THE LEVICK E-BOOK SERIES
VOLUME 3

Navigating U.S. Regulatory, Legal & Communications Hurdles

A Guidebook for Foreign Companies

LEVICK
FIXING THE IMPOSSIBLE™

AL-MONITOR · BRG · BuzzMaker · Blue Ocean Global Technology · CCBJ General Counsel Resources · commPRO.biz · Kobre & Kim · Lewis Baach Kaufmann Middlemiss PLLC · Potomac · Primerus · Schillings

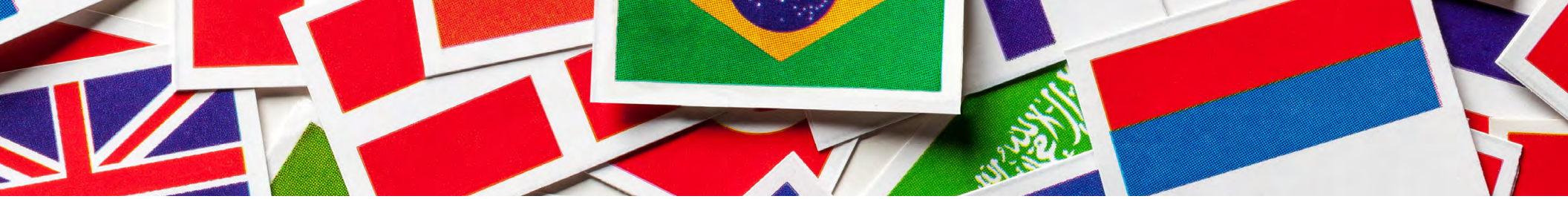

Table of Contents

U.S. Plaintiffs' Bar Targets Foreign-Based Companies

For foreign companies entering the U.S. market, our society's litigiousness is something that is understood but not fully appreciated, especially now. Between the Internet, which makes it far easier for the plaintiffs' bar to attract clients, and the unique contingency fee arrangements in the U.S., foreign companies should anticipate litigation at a far higher level than in their home countries. And the trend is getting worse, not better.

Whether it's complying with the Foreign Corrupt Practices Act or wrestling with regulations in 50 different state jurisdictions *plus* the federal government, foreign-based companies face thorny challenges as they approach the U.S. market. But ask international CEOs to name their biggest apprehension about doing business in the U.S. and most will point to one fear: the specter of being successfully sued by the U.S. plaintiffs' bar.

Other countries have their share of litigious lawyers, but they don't have anything as intimidating or potentially lethal as the U.S. plaintiffs' bar, especially its capacity to file securities class-action lawsuits on behalf of disgruntled shareholders.

Just ask Brazil's state-controlled oil company, Petroleo Brasileiro SA (Petrobras), which earlier this year was forced to pay nearly $3 billion to settle a U.S. class-action securities corruption lawsuit, the largest such payout by a foreign entity in U.S. history. Petrobras has been embroiled for years in a related corruption scandal back home that has tainted two former Brazilian presidents and dozens of executives. Yet, the U.S. securities class-action settlement is *six times greater* than the fines Petrobras has been assessed to date in Brazil.

Petrobras isn't alone. A recent study conducted by NERA Economic Consulting suggests that foreign-based companies are being named in a "disproportionate number" of securities class actions.

In 2017, NERA found that the number of standard securities class actions filed against foreign issuers had significantly increased over previous years. Most of those securities class actions were triggered by supposed "regulatory" violations, another index that is trending distressingly upward for foreign-based companies.

"The U.S. securities litigation plaintiffs' bar have non-U.S. companies squarely in their target zone," confirms David Kistenbroker, Global Co-Leader of Dechert LLP's white collar and securities litigation practice and managing partner of its Chicago office.

"Using the companies' ADRs (American depositary receipts) and ADSs (American depository shares) to obtain jurisdiction in the U.S., the plaintiffs' bar filed 42 shareholder actions in the U.S. in 2017 against non-U.S. issuers. This is nearly double the historical average and there is no cooling off of the trend in sight," he observes.

What is it that makes the U.S. plaintiffs' bar so daunting? And why are foreign companies being so aggressively targeted?

The one-time managing director of Marsh's FINPRO points out that, "While the FCPA does *not* provide individuals with a private right of action, the U.S. plaintiffs' bar is not slow to consider whether the company may have to restate its financials and/or reduce future earnings estimates — which may impact stock price leading to a civil suit. Similarly, substantial settlements may result in follow-on derivative litigation."

Americans are fair-minded: most want a civil court system in which people who have been legitimately harmed can seek and be awarded fair compensation. But too many suits filed by the plaintiffs' bar are precipitated not by genuine grievances but by the depth of pockets of select corporations, especially if those companies happen to be foreign-based.

At the root of this uniquely American quandary are contingency fees — arrangements by which plaintiffs' lawyers decline up-front payment and instead take a healthy percentage of any eventual judgment or settlement. These contingency scenarios, detractors say, create such strong incentives for lawyers that they pervert the process. The plaintiffs' bar pinpoints wealthy corporations, then rummages around for data that documents how the companies have "victimized" people, then aggressively recruits clients who fit the class action profile.

The former FINPRO executive notes that, "The most current data on U.S. directors-and-officers (D&O) securities class actions, especially as to frequency, is particularly surprising when considering the drop in the number of publicly-traded companies and that the stock market had been doing exceptionally well until very recently."

"With stock prices high, one would not anticipate that cases would be up. This may go to show that the plaintiffs' bar has made this a full-time business. Year-in and year-out, one should not expect the number of suits to fall even when evidence would point to the contrary," she predicts.

It's clear that securities class action suits against foreign companies aren't going to disappear anytime soon. How can foreign-based entities lessen the likelihood of being targeted by the U.S. plaintiffs' bar? Here's a quick primer.

- **Know Thy Adversary:** Immerse yourself in the tactics of the plaintiffs' bar. Many plaintiffs' lawyers have media footprints that give you advance warning of their communications strategy. Historically, we have found the plaintiffs' bar and activist investors to be communications-savvy. Once a lawsuit has been filed against you, don't just look at the legal strategies of the plaintiffs' firm, but their media ones, as well. It will often tell you what to expect next. Track the website of the American Association for Justice because it will tell you on a regular basis what the plaintiffs' bar is thinking.

- **Redefine Risk:** Most companies still think about risk in historical terms. What was true in the past must be prologue. But the plaintiffs' bar is constantly redefining risk. Assess the enterprise's risk profile through a detailed "map" that moves beyond financial compliance and looks more broadly at potential event-driven and operational-related risks. What liability trends are you seeing? What is happening to your competitors? What is happening in similarly situated industries? Are you seeing new theories of law attempted by the plaintiffs' bar against other companies that could be used against you? View the risk holistically. Sexual harassment, for example, was until recently considered a lower risk; now it is obviously of highest concern. The recent actions of New York State Attorney General Eric T. Schneiderman are beginning to raise the question as to whether ignored behavior is even an insurable risk. Markets change quickly, spend more time looking forward and sideways and less time backwards.

- **Look for the Canary-in-the-Coal Mine:** Institute a sophisticated monitoring and early-warning system that identifies trends in social media, by hashtag, and by issue. Rely on human intelligence to make sense of what you are seeing, not just the "big data." You of course need to track lawsuits to Thomson Reuters litigation software and competitor liability trends, but you also need to track social and digital media key words and terms that relate to your risk. Track these risk terms daily: If you see a term only once on Google or with little impact in social media one week, but an uptick the next, it should set off an alarm. The plaintiffs' bar has to optimize key words to find clients. It should serve as one of your early warning systems. Have appropriate reporting procedures/process in place to alert senior management as quickly as possible to a potential event.

- **Beware of the "Humanizing" Video:** The plaintiffs' bar is genius at taking complex issues and distilling them into emotion-laden videos. Make sure that you're monitoring all platforms that could transmit these videos, since the plaintiffs' bar uses them to recruit potential class action litigants.

- **Understand that Everything is Evidence:** Cultural norms may dictate differently, but "everything" is discoverable in America. If you write it down — including texts and emails — it may come back later as evidence. As a result, try to keep in mind that whatever you write — and many things you say — might someday be read by critical audiences.

- **Strengthen Your Defense:** Mitigate your liability by focusing on disclosure issues in your Securities and Exchange Commission (SEC) filings. The plaintiffs' bar views SEC filings as potential red meat. Keep that uppermost in mind as you prepare SEC documents. Conduct a training exercise to test the company's response to a formal investigation or informal inquiry from the SEC or other regulators. Educate directors annually on their fiduciary duties and make it clear that they will be subject to U.S. law.
- **Preach Transparency, Practice Transparency:** Throughout your organization, at every level, promote a culture of compliance and transparency. Don't pay mere lip service. Reward employees for standout work that reflects those values.

Given America's size, technological savvy, and access to capital, the growing U.S. market remains a lucrative place to do business for foreign companies. But like any attractive market, it has its risk. Foreign companies need to culturally appreciate the difference in an aggressive U.S. plaintiffs' bar and fortify themselves against its machinations.

FIRRMA HAS FIRMLY CHANGED CFIUS REALITIES

by Harry G. Broadman, Chair, Emerging Markets Practice, Berkeley Research Group LLC

The role of CFIUS and its procedures recently changed significantly because of the enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018.

One key change is that under FIRRMA, the *statutory* authority that provides how CFIUS operates has greatly expanded. In other words, Congress now has a far more visible and strengthened role in how the agency works.

Another is that FIRRMA has made the operations of CFIUS and its criteria *more transparent* and regularized. New requirements also were introduced. While in the past, parties to a transaction were not obligated to notify CFIUS prior to the closing of a deal, the new law requires pre-notification.

Frankly, my counsel to parties to a transaction has *always been* to pre-notify since there is the risk of CFIUS unwinding or forcing a divestiture following the closing of a transaction. Finally, CFIUS shortly will get the authority to scrutinize *non-controlling* investments into companies that maintain or collect personal data of citizens that "may be exploited in a manner that threatens national security."

If there is one thing that FIRRMA makes clear, it is that CFIUS is no longer a legal matter. Those naïve enough to still see it that way will not fare well. CFIUS is now, ultimately, an issue of business strategy: in sum, how best to structure a transaction and execute risk-mitigation protocols.

This is not your grandfather's CFIUS. Businesses — whether in the US or abroad — would do well to understand the implications of these changes.

With Thanks to Our Partners: