BRACEWELL

BLOG POST

Is there really an "offensive" use of the FCPA?

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Several months ago, as I was browsing through a ***forthcoming law journal article*** on the Foreign Corrupt Practices Act, I noticed an entry in the article's table of contents titled: "Offensive Use of the FCPA." I have to admit that the mere idea of an "offensive" FCPA itself sent shivers down my spine. An *offensive* FCPA?! Does that mean there is even more to worry about for companies then increasingly aggressive enforcement programs already instituted by the Department of Justice and the Securities and Exchange Commission? Surely there has not been a hidden FCPA lurking around the corner ***like some ghoul in a late-night horror movie***. Like most things in life – and like most answers you get from a lawyer – the answer here is, well, sort of.

According to law professor Mike Koehler, an offensive use of the FCPA ***occurs*** when a company uses the anti-bribery statute "to achieve a business objective or to further advance a litigating position." In its most basic form, an offensive use involves little more than a company pointing out an opponent's FCPA violations for its own gain. Commentators and advocates have started using this term to describe this fairly specific and heretofore unidentified use of our favorite U.S.-based foreign bribery provision.

In its most basic form, an offensive use of the FCPA involves little more than a company pointing out an opponent's FCPA violations for its own gain. For example, in 2013 when Dish Network challenged SoftBank's bid to purchase Sprint Nextel, Dish Network ***cited*** a 2009 enforcement action against UTStarcom, a separate company, as a reason "public interest analysis" skewed against allowing the sale. Dish Network alleged that because the founder of SoftBank sat on the board of directors of UTStarcom when that company was under FCPA scrutiny, SoftBank was required to "provide a full explanation" of the incident.

Koehler and ***others*** cite several instances of offensive FCPA use. One of the most startling examples of the offensive FCPA occurred during boardroom fight between Wynn Resorts and Kazuo Okada, a large shareholder and board member. In 2011, Okada filed a civil lawsuit against Wynn, accusing the company of making an illegal, FCPA-violating contribution to the University of Macau. Of course, the lawsuit triggered DOJ and SEC scrutiny, which the company was forced to disclose in a public filing. Soon after the company disclosed the government inquiry, it ***countered*** with its own public announcement that an internal investigation by its compliance committee had revealed "three dozen instances" of possible wrongdoing by the disgruntled shareholder and director. In yet another ***incident***, after a liquor distributor's largest shareholder failed to gain control of the company, he retaliated by announcing that executives at the company were under FCPA scrutiny.

Right now it is hard to say whether the offensive FCPA is a ***brave new world*** of FCPA litigation or simply another offshoot of the growing enforcement climate surrounding the FCPA.

Allegations of foreign bribery can not only trigger government investigations, but also shareholder lawsuits, state and federal antitrust lawsuits, and state unfair competition liability. Companies have always had the option of outing their rivals' wrongdoing or even bringing it up in adversarial proceedings. The new resources that the government is pouring into FCPA enforcement – and that companies are spending to investigate those claims – make allegations of foreign bribery an especially devastating adversarial tactic. Wal-Mart, for example, recently ***revealed*** that it spent $439 million over two years fielding internal investigations over FCPA misconduct.

Imagine racking up those costs due to accusations by a jilted merger partner, an irritable director, or an on-the-ropes rival? Now *that's* offensive.