

Client Alert

August 2017

A Primer on Insurance Coverage for FCPA Claims and Investigations

The frequency and magnitude of FCPA investigations and claims continue to grow. Last month, the U.S. Securities and Exchange Commission announced that Halliburton Co. had agreed to pay \$29.2 million in fines and penalties to settle allegations that its operations in Angola and Iraq violated the FCPA's books and records and internal accounting controls provisions. In its press release, Halliburton vowed that it had "continuously enhanced its global ethics and compliance program" since first receiving an anonymous tip in December 2010, but the recent settlement serves as a reminder that even the most robust compliance program cannot guarantee that FCPA violations will not occur.

Historically, targets of FCPA investigations have assumed that any FCPA-related losses were not covered by insurance, but in recent years the landscape has changed. Given the staggering liability exposure that arises from FCPA investigations and any subsequent civil litigation—not to mention the significant legal fees and costs incurred in responding to such claims—companies purchasing directors and officers (D&O) and corporate liability coverages should review their entire insurance program in view of their potential FCPA exposure. While limitations on coverage still exist, this Client Alert highlights several potential issues that policyholders should consider to maximize recovery for FCPA-related loss.

- **Broad triggers of coverage:** Policyholders should ensure that D&O insuring agreements cover government investigations or inquiries and, if needed, expand the definitions of "Claim" and "Loss" to cover costs incurred in internal investigations or responding to agency subpoenas and other informal information requests. Companies should negotiate entity coverage (often referred to as "Side C" coverage) for regulatory investigations, not just securities claims, to ensure that any investigation coverage extends to both the entity and any insured persons.
- **Exclusions from Definition of "Loss":** The definition of "Loss" in D&O policies commonly excludes many types of damages implicated in FCPA matters, such as civil and criminal fines, penalties, and punitive damages. However, insurers are increasingly offering coverage for some or all of the foregoing types of damages and policyholders should seek to take advantage of such offerings. Even if part of the FCPA loss may be excluded, chances are that some of the loss is covered. This may be especially true as to defense costs.
- **Insurability:** D&O policies typically exclude from the definition of "Loss" any amounts uninsurable as a matter of law. Insurers may argue that coverage is barred for payments labeled as disgorgement (often a large component of FCPA settlements). But the devil is in the details both as to the scope of the coverage afforded under the policy and the true nature of the payments, so policyholders should not simply take the insurer's word for it.
- **Conduct Exclusions:** Given that FCPA claims often involve alleged willful conduct and/or disgorgement remedies, it is important to confirm that intentional acts and personal profit exclusions are triggered only by "final adjudication," so coverage for defense costs and settlement coverage may still be available in the absence of a final adjudication. FCPA costs continue to rise, so obtaining coverage for legal fees and expenses can be significant.

- **Other Exclusions:** FCPA claims may also trigger other exclusions, such as regulatory exclusions or “commissions” exclusions (precluding coverage for claims attributable to commissions, gratuities, or other benefits to foreign government officials). Lengthy investigations into historical conduct may implicate “prior acts” exclusions.
- **Defense Restrictions:** The size and complexity of FCPA investigations requires [specialized expertise](#). Policyholders should negotiate adequate pre-selected counsel and rates so coverage is not undermined by an inadequate defense or a dispute over billing rates.
- **FCPA-Specific Endorsements:** Certain brokers and insurers have marketed specific coverage extensions for FCPA investigation and defense costs, although such coverage is usually subject to relatively low sublimits and may not extend to fines and penalties.
- **Coverage Territory:** Cross-border activities give rise to [many unique risks](#). Policyholders should confirm that their policy’s “coverage territory” covers activities and wrongful conduct abroad.
- **Notice:** Most D&O liability policies require that notice of circumstances that are reasonably likely to give rise to a claim be provided in a timely manner. Failure to give prompt notice to the insurance company may result in a forfeiture of coverage. It is therefore important to consider insurance at the outset of every FCPA matter.

Companies should be proactive in assessing potential FCPA exposure before a claim arises to ensure that both the company and its directors and officers are adequately protected. Of course, potential coverage for any FCPA-related claims depends on specific policy language and underlying facts at issue. Retaining competent coverage counsel to perform pre-claim audits can attempt to address the issues discussed above and identify any coverage gaps. Although FCPA investigations and claims present many unique coverage issues, policyholders can take steps to mitigate their risk and maximize their recoveries in the event a claim arises.

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