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SHAREHOLDER LITIGATION FOR WASTE OF CORPORATE ASSETS IN INTERNAL FCPA INVESTIGATIONS

Despite the fact that there is no private right of action under the FCPA, shareholders have brought derivative and class action claims against companies and their executives for allowing violations to occur and incurring the large costs of investigating alleged misdeeds. The author discusses several such cases and the Department of Justice's new FCPA policy.

By Benjamin Galdston *

Companies facing potential criminal or civil regulatory action often respond by commencing an internal investigation, promising to share the results with regulators and shareholders. However, in the zeal to avoid civil or criminal penalties, internal investigations can have the unintended consequence of creating liability to shareholders. This is because internal investigations are costly. Attorneys' fees and expenses can quickly escalate and exceed \$100 million.

This is particularly so with investigations into possible violations of the Foreign Corrupt Practices Act of 1977 ("FCPA"). For example, Avon Products spent nearly \$100 million on its internal investigation of potential violations in 2011 alone. This was on top of \$95 million the company spent in 2010 and another \$59 million the year before. Moreover, these costs only escalate if litigation ensues and more counsel and litigation support are added to the mix.

Of course, no company wants to be accused of hamstringing an investigation with budgetary constraints. Nor could they. Even if they wanted to rein

in expenses, publicly traded companies typically have indemnification obligations that require them to subsidize the defense of their officers and directors who may be accused of a violation, and in most cases those costs must be advanced during the course of an investigation or prosecution.

These costs are a real concern to the company's investors who ultimately bear them. Investigations and litigation can drag on for years, while costs spiral out of control. Recent "claw-back" provisions entitling companies to recover from wrong-doer executives are rarely used or are otherwise ineffectual in the face of enormous expense. While there is no private right of action under the FCPA, shareholders have increasingly pursued derivative and class action claims against companies and their executives that allow violations to occur or spend hundreds of millions of dollars investigating alleged misdeeds. Increasingly, the investigations themselves become the subject of shareholder litigation for corporate waste, breach of fiduciary duty, unjust enrichment, or other claims. The corporate harm that may result from internal

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