.[12]

Some contracts may also require government contractors to disclose any credible evidence that an employee or agent has committed bribery, fraud or gratuity violations, among other offenses.[13] Allegations of foreign bribery could trigger these disclosure requirements.

A government contractor might also be required to certify its compliance with anticorruption laws. Violation of these contractual requirements and certification could render any claims submitted under those contracts false or fraudulent, triggering potential FCA liability and creating the risk of a relator claim.

Of course, even when a relator sues under the FCA, the government may dismiss the case over the relator's objection.[14] In FCA cases involving foreign corruption allegations, the DOJ may be quick to exercise that authority, consistent with its revised guidance on FCPA cases. But even in that situation, risks associated with a qui tam complaint remain, including putting another potential plaintiff on notice of the company's corrupt practices.

Conclusion

Ultimately, maintaining strong anticorruption policies and compliance programs will remain essential for companies doing business overseas.

Strong policies can help demonstrate a lack of bad intent. They can shield officers and directors from allegations that they negligently or recklessly failed to provide effective oversight. And — if it comes to it — compliance measures can appeal to civil juries that are assessing a company's good faith efforts to

avoid corrupt practices.

Finally, corporations that respond effectively and quickly to allegations of foreign corruption will help mitigate the risk that civil plaintiffs could step in to fill any void left by the DOJ's revised enforcement regime.

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[1] 18 U.S.C. §§1961(3), 1962.

[2] 18 U.S.C. §1961(5).

[3] 18 U.S.C. §1961(1).

[4] Id.

[5] 18 U.S.C. §1962(d).

[6] 18 U.S.C. §1964.

[7] See generally Menaldi v. Och-Ziff Capital Mgmt. Group LLC, 277 F. Supp. 3d 500 (S.D.N.Y. 2017).

[8] Menaldi v. Och-Ziff Capital Mgmt. Group LLC, 164 F. Supp. 3d 568 (S.D.N.Y. 2016).

[9] Id. at 357.

[10] See 31 U.S.C. §§3729-3730.

[11] 31 U.S.C. §3729.

[12] See FAR §52.203-13(b).

[13] Id. §52.203-13(b)(3).

[14] See 31 U.S.C. §3730(c)(2); United States ex rel. Polansky v. Executive Health Resources Inc., 599 U.S. 419 (2023).