

# Under Scrutiny:

## SHB's Government Enforcement & Compliance Update

DECEMBER 12, 2008



### NINTH CIRCUIT CURBS SHAREHOLDER'S SECURITIES FRAUD CLAIMS BASED ON FCPA VIOLATIONS

A consequence of the government's aggressive Foreign Corrupt Practices Act (FCPA) enforcement is increasing parallel civil litigation arising from FCPA violations.

A company and its executives facing the specter of an FCPA investigation may often find themselves sued under securities law by shareholders claiming to have purchased their shares at an inflated price and in shareholder derivative actions brought to recover for alleged officer and director wrongdoing. The number of these civil suits should continue to grow as more and more companies become targets of DOJ and SEC FCPA enforcement actions.

The Ninth Circuit Court of Appeals' recent decision in *Glazer Capital Management, LP v. Magistri*, No. CV-04-02181 (9th Cir. Nov. 26, 2008), highlights some of the difficulties that shareholders must overcome to maintain securities fraud claims based on alleged FCPA violations.

InVision Technologies, Inc., a small publicly traded company, announced that it would be acquired by General Electric in a cash transaction for \$50 per share. InVision filed a Form 10-K, attaching a copy of the merger agreement, signed by Sergio Magistri, InVision's president and CEO. Several months later, InVision disclosed that an internal investigation had revealed possible FCPA violations, causing InVision's stock to drop by more than \$6 per share. Shareholders filed a class action lawsuit for securities fraud, citing statements included within InVision's settlement agreement with the SEC.

The Ninth Circuit upheld the district court's dismissal of the action, finding that plaintiffs failed to plead any facts which demonstrated that Magistri was personally aware of the illegal payments or that he was actively involved in the details of InVision's sales overseas. In particular, the court found that "it was *not* hard to believe" that Magistri was unaware of the FCPA violations because the "surrepti-

#### GOVERNMENT ENFORCEMENT & COMPLIANCE

Our clients face unprecedented enforcement scrutiny and novel legal theories. Today, government enforcement actions can include civil as well as criminal investigations and litigation. They can involve a host of independent actors including federal and state prosecutors, regulators, whistleblowers and their counsel, and class-action attorneys. These cases must be defended under the watchful eye of investors and the public.

Our Government Enforcement & Compliance Practice consists of former prosecutors -- including a former U.S. Attorney, former Justice Department officials and even former corporate executives -- who counsel and defend companies, their executives and employees in the full range of criminal, civil and regulatory government enforcement actions at the state and federal level. We counsel clients on how to avoid enforcement scrutiny. When investigations do arise, however, we work with our clients to resolve it as efficiently, cost-effectively and quietly as possible.

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DECEMBER 12, 2008 - PAGE 2

tious nature of the transactions...[created] a strong inference that the payments would have been kept secret—even within the company.”

This decision is perhaps most significant for the court's clear disdain for plaintiff's speculative argument that the defendant must have known of some extraterritorial conduct involving a third party intermediary's bribe of a foreign official. In the absence of collective *scienter*, defense counsel may rely on *Magistri* to obtain the dismissal of plaintiffs' security claims where the defendants were unaware or unlikely to have become aware of the clandestine and discrete misconduct giving rise to corporate FCPA liability.

Analysis prepared by [Jonathan N. Rosen](#) and [Matthew Benov](#).

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