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Victims' Rights in FCPA Settlement—When Is Final Truly Final?

Do you think that your corporate Foreign Corrupt Practices Act ("FCPA") settlement with the U.S. Department of Justice ("DOJ") has given you some certainty and finality? Not so fast.

In 2019 alone, the DOJ and the Securities and Exchange Commission ("SEC") entered into 14 negotiated corporate resolutions and collected $2.6 billion in fines and penalties, with two enforcement actions comprising 70 percent of this amount and resulting in the two largest corporate resolutions in FCPA history. Companies settle cases for many reasons, but perhaps one of the most important ones is a desire for finality. Settling with the DOJ, however, may not be the ultimate final resolution that a company seeks or desires. For example, non-U.S. authorities may come knocking and public companies may be the target of civil class action suits. Additionally, and as illustrated by recent cases, potential claims by "victims" in an FCPA case should be added to the list of possible continuing issues.

STATUTORY BACKGROUND

The Mandatory Victims' Rights Act ("MVRA"), 18 U.S.C. § 3663A, requires that those convicted of certain federal crimes make payments to victims of their crimes as an element of their sentence. Further, the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, provides a statutory bill of rights for victims of federal crimes. Victims under these statutes include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. An individual or corporation may apply and seek restitution for losses they suffer as a result of violations of law involving fraud or deceit.

EXPANDED VIEW OF FCPA VICTIMS

In 2016, the hedge fund Och-Ziff settled with the DOJ and the SEC by admitting to violations of the FCPA's anti-bribery provisions and paying a total of $412 million, of which $213 million was a criminal penalty. Three years later, in 2019, the U.S. District Court for the Eastern District of New York ordered that a group of Och-Ziff's former investors qualified as victims under the MVRA. Even though the investors were related to Och-Ziff, the court found that the investors were victims because they were not parties to the bribery. This was a novel and unexpected decision, particularly because the DOJ had originally determined that these investors were not victims under the MVRA.

The judge requested that the investors, government, and Och-Ziff provide assessments regarding restitution calculation. As you can imagine, there are differing opinions regarding the appropriate restitution amounts. The investors requested $421.8 million in restitution, the DOJ proposed $151 million in losses, and Och-Ziff stated the losses equal to $37 million. At a status conference held on July 23, 2020, Och-Ziff, the identified group of former investors, and the DOJ announced a proposed agreement on a restitution amount of $136 million. All parties agree that an exhaustive search has been completed and the investors identified in this case are realistically the full list of victims. The judge's final decision and a formal settlement agreement are pending and are being closely watched by all, especially attorneys who are thinking broadly about who a victim in other FCPA cases might be, or equally, how attorneys can protect their clients from additional losses after having settled with DOJ and the SEC.

VICTIMS MAY NOT BE STATE-OWNED COMPANIES

Similar to the DOJ's position in *Och-Ziff*, the DOJ also believes that state-owned corporations are not afforded the right to restitution under the CVRA because they do not fall within the parameters of "person" as defined by the CVRA. Even so, unsurprisingly, given the potential dollars involved, state-owned entities have sought relief in the courts.

In April 2020, in ***U.S. v. Ortega***, the third-party claimant, PDVSA, filed a Motion for Victim Status and Restitution, which the U.S. government has opposed by stating that PDVSA does not qualify as a victim and was complicit in the bribery and money laundering schemes. The government's position is that complicity precludes PDVSA from being treated as a victim under CVRA and MVRA. The DOJ also argued that "person" does not include the sovereign, which means that PDVSA, as a Venezuelan state-owned entity, could not recoup under these statutes. PDVSA has argued that since corporate victims are eligible under the statutes, it should not matter that its sole shareholder is Venezuela.

Although the Court in ***U.S. v. Ortega,*** has not issued its ruling, in May 2020, the Eleventh Circuit in ***In re: Empresa Publica De Hidrocarburos Del Ecuador*** affirmed the district court's decision that PetroEcuador did not qualify as a victim under the CVRA and MVRA because several of its employees had been involved in the underlying bribery scheme. The court denied restitution concluding that, because the entity was a state-owned instrumentality, it did not benefit from the protections of the statute as a victim.

CONCLUSION

Any entity considering entering into a FCPA resolution with the DOJ needs to be aware of potential victim rights issues and think comprehensively about possible claims. Negotiating a favorable DOJ view of who might be a victim is essential, although not foolproof as illustrated by the *Och-Ziff* case.

With such huge financial incentives, just about any person or entity connected with a project or deal involved in an FCPA resolution will be motivated to think about how they can present themselves as a victim. There is likely to be a great deal of creative thinking, and settling parties need to be equally thoughtful and creative on how to protect themselves from these arguments.

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