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A Rose By Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions

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The U.S. Foreign Corrupt Practices Act (FCPA), which prohibits companies and individuals from paying or promising to pay anything of value to foreign officials with the corrupt intent of obtaining or retaining business, does not provide a private right of action. Yet this fact has not stopped businesses, shareholders, and foreign governments from recently bringing an array of FCPA-inspired civil actions, and Congress is considering amending the FCPA to permit private civil suits against "foreign concerns."

"What's in a name? That which we call a rose
By any other name would smell as sweet."
-William Shakespeare, *Romeo and Juliet*

For over thirty years, companies and individuals engaged in international business have had to comply with the Foreign Corrupt Practices Act's (FCPA) prohibition on bribing foreign officials to obtain or retain such business advantages as contracts, tax breaks, and customs exemptions. The Department of Justice (DOJ) and the Securities & Exchange Commission (SEC) have exclusive responsibility for enforcing the FCPA's prohibitions and requirements. In recent years, the DOJ and the SEC have dramatically increased their efforts in this area, doling out millions of dollars in civil and criminal penalties and securing hefty prison sentences for dozens of individuals. The U.S. government's increased enforcement activity, coupled with the inherent challenges of complying with the FCPA's vague language, have understandably generated anxiety among exporters, importers, and multinational companies.

Such global businesses might take some solace in the fact that the FCPA does not provide a private right of action and, therefore, does not enable shareholders, business partners, competing businesses, and foreign governments to sue for the alleged bribery of foreign officials. If so, these global businesses should think again. Plaintiffs are increasingly making an end-run around the FCPA's lack of a private right of action through an array of FCPA-inspired civil suits. The plaintiffs in such civil actions allege facts that sound virtually identical to those alleged in the U.S. government's FCPA enforcement actions. Yet rather than cite the FCPA as the basis for a damages award, these plaintiffs rely on such causes of action as violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), common law fraud, and violation of federal securities law. In other words, the plaintiffs in these FCPA-inspired cases simply change the name of their cause of action from "FCPA" to something like "RICO." And based on the sizeable settlements and judgments this strategy can possibly fetch, the FCPA by any other name smells just as sweet to potential plaintiffs.

Overview of the FCPA

During the mid-1970s, a series of congressional investigations—including one headed by Idaho Senator Frank F. Church in his capacity as Chair of the Subcommittee on Multinational Corporations—targeted various U.S. corporations' questionable foreign activities. These inquiries revealed that over 400 U.S. corporations had paid roughly $300 million in bribes to foreign officials to secure business abroad. In the wake of these revelations, Congress passed the FCPA, and President Jimmy Carter signed it into law on December 19, 1977.

The FCPA contains two overarching sets of provisions geared toward battling bribery abroad. First, the FCPA's anti-bribery provisions prohibit companies (both private and public) and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business.[1] Second, the FCPA's books-and-records and internal-controls provisions (collectively known as the accounting provisions) mandate various record-keeping practices and internal accounting controls aimed at preventing and detecting illegal bribery of foreign officials.[2]

The FCPA generally strikes fear into the hearts of exporting, importing, and multinational companies for five primary reasons: (1) its jurisdictional reach is expansive, (2) its anti-bribery prohibitions are sweeping, (3) its vicarious and successor liability is extensive, (4) its penalties are harsh, and (5) its enforcement by the U.S. government is becoming increasingly aggressive. I will briefly address each of these factors in turn.

Jurisdiction

The FCPA casts an expansive jurisdictional net intended to ensnare as many individuals and entities—both domestic and foreign—as possible. In general, the FCPA covers (1) "issuers," (2) "domestic concerns," and (3) "any person other than issuers or domestic concerns" who corruptly uses the U.S. mails or instrumentalities of interstate commerce to bribe foreign officials. The FCPA's anti-bribery provisions pertain to entities and individuals falling within any of these three categories, while the accounting provisions apply only to issuers.

"Issuers" are entities required under the U.S. Securities Exchange Act to register under Section 12 or to file reports under Section 15(d).[3] In other words, publicly held companies with securities or American Depository Receipts listed on a U.S. securities exchange (e.g., NYSE or NASDAQ) are subject to the FCPA. The term "domestic concern" includes any individual who is a U.S. citizen, national or resident, as well as any business entity (public or private) with its principal place of business in the United States, or which is organized under the laws of a U.S. state, territory, possession or commonwealth.[4] Under the nationality approach to jurisdiction, issuers and domestic concerns are subject to FCPA criminal and civil liability for bribery committed anywhere in the world, regardless of whether

the bribery implicates the U.S. mails or instrumentalities of interstate commerce.

Based on the territorial approach to jurisdiction, "any person other than issuers or domestic concerns" faces FCPA exposure if the person uses the mails or instrumentalities of interstate commerce, while within U.S. territory, to carry out an act prohibited under the FCPA.[5] This territorial jurisdictional hook ensnares any foreign individual or entity that causes a prohibited act to be done within U.S. territory by any person acting as the individual's or entity's agent.

Officers, directors, employees, and agents of entities that fall within one of the three categories above also face FCPA exposure.[6] It does not matter whether the officers, directors, employees, and agents qualify as issuers or domestic concerns or utilize an instrumentality of interstate commerce in their own rights; mere association with the covered entity suffices for purposes of imposing FCPA civil and criminal penalties.

Anti-Bribery Prohibitions

The broad scope and sweeping language of the FCPA's anti-bribery provisions render compliance challenging for exporting, importing, and multinational companies. Again, the FCPA's anti-bribery provisions prohibit companies and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business. Although a comprehensive analysis of the FCPA's various terms is beyond the scope of this Article, a brief discussion of the term "foreign official" should illustrate the slippery nature of the FCPA's language.

Under the FCPA, the term "foreign official" includes not only actual government members, but also government instrumentalities, public international organizations (e.g., the United Nations), political parties, political party officials, candidates for political office, and even members of royal families.[7] In countries like China, where government instrumentalities known as state-owned enterprises ("SOEs") dominate the business arena, an array of potential business partners may arguably constitute "foreign officials."

For example, in June 2008, the DOJ and the SEC brought enforcement actions against AGA Medical Corporation ("AGA"), a Minnesota-based medical products manufacturer, for authorizing its Chinese distributor to pay $460,000 in "commissions" to Chinese doctors. These doctors in turn directed their hospitals to order AGA's products. Given that these hospitals are SOEs, the doctors constitute "foreign officials" under the FCPA, thus rendering AGA's payments illegal bribes. After the DOJ brought enforcement proceedings against AGA, AGA agreed to pay a $2,000,000 penalty and enter into a deferred prosecution agreement.

Vicarious and Successor Liability

The FCPA makes companies and individuals vicariously liable for the conduct of third parties like distributors, agents, consultants, and representatives. It also imposes successor liability on the acquiring company in a merger, even if the merger target's FCPA violations predate the merger's closing date. Such vicarious and successor liability is especially perilous because, under the scienter element of the FCPA's anti-bribery provisions, a company is deemed to "know" of prohibited conduct if it possesses information indicating a high probability of the prohibited conduct.[8] In other words, to run afoul of the FCPA, a company need not have actual knowledge of illegal bribes paid by its third-party representatives or merger targets—the mere failure to recognize and investigate the third party's or merger target's suspicious activities may suffice.

Civil and Criminal Penalties

Under the FCPA's anti-bribery provisions, entities face criminal fines of up to $2,000,000 per violation and civil penalties of up to $10,000 per violation. Individuals face criminal fines of up to $100,000 or imprisonment of not more than five years, or both, per violation, and civil penalties of up to $10,000 per violation.[9] As for the accounting and record keeping provisions, entities face fines up to $25,000,000, and individuals face up to twenty years in prison and fines up to $5,000,000, or both.[10] Additionally, under the alternative "profit disgorgement" penalty provisions, a fine can be twice the gross gain to the defendant or, if a competitor suffers a monetary loss, the greater of twice the gross gain to the defendant or twice the gross loss to the competitor.[11]

Upward Enforcement Trend

The DOJ and the SEC have recently dramatically stepped up their efforts to enforce the FCPA. While the DOJ handles all criminal actions and all civil actions against non-issuers, the SEC handles only civil actions against issuers. In 2007 and 2008, the DOJ and the SEC brought a combined total of seventy-one FCPA enforcement actions—a more than 162 percent increase over the total number of FCPA enforcement actions brought in 2005 and 2006. Moreover, top-ranking enforcement officials have acknowledged the existence of over 100 ongoing FCPA investigations, and have publicly committed to continuing their aggressive enforcement of the FCPA.

In addition to pursuing more enforcement actions, DOJ and SEC officials—as well as their foreign counterparts—are levying heftier fines for bribery abroad. For example, on December 15, 2008, Siemens AG, a German conglomerate company, and three of its subsidiaries (collectively, "Siemens"), pled guilty in the U.S. District Court for the District of Columbia to violating the FCPA. According to the DOJ's and the SEC's estimates, Siemens paid $1.4 billion in bribes to foreign officials in Asia, Africa, Europe, the Middle East, and the Americas.[12] As part of its settlement with the DOJ and the SEC, Siemens agreed to pay a $450 million criminal penalty and to disgorge $350 million in wrongful profits. On the same day, Siemens announced an agreement with German prosecutors to pay a €395 million ($569 million) fine for violating Germany's anti-corruption laws, adding to the €201 million ($285 million) a Munich court sentenced Siemens to pay in October 2007.

The $1.6 billion penalty Siemens must pay U.S. and German authorities is roughly thirty-five times larger than any previous anti-corruption settlement. This staggering figure does not include the €850 million ($1.2 billion) Siemens has reportedly paid to attorneys, accountants, and other service providers to deal with its global bribery scandal since late 2006. Nor does it include the significant sums Siemens must pay an outside FCPA compliance monitor for the next four years as part of its settlement with the DOJ and the SEC.

The five factors discussed above have already combined to make the FCPA a hot topic in business, legal, and government circles. As discussed in the following section, a sixth factor is rapidly emerging: FCPA-inspired civil actions. Although this sixth factor is still in its formative stages, it has the potential to significantly broaden the FCPA's reach in a way Congress likely never envisioned.

FCPA-Inspired Causes of Action

As indicated above, the FCPA does not contain a private right of action.[13] In other words, under the FCPA, only the U.S. government may sue entities and individuals for bribing foreign officials. Yet this fact has not deterred the U.S. plaintiffs' bar. In recent months, plaintiffs have transformed FCPA violations into traditional causes of action against companies under RICO,[14] common law fraud, and federal securities laws. These plaintiffs have generally fallen into four categories: (1) foreign governments, (2) shareholders, (3) business partners, and (4) business competitors. The following paragraphs analyze some of the most noteworthy examples from each of these four categories.

Foreign Governments

The Kingdom of Bahrain and the Republic of Iraq have led the charge in bringing FCPA-inspired civil suits against U.S. companies for allegedly corrupting government officials with bribes. First, on February 27, 2008, the Kingdom of Bahrain's state-controlled aluminum smelter, Aluminum Bahrain B.S.C. ("Alba"), sued its Pennsylvania-based aluminum supplier, Alcoa, Inc. ("Alcoa"), in the U.S. District Court for the Western District of Pennsylvania.[15] Alba, which seeks more than $1 billion in damages, alleges in its complaint that an Alcoa agent created shell companies in Switzerland, Singapore, and the Isle of Guernsey for the purpose of funneling illegal bribes to senior Bahraini government officials. These bribes allegedly prompted the Bahraini officials to cause Alba to pay inflated prices for Alcoa's aluminum and to push for the sale of a controlling interest in Alba to Alcoa.

Although Alba's complaint primarily relied on RICO, common law fraud, and civil conspiracy to defraud as the bases for its damages claim, its allegations sounded eerily similar to those found in the DOJ's and the SEC's past enforcement actions. In fact, Alba's claims were so similar to standard FCPA claims that the DOJ and the SEC soon intervened in Alba's lawsuit, prompting the federal court to stay discovery pending the U.S. government's FCPA investigation.

Next, on June 27, 2008, the Republic of Iraq filed an action in the U.S. District Court for the Southern District of New York against ninety-one companies and two individuals for allegedly corrupting the United Nations' Oil-for-Food program.[16] According to Iraq's complaint, the defendants conspired with members of Saddam Hussein's regime to divert up to $10 billion in Oil-for-Food program funds intended for humanitarian purposes to the illicit use of Hussein's government. Again, the allegations sound almost identical to those of an FCPA claim, but Iraq relies on RICO, common law fraud, breach of fiduciary duty, and Robinson-Putnam Act claims. Unlike Alba, Iraq filed its FCPA-inspired lawsuit after, rather than before, the DOJ and the SEC announced their related FCPA enforcement actions. Indeed, by the time Iraq filed its lawsuit, the DOJ and the SEC had already levied large penalties against several of the defendants.

Alba's and Iraq's lawsuits suggest a trend in which foreign governments seek redress for alleged bribery-related injuries by simply casting their FCPA claims in the form of some other cause of action. RICO will likely serve as a driving force behind such FCPA-inspired civil actions because federal courts have already held that a RICO predicate act may be based on an FCPA violation.[17] Moreover, these two cases illustrate the dangers of "tag-along" lawsuits in which a foreign government's private civil action triggers a U.S. government FCPA enforcement action or vice versa. The U.S. government's recent FCPA enforcement surge, coupled with the U.S. plaintiffs' bar's development of FCPA-inspired private rights of action, promises to dramatically expand the already vast realm of FCPA exposure for companies conducting cross-border operations.

Shareholders

Shareholders of public companies are increasingly following the U.S. government's FCPA enforcement actions with private civil actions against the allegedly bribing companies and their officers and directors. In fact, the Alba lawsuit described above gave rise to a shareholders derivative lawsuit. On May 6, 2008, an ironworkers' pension trust fund filed a shareholders' derivative action in the U.S. District Court for the Western District of Pennsylvania on behalf of Alcoa against twenty-two current and former Alcoa officers and directors.[18] The pension fund's complaint essentially raised the same FCPA-based allegations set forth in Alba's complaint, and sued the defendants for breach of fiduciary duty, corporate waste, abuse of control, gross mismanagement, and unjust enrichment. The Western District of Pennsylvania dismissed this lawsuit on July 9, 2008 on the grounds that plaintiffs failed to make a pre-suit demand on Alcoa's board of directors.

Additionally, FARO Technologies, Inc. ("FARO"), a Florida-based company that markets software and portable computerized measurement systems, recently discovered that FCPA violations can lead to costly securities fraud class actions under § 10(b) of the Securities Exchange Act.[19] FARO's public FCPA troubles began in 2006 when it self-disclosed that its Shanghai-based subsidiary had secured sales contracts by paying $444,492 in bribes (disguised as "referral fees") to various employees of Chinese SOEs. DOJ and SEC enforcement actions soon commenced, followed by a related amendment to a pending shareholders' consolidated class action complaint. The shareholders' amended class action complaint alleged, among other things, that FARO's "system of internal controls was inadequate and unable to prevent [its] FCPA violations," resulting in a fraud upon its shareholders.[20] On October 3, 2008, the U.S. District Court for the Middle District of Florida fully approved a $6.875 million settlement of this lawsuit.[21] FARO's desire to settle this lawsuit was likely heightened by the fact that at least two federal courts had previously allowed similar § 10(b) securities fraud actions to survive summary judgment.[22] Three days later, the DOJ and the SEC announced a roughly $2.92 million settlement of their FCPA enforcement actions against FARO.

These types of FCPA-inspired shareholders actions are especially frightening for directors and officers of international businesses because many directors and officers insurance policies ("D&O policies") contain a "commissions exclusion" (created shortly after the FCPA's enactment) that excludes coverage for losses arising from payments to foreign officials. As the U.S. government ramps up its FCPA enforcement efforts, the number of tag-along shareholders private actions will likely correspondingly increase, resulting in yet another layer of potential liability for international businesses, as well as these businesses' directors and officers. Indeed, given that the shareholders class managed to extract a nearly $7 million settlement out of FARO with its § 10(b) securities fraud theory, FCPA-inspired shareholders' actions appear poised for a rapid increase.

Business Partners

The business partners of global companies constitute another burgeoning group of FCPA-inspired plaintiffs. For example, on February 21, 2008, Colorado-based oilman Jack Grynberg filed a lawsuit in the U.S. District Court for the District of Columbia against BP PLC ("BP"), StatoilHydro ASA ("Statoil"), British Gas, and several of these entities' current or former top executives.[23] Mr. Grynberg's complaint alleged that he entered into a joint venture partnership with the defendants to pursue oil business in Kazakhstan, and the defendants, without his knowledge or consent, bribed Kazakh officials to obtain certain oil rights and then lied to cover up the bribes. Mr. Grynberg claims these bribes not only constituted a diversion of his share of the joint venture profits, but also "harm[ed his] hard-earned and well-justified reputation as a crusader against bribery and other corruption within the petroleum industry." In addition to the increasingly standard FCPA-inspired RICO causes of action, Grynberg's complaint raises common law fraud, theft/conversion, false light, and constructive trust claims against the defendants.

On March 24, 2008, Agro-Tech Corp. ("Argo-Tech"), an Ohio-based aerospace manufacturer, sued its Japanese distributor, Yamada Corp. ("Yamada"), and Yamada's California-based subsidiary, Upsilon International Corp. ("UIC"), in the U.S. District Court for the Northern District of Ohio.[24] This lawsuit flowed from the Japanese government's investigation of Yamada for allegedly bribing high-ranking officials in Japan's Ministry of Defense to secure contracts. In its complaint, Argo-Tech claims Yamada breached a provision in the parties' distribution agreement requiring Yamada to take various steps to ensure FCPA compliance. Argo-Tech also asks the federal court for a declaratory judgment that Argo-Tech may lawfully terminate the distribution agreement in its entirety based on Yamada's alleged breach of the FCPA provision.

Such FCPA-inspired business partner lawsuits, like the foreign government and shareholders suits described above, will almost certainly gain prominence in the wake of the DOJ's and the SEC's escalating FCPA enforcement efforts. Companies that suspect their business partners have engaged in bribery abroad have an incentive to go on the legal offensive, both from a public relations standpoint and an FCPA liability perspective. If such companies sue their allegedly corrupt business partners, they have an opportunity to portray themselves as innocent victims in the complaint, and, therefore, can theoretically garner favor with consumers, investors, the DOJ, and the SEC. As the DOJ and the SEC continue to crank up their FCPA enforcement activity, businesses have an even greater incentive to file preemptive FCPA-inspired civil suits against their allegedly corrupt partners.

Business Competitors

Yet another category of FCPA-inspired plaintiffs appears to be emerging: companies that allegedly lose business abroad due to a competitor's bribery of foreign officials. On October 21, 2008, Supreme Fuels Trading FZE ("Supreme"), a United Arab Emirates-based company, sued its Florida-based competitor, International Oil Trading Co. ("IOTC"), and IOTC's owners in the U.S. District Court for the Southern District of Florida.[25] To transport fuel through Jordan into Iraq, a company must obtain a Letter of Authorization ("LOA") from the Jordanian government. In turn, only companies that obtain this LOA are eligible to bid for certain U.S. government contracts for supplying aviation and ground fuel to U.S. forces in Iraq. Supreme alleges that IOTC paid Jordanian government officials millions of dollars in bribes to ensure that only IOTC received an LOA from the Jordanian government, and, therefore, only IOTC could bid for these lucrative U.S. government contracts. The complaint further alleges that, if not for IOTC's bribery scheme, Supreme would have obtained the LOA from Jordan and secured millions of dollars in U.S. government contracts. Supreme brings its action under RICO, the Sherman Act, the Florida state law equivalents of those federal acts, and Florida common law for tortious interference with business relations.

Under the FCPA, companies have to rely on the DOJ and the SEC to ensure a level playing field abroad. Accordingly, it is not uncommon for companies to provide the DOJ and the SEC anonymous tips about their competitors' alleged bribery of foreign officials. The DOJ's and the SEC's subsequent FCPA investigations might lead to hefty penalties for the bribing competitors. Yet the companies that lost business to these bribing competitors will not receive a penny of the penalty funds. In contrast, through the types of FCPA-inspired civil suits discussed in this article, companies can potentially recoup the money they claim to have lost at the hands of their allegedly bribing competitors, as well as punitive damages. Thus, such FCPA-inspired lawsuits will probably increasingly crop up alongside not only U.S. government enforcement actions, but also suits brought by foreign governments, shareholders, and business partners.

Foreign Business Bribery Prohibition Act of 2008

The foreign governments, shareholders, business partners, and business competitors discussed above are evidently not the only parties interested in private rights of action and the FCPA. On June 4, 2008, Representative Ed Perlmutter (D-Colorado) introduced in the U.S. House of Representatives the "Foreign Business Bribery Prohibition Act of 2008" (H.R. 6188).[26] In short, H.R. 6188 seeks to amend the FCPA to enable issuers, domestic concerns, and United States persons to sue "foreign concerns" for violating the FCPA. Plaintiffs would have to establish that a foreign concern not only violated the FCPA, but

also that the FCPA violation either prevented the plaintiff from obtaining or retaining business or enabled the foreign concern to obtain or retain business. If successful, the plaintiff could obtain damages of three times the greater of the total amount of the contract the foreign concern obtained through the FCPA violation or the total amount of the contract the plaintiff lost due to the foreign concern's FCPA violation.

Given that H.R. 6188 defines the term "foreign concern" to exclude issuers and domestic concerns, this bill would essentially only allow U.S.-based entities and individuals to sue foreign companies that corruptly use the instrumentalities of interstate commerce within the United States for the purpose of bribing foreign officials in violation of the FCPA. H.R. 6188 would not allow any plaintiff to bring such a private FCPA civil action against a U.S.-based entity or individual, and, thus, would not necessarily transform the types of FCPA-inspired civil actions discussed above into legitimate FCPA civil actions.

Rather, H.R. 6188 appears geared toward addressing concerns that the FCPA places U.S.-based global companies at a disadvantage because (1) the FCPA's application to "domestic concerns" makes their liability exposure broader than that of their foreign competitors, and (2) the authorities in their foreign competitors' home countries do not enforce anti-bribery laws as aggressively as the DOJ and the SEC enforce the FCPA. By enabling U.S. entities and individuals to sue their foreign competitors in U.S. courts under the FCPA, H.R. 6188 would arguably help level the playing field in the international business arena. The House Judiciary and Energy and Commerce committees did not take action on the H.R. 6188 during the 110th Congress. Thus, as of the submission of this Article for publication, it remains to be seen whether the bill's "foreign concern" approach to FCPA private rights of action has a chance of becoming law.

Conclusion—FCPA Compliance Programs

In light of the trends discussed above, the need for international businesses to proactively address their potential FCPA and FCPA-inspired liability exposure has never been more important. Global businesses can minimize their exposure to FCPA enforcement actions and FCPA-inspired civil actions by developing a culture of FCPA compliance throughout their global operations. The cornerstone of such a culture of compliance is an FCPA compliance program that contains at least the following five elements:

1. Written Policies: Companies should work with their attorneys to draft a clearly articulated policy against FCPA violations. Depending on the extent of the company's foreign operations, this written policy may vary in length and complexity. In any event, it should highlight prohibited behavior, accommodate employees who blow the whistle on compliance violations, and set forth disciplinary procedures to address such violations.

2. Training Programs: Companies should provide regular FCPA training for employees, distributors, sales agents, and other third-party representatives. Such training sessions should seek to equip these individuals with the ability to recognize and avoid conduct that runs afoul of the FCPA and should conclude with each participant signing an FCPA certification.

3. Due Diligence: Businesses should conduct thorough due diligence of potential foreign distributors, agents, consultants, representatives, joint venture partners, and merger targets, focusing on whether anything in these third parties' backgrounds raises any FCPA red flags.

4. Contract Provisions: Companies should ensure their agreements with foreign business partners address the FCPA. For example, an exporting company's international distribution agreements should require the distributor to provide FCPA-specific representations, warranties, and covenants. Such agreements should give the exporter the right to audit the foreign business partner's financial records, as well as the right to terminate the agreement immediately if the foreign business partner breaches its FCPA representations, warranties, or covenants. (Notably, it appears Agro-Tech and Yamada's distribution agreement, which gave rise to the FCPA-inspired lawsuit discussed above, did not give Agro-Tech a clear right to terminate the agreement if Yamada violated the FCPA. If the distribution agreement had included such termination rights, Agro-Tech likely could have avoided the court proceedings in which it is currently embroiled.)

5. Internal Controls: Businesses should centralize their accounting systems to ensure corporate headquarters' review of all foreign financial transactions. Careful analysis of the financial records of employees, subsidiaries, and business partners abroad can enable businesses to quickly detect and eliminate conduct prohibited under the FCPA.

In the past, global businesses have implemented such FCPA compliance programs to (1) minimize the possibility of FCPA violations, and (2) to heed the DOJ's and the SEC's warnings that they will punish more severely those companies that lack well-developed compliance programs. In light of the recent rise of FCPA-inspired civil actions, FCPA violation minimization should assume an even greater importance for such global businesses. Unlike the DOJ and the SEC, private plaintiffs could generally care less about the existence or complexity of the defendant's FCPA compliance program; rather, these plaintiffs merely care about the occurrence of FCPA violations that they can bootstrap into existing causes of action. And as far as defendants are concerned, these FCPA-inspired causes of action can smell just as foul as the traditional FCPA enforcement actions from which they spring.

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Endnotes

[1] 15 U.S.C. §§ 78dd-1-78dd-3.
[2] *See id.*, § 78m.
[3] *See id.*, §§ 78dd-1, 78m.
[4] *See id.*, § 78dd-2.
[5] *See id.*, § 78dd-3.
[6] *See id.*, § 78dd-2(g)(2).
[7] *See id.*, § 78dd-1(f)(1).
[8] *See id.*, § 78dd-1(f)(2).
[9] *See id.*, § 78dd-2(g).
[10] *See id.*, § 78ff(a).
[11] *See* 18 U.S.C. § 3571(d).
[12] *See* Complaint, SEC v. Siemens AG, No. 1:08-cv-02167 (D.C. Dec.
[12] 2008); Information, United States v. Siemens AG, No. CR-08-367 (D.C. Dec. 12, 2008).
[13] *See Lamb v. Phillip Morris*, 915 F. 2d 1024, 1027-30 (6th Cir. 1990).
[14] *See* 18 U.S.C. §§ 1962-1968.
[15] *See* Complaint, Aluminum Bahrain B.S.C. v. Alcoa, Inc., No. 08-cv-299 (W.D. Pa. Feb. 27, 2008).
[16] Original Complaint, Iraq v. ABB AG, No. 08 CV 5951 (S.D.N.Y. June 27, 2008).
[17] *See, e.g.*, *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 339 (D. Conn. 1990) (holding that a predicate act under RICO could be based on a violation of the FCPA); *Nat'l Group for Commc'ns & Computers, Ltd. v. Lucent Technologies Inc.*, No. 03 C.v. 6001 (NRB), 2004 WL 290374 (S.D.N.Y. Dec. 15, 2004) (holding that an FCPA-based claim alleging bribery of a Saudi Arabian government official could be brought as a predicate claim under RICO).
[18] *See* Complaint, Hawaii Structural Ironworkers' Pension Trust Fund v. Belda, No. 08-cv-00614 (W.D. Pa. May 6, 2008).
[19] *See* 15 U.S.C. § 78j(b).
[20] *See* Consolidated Amended Class Action Complaint, In re FARO Technologies Securities Litigation, No. 6:05-cv-1810-Orl-22DAB (M.D. Fla. May 16, 2008).
[21] *See* Final Judgment and Order of Dismissal with Prejudice, In re FARO Technologies Securities Litigation, No. 6:05-cv-1810-Orl-22DAB (M.D. Fla. October 3, 2008).
[22] *In re Nature's Sunshine Prods. Sec. Litig.*, 486 F. Supp. 2d 1301 (D. Utah 2007); *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133 (N.D. Ga. Oct. 4, 2006)
[23] Verified Complaint and Jury Demand, Grynberg v. B.P. P.L.C., No. 1:08-cv-00301-JDB (D.C. Feb. 21, 2008). On November 12, 2008, the District Court for the District of Columbia dismissed without prejudice Grynberg's complaint against BP, Statoil, and the individual BP defendants on the grounds that a AAA arbitrator needed to determine the arbitrability of Grynberg's claims against these defendants.
[24] Complaint, Agro-Tech Corp. v. Yamada Corp., No. 1:08CV0721 (N.D. Ohio March 24, 2008).
[25] Complaint, Supreme Fuels Trading FZE v. Sargeant, No. 9:08-cv-81215-DTKH (S.D. Fla. October 21, 2008).
[26] Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008).

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