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DISCLOSING PENDING FCPA INVESTIGATIONS

A public company undergoing an internal or governmental FCPA investigation must make decisions as to whether, when, and how to disclose it. In exploring the issues raised by these decisions, the authors begin by discussing the collateral consequences of disclosure and the use of risk-factor disclosures before any specific problem arises. They then turn to the threshold question of whether to disclose, the timing of disclosure, and the crafting of disclosure statements.

By F. Joseph Warin and Maura M. Logan *

A publicly traded corporate target of a government investigation under the Foreign Corrupt Practices Act ("FCPA") confronts multifaceted challenges. In addition to dealing with the investigation while trying to manage its day-to-day business, the organization must grapple with difficult questions as to whether, when, and how to disclose the investigation to shareholders and the public. Federal and state regulations may require certain basic disclosures.[1] But a number of other significant considerations should inform decisions as to the nature, extent, and scope of a company's disclosures of a pending FCPA investigation.

Naturally, in considering such disclosures the company will be concerned about its business interests and public relations. Some executives may be inclined to lay out all the facts straightaway to obviate any suspicion of a cover-up or to make clear the company's commitment to remediation. On the other hand, management may worry that unnecessary disclosure could cause confusion, undue alarm, or a precipitous decline in the company's stock price. There will be the FCPA investigation itself to worry about, and how the company's statements may impact its defense (or that of individual defendants). Any number of collateral consequences may arise from the investigation, including exposure to follow-on civil litigation and potential snags with planned mergers and acquisitions. All told, FCPA investigations provide corporate and outside counsel with unenviable dilemmas.

[1] In addition to state-law requirements, companies must consider, *inter alia*, SEC filing requirements; the "rule of completeness," that "[w]hen an issuer speaks publicly about a material event, it must not misstate a material fact, or omit to state a material fact if the omission makes the statements made misleading, regardless of whether the issuer is trading in its own securities or is otherwise required to disclose material facts," *In re Am. Sav. & Loan Assoc.*, Rel. No. 25,788, 41 S.E.C. Docket 78, 1988 WL 240460, at *6 (S.E.C. June 8, 1988); and stock exchange rules. *See* John K. Villa, *Disclosures Under the Federal Securities Laws of Criminal Investigations and Illegal Conduct*, 2 CORPORATE COUNSEL GUIDELINES § 5:22 (2012).

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This article examines the considerations that should inform decisions as to the nature, extent, and scope of a company's disclosures of a pending FCPA investigation, focusing primarily on potential exposure to follow-on litigation. The article also discusses the risk-factor disclosures companies should make before any specific FCPA issue arises. Finally we offer some suggestions for crafting disclosures of pending FCPA investigations.

COLLATERAL CONSEQUENCES OF FCPA INVESTIGATIONS

FCPA investigations and enforcement proceedings by the U.S. Department of Justice ("DOJ") or Securities Exchange Commission ("SEC") can directly result in a number of painful consequences. These investigations can expose companies to multimillion-dollar liabilities in criminal and civil fines and disgorgement, debarment and licensing troubles, and reputational harm. Such investigations often have far-reaching collateral consequences as well. Two, in particular, should be anticipated and kept in mind while a company deliberates whether, when, and how to disclose that it is subject to an FCPA investigation. These are the company's potential exposure to follow-on litigation, which in recent years has proven more costly to many companies than their underlying FCPA exposure, and the consequences for mergers and acquisitions if FCPA issues are not adequately disclosed.

Exposure to Follow-On Litigation

Exposure to follow-on civil litigation can be one of the most devastating collateral consequences of an FCPA investigation.[2] When a company is already staggering under the investigation itself, it may be hit with a number of civil suits based on the same set of factual allegations, including tort and contract law claims, unfair competition claims, whistleblower and other employment lawsuits (as when employees claim they were retaliated against for reporting, or refusing to go along with, the alleged underlying bribery), and private actions under the Racketeer Influenced and Corrupt Organizations ("RICO") Act.[3] But the greatest danger for publicly traded companies may lie in exposure to shareholder derivative suits and securities fraud claims.[4]

The typical shareholder derivative action alleges that the officers and directors breached their fiduciary duties of loyalty and care by failing to oversee the compliance by management that could have prevented FCPA violations.[5] These suits often include "*Caremark*" claims – that the FCPA violations occurred through a lack of oversight from directors – which require plaintiffs to prove "that the directors *knew* they were not

[2] *See* George H. Brown, Debra Wong Yang & Matthew S. Kahn, *Strategies for Mitigating Civil Liability Consequences of FCPA Investigations & Enforcement Actions*, 9 SEC. LITIG. REP. 4 (2012) ("Brown, *Mitigating Civil Liability"*).

[3] Gibson, Dunn & Crutcher LLP, *2012 Year-End Update* (Jan. 2, 2013), *available at* http://www.gibsondunn.com/publications/pages/2012YearEndFCPAUpdate.aspx; *id. 2011 and 2010 Year-End Updates* ("Hardly an FCPA investigation or resolution was announced during the past year [2010] that was not followed swift succession by a press release from any number of plaintiffs' law firms that have created a cottage industry for private FCPA enforcement.").

[4] *Can We Sue Our Way to Prosperity?: Litigation's Effect on Global Competitiveness: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary* (2011) ("Beisner, *Can We Sue Our Way to Prosperity?*") (statement of John H. Beisner on behalf of the U.S. Chamber Institute for Legal Reform), *available at* http://www.judiciary.house.gov/hearings/pdf/Beisner05242011.pdf ("Follow-on FCPA cases target companies at a difficult time .... 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."); *see also* Brian Grow, *Bribery Investigations Spark Shareholder Suits*, Reuters (Nov. 1, 2010).

[5] *See, e.g., Midwestern Teamsters Pension Trust Fund v. Baker Hughes, Inc.*, 2009 WL 6799492 (S.D. Tex. 2009); *Hawaii Structural Ironworkers Pension Trust Fund ex rel. Alcoa, Inc.*, 2008 WL 2705548 (W.D. Pa. 2008); *see also* Brown, *Mitigating Civil Liability*, *supra* note 2.

discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities, such as by failing to act in the face of a known duty to act."[6] On the theory that the officers and directors thus should be held personally liable to the corporation for losses suffered, the shareholders stand in the shoes of the corporation to sue its officers and directors.[7]

Federal securities fraud claims – "stock drop" cases – following on FCPA investigations typically allege that the company made false or misleading statements about its levels of compliance with the FCPA or other laws, or the strength of its internal controls; and/or that the company failed to adequately disclose known potential violations of the FCPA or, more generally, FCPA risks associated with its business.[8] These misstatements or omissions, the complaint alleges, artificially inflated the price of the company's stock, which then dropped after disclosure of an investigation that revealed the "truth" to the marketplace. The argument is that the company omitted telling the market that its employees engaged in misconduct and falsely stated that it had airtight internal controls which prevent misconduct.[9] Because of the astronomical costs of defending securities fraud suits, these cases are often won or lost on the defendant's motion to dismiss; defendant companies that lose at this stage frequently choose to settle rather than endure the expense and uncertainty of further litigation.[10]

Often these suits are filed within hours of, and based solely on, a company's announcement of a pending investigation. For example, SEC and DOJ advised SciClone Pharmaceuticals, Inc. in early August 2010 that they were investigating the company as part of a sweep of the pharmaceutical industry.[11] SciClone disclosed this investigation three days later, on August 9, in its quarterly filing. The first of many securities fraud class actions based on this disclosure was filed on August 13, just four days later, the complaint quoting from statements in SciClone's quarterly report.[12] Other plaintiffs' firms followed suit with astonishing speed – seemingly, as soon as clients could be found – in what was aptly described as a "feeding frenzy."[13]

The financial stakes involved enhance the threat these suits pose (and explain the eagerness of the plaintiffs' bar to seize opportunities to bring them). For some companies, the costs to settle follow-on litigation have exceeded, by an order of magnitude, the costs to settle with the government. Some prominent examples include: Nature's Sunshine Products, which settled with the SEC for $600,000, and then with follow-on plaintiffs for $6 million; Syncor International Corporation, which settled with the government for $2.5 million, and then with follow-on plaintiffs for $15.5 million; and FARO Technologies, which settled with the government for

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[6] *In re Dow Chem. Co. Deriv. Litig.*, Civ. Action No. 4349-CC, 2010 Del. Ch. LEXIS 2, *44-45 (Del. Ch. Jan. 11, 2010) ("*In re Dow*") (emphasis in original) (internal quotation marks omitted); *see also Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (citing *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A2d 959 (Del. Ch. 1996)).

[7] *See* Beisner, *Can We Sue Our Way to Prosperity?*, *supra* note 4 ("Derivative 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 D&O 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.").

[8] *See, e.g.*, *Glazer Capital Mgmt, LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008); Second Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws, *In re Syncor Int'l Corp. Sec. Litig*., 2004WL 5784765 (C.D. Cal. 2004); *see also* Brown, *Mitigating Civil Liability*, *supra* note 2; Beisner, *Can We Sue Our Way to Prosperity?*, *supra* note 4.

[9] *Cf.* DOJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 56 (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf ("*Resource Guide*") ("[A] company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective. DOJ and SEC understand that 'no compliance program can ever prevent all criminal activity by a corporation's employees,' and

footnote continued from previous column…

they do not hold companies to a standard of perfection." (quoting DOJ, U.S. ATTORNEYS' MANUAL § 9-28.800B (2008)).

[10] Under the Private Securities Litigation Reform Act ("PSLRA"), discovery is stayed during the pendency of a motion to dismiss. The PSLRA's discovery stay has spared some defendants the burdens of discovery in cases that can be disposed of on the pleadings. But in actions that survive, a major pressure point for settlement arises just after the denial of a motion to dismiss.

[11] SciClone Pharmaceuticals, Inc., Quarterly Report Pursuant To Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form10-Q), at 13, 28 (Aug. 9, 2010).

[12] Class Action Complaint for Violations Of Federal Securities Laws, *Lewis v. SciClone Pharmaceuticals, Inc.*, No. 10-03584 (N.D. Cal. Aug. 13, 2010).

[13] FCPA Professor, *SciClone – An FCPA Feeding Frenzy*, (Oct. 13, 2010), *available at* http://fcpaprofessor.blogspot.com/2010/10/sciclone-fcpa-feeding-frenzy.html.

$2.95 million, and then with follow-on plaintiffs for almost $6.88 million.[14]

Effects on Mergers and Acquisitions

In addition to follow-on litigation, disclosures (and non-disclosures) of FCPA investigations may have a significant impact on a company's prospects with respect to mergers and acquisitions. It is essential that an acquiring company be informed of any potential FCPA issues in a prospective acquisition target, as the acquiring company must negotiate the potential costs of any bribery and take precautions against successor liability.[15] In performing its due diligence, the acquiring company will likely expect pending-investigations disclosures to appear in a potential target's SEC filings.

Deals have fallen apart, or nearly so, because of the belated discovery of previously undisclosed FCPA problems.[16] Moreover, companies whose positions in merger transactions are compromised because of previously undisclosed FCPA issues also may find themselves facing follow-on litigation based on the merger.[17]

RISK-FACTOR DISCLOSURES

Issuers with any global operations should consider adding or enhancing FCPA risk-factor disclosures in their public filings. Fundamentally different than disclosures of pending investigations, these are prophylactic statements – to be made before any specific problem arises – about the FCPA risks that remain notwithstanding a company's compliance measures.[18] They may include risks associated with: working in countries with high levels of perceived corruption, commonly gauged according to the Transparency International Corruption Perceptions Index; violating anti-corruption laws, including, *inter alia*, the FCPA and the U.K. Bribery Act; potential failures in the company's compliance program, no matter how well-designed and -maintained; and potential exposure to corruption-related criminal and civil liability. In sum, the disclosure should state explicitly that the company operates in corruption-intensive environments and, despite its best efforts, employees may misbehave.

Well-crafted risk-factor disclosures can help fend off collateral civil litigation in the event that a company later has to disclose an FCPA investigation. Because these statements are judicially noticeable, courts can consider them in ruling on motions to dismiss (where, as noted above, securities fraud claims are often won or lost). In securities fraud cases, these statements can serve to disprove, as a matter of law, claims that the

[14] Judgment and Final Order, *In re Nature's Sunshine Prods. Sec. Litig.*, No. 2:06-cv-00267-TS (filed Feb. 10, 2010); SEC Lit. Rel. No. 21162, *SEC v. Nature's Sunshine Products, Inc.*, No. 09CV6722 (D. Utah filed July 31, 2009); SEC Lit. Rel. No. 17887, *SEC Obtains $500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act* (Dec. 10, 2002); Nathan Vardi, *Plaintiff Lawyers Join the Bribery Racket* (Aug. 16, 2010), *available at* http://www.forbes.com/sites/nathanvardi/2010/08/16/plaintiff-lawyers-fcpa-bribery-racket (discussing Nature's Sunshine, Syncor, FARO, and Immucor settlements); Raymund Wong & Patrick Conroy, *FCPA Settlements: It's a Small World After All*, Nera Economic Consulting (Jan. 28, 2009), *available at* http://www.nera.com/extImage/Pub_FCPA_Settlements_0109_Final2.pdf (discussing FARO).

[15] *Resource Guide*, *supra* note 9, at 62. *See also* Gibson, Dunn & Crutcher LLP, *Decoding FCPA Enforcement: The U.S. Government Issues Comprehensive Guidance on the Foreign Corrupt Practices Act* (Nov. 19, 2012), *available at* http://www.gibsondunn.com/publications/Documents/DecodingFCPAEnforcement-USGovernment-ComprehensiveGuidance.pdf ("The Resource Guide ... makes it clear that the value of target companies may be adversely affected by failure to attend to FCPA-related risks.").

[16] Renae Merle, *Lockheed Martin Scuttles Titan Acquisition*, WASHINGTON POST (Jun. 27, 2004).

[17] *See, e.g.*, *Glazer*, *supra* note 8 (securities fraud suit based on drop in company's share price where announcement of potential FCPA violations cast doubt on proposed merger).

[18] Any article providing FCPA advice would be incomplete without at least a few words on the importance of maintaining a robust compliance program. Should FCPA violations occur in spite of meaningful efforts toward compliance, the existence of the program may well lead to more favorable treatment from the government. *See Resource Guide*, *supra* note 9, at 56 (Nov. 14, 2012) ("DOJ and SEC ... consider the adequacy of a company's compliance program when deciding what, if any, [enforcement] action to take."). In addition, a company's demonstrated commitment to maintaining a strong compliance program can protect it and its directors from follow-on litigation. *See, e.g.*, *In re Dow*, *supra* note 6, at*49 n.85 ("Plaintiffs cannot meet their [*Caremark*] burden here for another reason. The Dow board has set up policies to prevent improper dealing with third parties. In particular, Dow's Code of Ethics expressly prohibits any unethical payments to third parties.").

company misled investors as to the potential for FCPA liability.[19]

Conversely, failure to disclose FCPA risk factors, particularly when weaknesses in internal controls have been identified internally, can expand a company's potential litigation exposure. Even under the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA, a securities fraud complaint against medical supply company Immucor, Inc. based on the company's alleged failure to disclose known weaknesses in its internal controls over business practices at an Italian subsidiary withstood a motion to dismiss. Rejecting Immucor's argument that none of its statements was materially false or misleading, the court held that a "reasonable investor would have been swayed had Immucor identified to the public (as it admits that it identified internally) weaknesses in its internal controls."[20] Immucor ultimately settled the securities fraud suit for $2.5 million.[21]

Issuers should therefore strongly consider including FCPA-related risk factors in each annual report, noting any material changes in quarterly filings or other interim reports. The language of such risk-factor disclosures may read, in part, as follows:

> Compliance with complex foreign and U.S. laws and regulations that apply to our international operations increases our cost of doing business in international jurisdictions and could expose us or our employees to fines and penalties. These numerous and sometimes conflicting laws and regulations include U.S. laws such as the Foreign Corrupt Practices Act, and local laws prohibiting corrupt payments to governmental officials. Violations of these laws and regulations could result in fines, criminal sanctions against us, our officers, or our employees, prohibitions on the conduct of our business, and damage to our reputation. Although we have implemented policies and procedures designed to ensure compliance with these laws, there can be no assurance that our employees, contractors, or agents will not violate our policies.

To be most effective, a company's risk-factor disclosures should reflect an individualized risk assessment taking into account, *inter alia*, the nature of the company's business, the countries in which it operates, and the extent to which it uses third parties to conduct business. It is helpful to benchmark against peers by regularly reviewing the risk-factor disclosures of similarly situated companies, though a surprising number of public companies do not disclose FCPA-related risks amongst their risk-factor disclosures in SEC filings.

PENDING-INVESTIGATION DISCLOSURES

When an FCPA investigation has crystallized with sufficient detail, a company must decide whether, when, and how to disclose it. Below are some potential considerations and suggestions.

The Threshold Question

The threshold question is whether to disclose a pending FCPA investigation in a company's periodic filings. Although non-issuers generally have no obligation to disclose non-public information and thus often do not, issuers, bound by federal and state securities regulations, often do disclose the initiation of a government FCPA investigation because it is deemed material. Indeed, many companies publicly announce their discovery of potential FCPA violations and initiation of *internal* investigations (along with "voluntarily disclosing" the same to DOJ and SEC).[22]

Beyond legal requirements, there may be other good reasons to disclose the pendency of an FCPA investigation. One pragmatic issue companies wrestle with is the possibility that, even if the company remains

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[19] *See, e.g., In re Polaroid Corp. Sec. Litig.*, 2001 WL 311224, at *8 (D. Mass. Mar. 21, 2001) ("[A]ny indication of scienter [drawn from] overly optimistic statements . . . is offset by the Company's cautionary admissions.").

[20] *In re Immucor Inc. Securities Litigation*, No. 1:05-CV-2276-WSD, 2006 WL 3000133, at *12 (N.D. Ga. Oct. 4, 2006).

[21] Greg Land, *Immucor Settles Class Action Securities Fraud Suit for $2.5 Million*, LAW.COM (May 24, 2007), *available at* http://www.law.com/jsp/article.jsp?id=900005555354&Immucor_Settles_Class_Action_Securities_Fraud_Suit_for_25_Million&slreturn=20130006085631.

[22] *See, e.g.*, Morgan Stanley Current Report Pursuant To Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 8-K), at 1 (Feb. 9, 2009) ("In an unrelated matter, Morgan Stanley announced today that it has recently uncovered actions initiated by an employee based in China in an overseas real estate subsidiary that appear to have violated the Foreign Corrupt Practices Act. Morgan Stanley terminated the employee, reported the activity to appropriate authorities, and is continuing to investigate the matter.").

silent, the investigation or underlying suspicious activity will be publicly announced by a third party in a manner over which the company has no control. This possibility has become significantly more likely since the Dodd-Frank Act set up a system of incentives, including a financial "bounty," for whistleblowers who come forward with original information about violations of the securities laws, including the FCPA. The prospect of such a bounty may have been behind the announcement by a plaintiffs' law firm that it had been "notified by a confidential source of potential violations of the Foreign Corrupt Practices Act (FCPA) by Furmanite [Corporation]," an issuer on the New York Stock Exchange, describing "cash gifts ... given to representatives of state-owned enterprises to maintain and develop customer relations" and naming at least one Chinese state-owned enterprise with which Furmanite reportedly had a business relationship.[23] Though Furmanite apparently has never confirmed that it is facing an FCPA investigation, it is now included on FCPA investigations lists throughout the blogosphere.[24]

Timing of Disclosure

A company's initial announcement that it is subject to an FCPA investigation often comes in an SEC filing – most commonly for U.S. companies, a quarterly report (Form 10-Q), annual report (Form 10-K), or interim report (Form 8-K). Though some circumstances may require the issuance of a Form 8-K, the "current report" companies must file with the SEC to announce material events, there are significant advantages to releasing in a regular quarterly or annual report.

First, while a company's announcement that it is the target of a new FCPA investigation should not be unduly delayed, neither should it be hasty. The scope of the investigation may be uncertain at first, and the corporation may benefit from a measured approach and thorough investigation, consulting with counsel and internally digesting what it has learned before rushing out a press release or material event report.

Second, release of an interim report – particularly if the FCPA investigation is the only material event to be discussed – might attract undue attention to the matter and suggest greater weight than it may really have. But whether an interim report is warranted, or whether the matter can wait until the next regularly scheduled filing, is a highly fact-sensitive matter that should be discussed with securities counsel.

Statements Should Be Complete, Not Comprehensive

Companies have taken vastly different approaches with respect to the length and scope of disclosures of pending FCPA investigations. Many companies' announcements have been under 100 words. One example is Royal Dutch Shell's disclosure of DOJ and SEC investigations, which comprised all of 79 words in a 224-page annual report:

> In July 2007, Shell's US subsidiary, Shell Oil, was contacted by the US Department of Justice regarding Shell's use of the freight forwarding firm Panalpina, Inc and potential violations of the US Foreign Corrupt Practices Act (FCPA) as a result of such use. Shell has started an internal investigation and is cooperating with the US Department of Justice and the United States Securities and Exchange Commission investigations. While these investigations are ongoing, Shell may face fines and additional costs.[25]

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[23] FCPA Professor, *Friday Roundup* (Sept. 24, 2010), *available at* http://fcpaprofessor.blogspot.com/2010/09/friday-roundup_23.html (linking to law firm press release).

[24] *See, e.g.*, *The Corporate Investigations List (January 2013)*, FCPA BLOG (Jan. 3, 2013), http://www.fcpablog.com/blog/2013/1/3/the-corporate-investigations-list-january-2013.html.

[25] Royal Dutch Shell plc Annual Report and Form 20-F for the year ended December 31, 2007 (Form 20-F), at 15 (Mar. 17, 2008). *See also* Teva Pharmaceutical Industries, Ltd. Report of Foreign Private Issuer (Form 6-K), at 19 (Aug. 2, 2012) ("Teva Form 6-K") ("Teva received a subpoena dated July 9, 2012 from the SEC to produce documents with respect to compliance with the Foreign Corrupt Practice Act ('FCPA') in Latin America. Teva is cooperating with the government. Teva is also conducting a voluntary investigation into certain business practices which may have FCPA implications and has engaged independent counsel to assist in its investigation. These matters are in their early stages and no conclusion can be drawn at this time as to any likely outcomes."); Aon Corporation Quarterly Report (Form 10-Q), at 25 (Nov. 8, 2007) ("Aon Form 10-Q") ("Following inquiries from regulators, the Company commenced an internal review of its compliance with certain U.S. and non-U.S. anti-bribery laws, including the U.S. Foreign Corrupt Practices Act ('FCPA'). An outside law firm with significant experience in the area is overseeing the review. Aon has advised the U.K. Financial Services Authority, the U.S. Securities and Exchange Commission, the U.S. Department of Justice, and certain other non-U.S. regulators of the review and has agreed with the U.S. regulators to toll any applicable statute of limitations pending completion of the review. Based on current information, the Company is unable

On the other end of the spectrum, Pride International, Inc. expended 1,251 words, set forth in full in the appendix, in discussing an ongoing FCPA investigation in a 10-K.[26]

As is so often the case, moderation here is best. An announcement should not be so sparse as to omit important facts; at the same time, there is little to gain and much to lose from revealing too much at any early stage – particularly about the underlying facts. First, doing so could prejudice the company's (or individual defendants') defenses. A company's statements about the results of preliminary investigation may be considered non-hearsay party admissions, which can be offered in collateral litigation for the truth of the matters asserted.[27] Second, a company's own statements can serve as a roadmap for follow-on litigation. Indeed, the shareholder derivative suits filed against Pride International quoted extensively from the company's announcement.[28]

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at this time to predict when the review will be completed or what regulatory or other outcomes may result.").

[26] Pride International ultimately entered into a three-year deferred prosecution agreement ("DPA") with DOJ; Ensco Corp. assumed the obligations of the DPA when it acquired Pride in 2011. In an apparent first for an FCPA case, DOJ moved terminate the DPA one year early, in November 2012 rather than November 2013, in recognition of the company's vigorous compliance efforts. Matt Kelly, *A First: Justice Department Ends DPA Early*, COMPLIANCE WEEK (Nov. 9, 2012), *available at* http://www.complianceweek.com/a-first-justice-department-ends-dpa-early/article/267762/. The DPA having been satisfied, the district court dismissed the criminal information on the Government's motion on November 5, 2012. Order Dismissing Criminal Information, *United States v. Pride Int'l, Inc.*, No. 10-cr-766 (S.D. Tex. Nov. 5, 2012).

[27] Fed. R. Evid. 801(d)(2).

[28] Verified Shareholder Derivative Petition, *Ferguson, Derivatively ex rel. Pride Int'l Inc. v. Raspino*, No. 2010-23805 (Harris Cnty., Tex. Apr. 15, 2010); Verified Shareholder Derivative Petition, *Dixon, Derivatively ex rel. Pride Int'l Inc. v. Brown*, 2010-24302 (Harris Cnty., Tex. Apr. 16, 2010). These cases were consolidated into a single action, captioned *Ferguson v. Raspino*, No. 2010-23805, along with two subsequently filed shareholder suits challenging Pride's proposed merger with Ensco Corp. *Ferguson v. Raspino* was dismissed March 1, 2012, on Plaintiffs' motion. *See also* Verified Shareholder Derivative Petition, *Arnold, Derivatively ex rel. Pride Int'l Inc. v. Bragg*, No. 2009-66082 (Harris Cnty., Tex. Oct. 14, 2009), dismissed on Plaintiff's notice of non-suit.

It is also important to avoid cherry-picking the facts in such a way as to make the overall statement misleading. One of the issues Immucor faced in its securities fraud suit was that its disclosures of the FCPA investigation pending against it allegedly suggested the underlying activity was a minor "bookkeeping" issue, when in fact the company faced serious criminal charges based on illegal bribes allegedly paid by the company's President and CEO.[29] The court there held that the company's failure to mention the exposure to criminal penalties along with civil ones was a material omission, as "a reasonable investor would have considered it important to know that Immucor might be criminally liable, because such liability could have other effects on Immucor's ability to do business, such as debarment, licensing trouble, marketplace credibility, and other outcomes capable of affecting the price of Immucor's stock."[30]

Facts Should Be Verifiable and Verified

The most effective disclosures contain only verifiable facts about the nature and scope of the pending investigation. An organization should carefully fact-check each statement in its disclosures and stick only to those that it can verify, keeping in mind that in follow-on litigation, the facts will be reviewed with the benefit of 20/20 hindsight. Even if made in good faith, misstatements of fact can be seized upon in follow-on litigation.

One stumbling block for companies can come in the form of boilerplate language in its SEC filings that may turn out to be inaccurate. For example, in a securities fraud case arising out of allegedly undisclosed FCPA issues in the mergers-and-acquisitions context, the Ninth Circuit held that plaintiff adequately pled falsity when a company's statements that it was "in compliance in all material respects with all laws" and "in compliance in all material respects with the provisions of Section 13(b) of the Exchange Act" were allegedly contradicted by the SEC's conclusion that the company violated the books-and-records and internal-controls provisions of Section 13.[31]

Avoid Characterization

Disclosures of pending FCPA investigations should avoid characterization through adjectives and adverbs.

[29] *In re Immucor*, *supra* note 20, at *16.

[30] *Id.*

[31] *Glazer*, *supra* note 8, at 742. In *Glazer*, the complaint was dismissed because plaintiff did not adequately plead *scienter*.

These words invite a quarrel where unadorned facts do not. For example, if an investigation concerns activity in one country, the disclosure might plainly state as much, rather than describing the investigation as "limited." As long as it is true, a statement following the former approach is unlikely to cause the company trouble, while the latter approach might.

Offer No Opinion or Speculation

Opinion and speculation make great material for securities fraud and shareholder derivative suits. The outcome of an FCPA investigation is often unpredictable and a company's initial estimation of the merits of an investigation may turn out to be erroneous. Thus, statements about the investigation should avoid speculation or opinion.

Offer Only Narrow Conclusions, If Required

Similarly, statements containing conclusions may be used in follow-on litigation if those conclusions prove to have been unfounded. Thus they are best avoided altogether. If it is necessary to include a conclusion, it should be limited in scope. Some companies expressly state that the outcome of the investigation cannot be predicted.[32]

Provide Updates

Adhering to the above rules may leave the company with little to say, at first, about a pending FCPA investigation. Although some may argue that this is injuring the company's reputation, bold, declaratory statements are often easily refuted later. Investigations often involve fact-finding that trickles toward the future so at the onset, it is difficult to state with any certainty how the investigation will unfold. But the company can and should provide its shareholders and the public regular updates as milestones and other important events occur throughout the investigation. ■

[32] *See, e.g.*, Teva Form 6-K, *supra* note 25 ("These matters are in their early stages and no conclusion can be drawn at this time as to any likely outcomes."); Aon Form 10-Q, *supra* note 25 ("Based on current information, the Company is unable at this time to predict when the review will be completed or what regulatory or other outcomes may result.").