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LAW vs. LORE

The Lack of Judicial Precedent in FCPA Cases

Part One of a Two-Part Article

By Robert J. Anello and Kostya Lantsman

When delivering legal advice, lawyers attempt to provide informed guidance based on the prevailing law. Yet, when it comes to significant chunks of the white-collar criminal and regulatory landscape, practitioners often are forced to provide advice based on professional lore derived from negotiated settlements rather than enacted laws or judicially established case law.

Statutes, regulations and court decisions make up the rules of law. But white-collar practitioners often encounter vast swaths of the landscape that have only the most basic or broad statutory language and lack any judicial precedent. In these areas, they may not be able comfortably to provide counsel based on law and, instead, often rely on lore — the accepted traditions developed among prosecutors, government regulators, and defense attorneys. This lore develops from negotiated settlements often lacking the true dynamics of adversarial proceedings before a neutral magistrate.

Lack of FCPA Precedent

The text of the Foreign Corrupt Practices Act (FCPA) contains relatively few words, and its brevity leaves many areas of ambiguity. Certain provisions of the FCPA have either never been litigated or have only been litigated in one or two trials. *See, e.g.*, Kathleen A. Lacey & Barbara Crutchfield George, Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act, 7 *J. Transnat'l L. & Pol'y* 119, 121 (1998) (discussing how the 1983 *World-Wide Coin* case is an important precedent because it was the only case concerning the books-and-records provisions that went to trial).

In criminal proceedings, for certain defendants — in particular the corporate entity facing charges under the FCPA — the stakes often are simply too high to risk a trial. "[I]nnocence is no longer the key determinant … even for those charged with white-collar offenses. Rather, our existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations. This is especially true for upper-level white-collar offenders like CEOs and corporate entities. In these cases, maneuvering the system to receive the least onerous consequences may ensure the best result for the accused party, regardless of innocence." Ellen S. Podgor, White Collar Innocence: Irrelevant in the High Stakes Risk Game, 85 *Chi.-Kent L. Rev.* 77, 77–78 (2010).

The dearth of criminal trials is particularly startling when it comes to actions pursuant to the FCPA. Lindsey Manufacturing was the first (and, as far as we know, only) corporate defendant to go

Robert J. Anello, a member of this newsletter's Board of Editors, is a partner in Morvillo, Abramowitz, Grand, Iason & Anello PC, specializing in the defense of white-collar criminal cases, securities litigation, other civil litigation, and the representation of attorneys and accountants. He is a Fellow of the American College of Trial Lawyers, a Fellow of the American Bar Foundation and the President of the Federal Bar Council. **Kostya Lantsman** is an associate with the firm.

to trial on FCPA charges; its conviction was eventually vacated and the indictment dismissed by the district judge. *United States v. Aguilar*, 831 F. Supp. 2d 1180 (C.D. Cal. 2011). Despite this precedent, corporations — generally not perceived as sympathetic defendants — are unwilling to risk the potential consequences of trial. These could include disruption of business affairs, bad publicity, reputational damage from a potential conviction, enormous fines under the Alternative Fine Act, and potential collateral consequences of a criminal conviction, such as revocation of export licenses and exclusion from obtaining U.S. government contracts.

Similarly, as one observer has noted, "[F]ew individual FCPA defendants are willing to 'test their innocence.'" Mike Koehler, A Focus on FCPA Criminal Trials, *FCPA Professor* (May 14, 2014), http://bit.ly/1GIaufy. In addition, individual FCPA defendants' limited financial resources prevent them from robustly litigating many issues.

The criminal process is not alone in failing to provide guidance. Practitioners cannot look to Securities and Exchange Commission (SEC) enforcement actions for interpretations of the FCPA, as "there has never been an FCPA civil trial in which the SEC has been put to its burden of proof." Mike Koehler, A Focus on FCPA Civil Trials, *FCPA Professor* (May 15, 2014), http://bit.ly/1MEOfW9.

Writing the FCPA Lore

Because of the lack of law arising from litigated matters, practitioners, in advising their clients, must rely on lore, which is derived by reading the "tea leaves" associated with previous interactions between government prosecutors and regulators enforcing the FCPA and the defense bar and negotiated resolutions. Whereas attorneys have hundreds of cases to help determine whether a destructive device constitutes a "firearm" under 18 U.S.C. § 921(a)(3)(D), attorneys have few cases from which to determine whether a certain transfer constitutes an illicit payment under the FCPA. Even academics, in trying to understand FCPA provisions, acknowledge having to look at "the few cases that have gone to trial, along with the settled cases." John P. Giraudo, Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement, 61 *Bus. Law* 135, 142 (2005). Such an approach places too much reliance on the government's interpretation of the law, accepts the untested concessions of negotiated settlements, and further perpetuates the government's unchallenged views.

Lacking court decisions upon which to rely, attorneys look to settled cases to determine not only the government's interpretation of the law, but also what other defendants have accepted. Here again, the government's interpretation can mislead. After all, individual settlements are based on unique facts and circumstances. Government prosecutors and regulators and defense attorneys spend significant time negotiating the deal, including the admitted facts and the punitive sanctions and fines.

Once a satisfactory dollar amount and other terms are reached, defendants may have no incentive to fight over the legal conclusions even if they had robust disagreement during their initial sparring over those same legal propositions. The goal is to get the deal done. Where the defendant is willing to admit some more clearly criminal conduct, there is particularly little incentive to fight over the government's legal interpretations on more marginal conduct. Thus, the legal concessions found in settlements reflect the complex circumstances of particular negotiations rather than positions defendants would take in adversarial proceedings. Yet, the government often drafts terms or releases public statements announcing its successful negotiation with broad pronouncements regarding such untested legal conclusions.

Future reliance by practitioners on the government's interpretation of the FCPA and settled cases — which is inevitable given the dearth of case law — merely adds to the lore; whether the recommendation is to avoid challenging the government's interpretation or avoid engaging in conduct that may be legal, the perceived illegality of the conduct is further ingrained. In next month's issue, we will discuss some of the consequences of this situation.

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The Lack of Judicial Precedent in FCPA Cases

Part two of a Two-Part Article

By Robert J. Anello and Kostya Lantsman

Last month, we discussed the "lore" that counsel must rely upon when tackling FCPA enforcement actions. A concrete example of the establishment of FCPA lore is useful when discussing how the lack of judicial precedent in these cases puts corporations and their counsel at a disadvantage.

A corporate client could be aware that the SEC has pursued FCPA enforcement actions against companies that make contributions to charities to curry favor with foreign officials, who oversee awards of government contracts and "hint" that a contribution to such a worthy organization would be welcome.

The client researches the charity and determines that the charity is legitimate, is focused on an area the company generally supports through charitable giving, and is successful in achieving substantial charitable goals. Moreover, the client concludes that a charitable donation would be commercially beneficial as it would reflect well on the company locally and would provide the client with access to other local business and government leaders. The client wishes to make a sizeable contribution, but is wary of running afoul of the FCPA. The client seeks counsel.

No federal court decisions have addressed directly the question of whether contributions to legitimate charities could be prohibited payments under the FCPA. Only one court decision has even mentioned the possibility that charitable contributions could be considered bribes. That decision, part of Chevron's never-ending battle with Steven Donziger over pollution at the Lago Agrio oil field, did not involve charitable contributions. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 597 (S.D.N.Y. 2014). Although that opinion, in passing, did state that "[t]he term 'anything of value' is construed broadly to include such benefits as … charitable contributions," *see id.*, the statement was not only *dicta*, but also itself cited only the SEC's complaint in its case against Schering-Plough, a case that was eventually settled. Complaint, *SEC v. Schering-Plough Corp.*, No. 04–cv–945, (D.D.C. June 9, 2004) ("Schering-Plough Complaint"). Moreover, the *Chevron* court merely listed types of payments that *could be* a transfer of *anything of value*, without considering whether such a transfer was *to* a government official. Finally, the Schering-Plough case cited was "the first occasion in which a company was found to have violated the FCPA by making donations to a charity." *Giraudo*, *supra* at 151.

Without law on which to rely, lore suggests that a charitable contribution to an organization favored by a foreign official is an FCPA violation. The SEC has pursued enforcement actions against, and reached settlements with, a number of companies that have made such contributions. In its enforcement actions, the SEC has asserted that charitable contributions can fall under the FCPA's prohibition of giving "anything of value" to a foreign official. The emphasis on whether something of value was given, however, ignores another fundamental question — whether the thing of value was given to a foreign official.

In its 2004 complaint against Schering-Plough, the SEC focused on payments to a bona fide charitable foundation whose president was also a Polish official responsible for the purchase of pharmaceuticals. Schering-Plough Complaint ¶¶ 1, 6–9. The complaint, however, did not allege that the payments were a violation of the FCPA. *See id.* Rather, the SEC claimed that Schering-Plough committed violations of the books-and-records and internal-controls provisions of the FCPA. *Id.* ¶¶ 1, 9–15. Schering-Plough consented to pay a $500,000 civil penalty without admitting or denying the allegations in

Robert J. Anello is a partner in the firm of Morvillo, Abramowitz, Grand, Iason & Anello PC. specializing in the defense of white-collar criminal cases, securities litigation, other civil litigation, and the representation of attorneys and accountants. He is a Fellow of the American College of Trial Lawyers, a Fellow of the American Bar Foundation and the President of the Federal Bar Council. **Kostya Lantsman** is an associate with the firm.

the civil complaint. SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violation, Litigation Release No. 18740 (S.E.C. June 9, 2004). In its administrative order, however, the SEC found that "while the payments in fact were made to a bona fide charity, they were made to influence the Director with respect to the purchase of Schering-Plough's products." *In re Schering-Plough Corp.*, Securities Exchange Act of 1934 Release No. 49838, File No. 3-11517 (S.E.C. June 9, 2004).

When Eli Lilly agreed to pay nearly $30 million in 2012 for wide-ranging misconduct, one charge was almost identical to the Schering-Plough facts. *See* Complaint, *SEC v. Eli Lilly and Co.*, No. 12–cv–2045, ¶ 2 (D.D.C. Dec. 20, 2012). Lilly's Polish subsidiary made similar payments to the same charitable foundation to curry favor with the same government official during approximately the same time period. *Id.* Lilly consented to the entry of a final administrative judgment without admitting or denying the allegations. Given the allegations of millions of dollars of payments to government officials in Russia and Brazil (*see id.* ¶¶ 22–43) it is hardly surprising that Lilly did not fight over whether $39,000 worth of payments to a bona fide charity could be considered an FCPA violation.

Finally and similarly, the SEC's $13 million settlement with Stryker Corporation included an allegation that Stryker's $200,000 donation to a public university in Greece to fund a laboratory that was a pet project of a public hospital doctor violated the FCPA. The SEC also alleged that Stryker made about $2 million worth of improper payments to government officials in Argentina, Greece and Mexico. Stryker settled without admitting or denying these allegations, but had little reason to fight the charges related to Greece when settling charges elsewhere.

Thus, despite the lack of court decisions grappling with the question, the SEC has asserted its view vigorously that bribes can come in the form of charitable contributions even to bona fide charities where a government official does not benefit financially from the contribution. Yet, in none of the cases did the targets of the investigation have a strong incentive to challenge this particular charge. Consequently, in the absence of law developed in adversarial proceedings, lore based on negotiated settlements has prevailed as practitioners now look at charitable contributions to charities favored by government officials skeptically.

Lore in Other Contexts

Without case law, practitioners have no choice but to rely on well-established lore. Attorneys and their clients, however, must recognize the downside of such reliance is that expectations may be thwarted instantly by a contrary court decision.

The development of lore and law around "big boy letters" provides a particularly enlightening example outside of the FCPA context. Corporate attorneys relied on so-called "big boy letters," which stated that the buyer has assessed an investment independently of representations by the seller and acknowledged that the seller possessed undisclosed, material, nonpublic information. Such reliance waivers were believed to insulate a seller from a securities fraud suit by a buyer by eliminating the reliance element. Yet, the U.S. Court of Appeals for the Third Circuit, in *AES Corp. v. Dow Chemical Co.*, 325 F.3d 174 (3d Cir. 2003), concluded that such waivers are prohibited under "Section 29(a) of the Exchange Act which forecloses anticipatory waivers of compliance with the duties imposed by Rule 10b-5." *Id.* at 180. The waivers could be evidence of a lack of reliance, but could not undermine fraud claims as a matter of law. *Id.*

Today, the lore about big boy letters has shifted in the opposite direction. In a 2007 enforcement action, the SEC alleged that Barclays Bank committed insider trading even though it used "'big boy letters' to advise … counterparties that [it] possessed material nonpublic information. According to the SEC, however, despite the use of a big boy letter, in no instance did [Barclays] disclose the material nonpublic information" to the counterparties. Complaint, *SEC v. Barclays Bank PLC*, No. 07–cv–4427, ¶ 18 (S.D.N.Y. May 30, 2007). Barclays ultimately settled the enforcement action without admitting or denying the allegations. Barclays Bank Pays $10.9 Million to Settle Charges of Insider Trading on Bankruptcy Creditor Committee Information, Litigation Release No. 20132 (S.E.C. May 30, 2007). Despite this settlement, a court confronted by this issue might find no fault with a bank's failure to disclose material, nonpublic information subject to confidentiality agreements.

Because little FCPA case law exists, similar, potentially deceptive lore has grown around the FCPA, and attorneys provide advice based on this lore. In doing so, attorneys should recognize and acknowledge that much of their advice is based on FCPA lore rather than law. Neither the statute nor any judicial decisions suggest that a payment to a bona fide charity is a payment to a foreign official. Yet, the SEC has pushed this interpretation in settlements, press releases and public statements. Charitable contributions are one example where FCPA lore predominates over law; it is, however, far from alone.

Conclusion

Settlements have their place. The defense bar should advise clients that resolutions based on settlements do not necessarily reflect the law and should be willing to stand up to such government assertions of untested lore across the FCPA landscape. Doing so may not only benefit the individual client, but also promote the development of law.

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