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INTERNATIONAL COOPERATION

How Companies Can Respond to the Boom in FCPA Enforcement Fueled by International Cooperation

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Over the past several years, DOJ and SEC, which have historically brought the vast majority of the world's foreign bribery enforcement actions, have made an intentional and concerted effort to cultivate international relationships and share substantial portions of large fines and disgorgement amounts with their foreign counterparts. That investment has paid dividends. Through their efforts, DOJ and the SEC have incentivized other countries to refer new cases to them, resulting in mutually beneficial relationships based on enhanced cooperation and collaboration in international corruption cases.

For companies, this trend, plus the number of countries that now can investigate and prosecute corporate criminal cases, means that they are under a microscope, whether they operate in the U.S. or abroad.

In this article, we explain what is behind the dramatic rise in coordinated prosecutions between the United States and foreign authorities and what this means for multinational companies with business operations around the world.

The Dramatic Rise in International Cooperation and Coordinated Global Resolutions

FCPA enforcement over the first 30 years pales in comparison to what we see today. Between 1977 and 2007, there were approximately 70 total corporate resolutions, resulting in approximately $50 million in total fines, penalties and disgorgement of profits. In contrast, since 2007, DOJ and the SEC have resolved almost 250 corporate cases, resulting in over $13 billion in total fines, penalties and disgorgement, including $11.5 billion since 2016 alone.

There has also been a dramatic increase in coordinated global resolutions between DOJ, the SEC and foreign authorities. Over the first 30 years of the FCPA's existence, there were only two coordinated resolutions – a deferred prosecution agreement with Statoil in 2006 and a non-prosecution agreement with Akzo Nobel N.V. in 2007 – involving U.S. authorities and foreign counterparts, resulting in approximately $25 million in total fines and

disgorgement. Since 2016, however, there have been 10 global FCPA resolutions that were coordinated with foreign authorities – resulting in approximately $9.5 billion in fines, penalties and disgorgement.[1]

What explains this dramatic increase in enforcement activity – particularly the growing involvement of foreign authorities in coordinated resolutions?

There are a number of possible explanations, and one explanation is that this is the natural result of an intentional effort by DOJ and the SEC to build their relationships with foreign authorities by increasing the frequency of interactions and joint trainings and cooperating on investigations. For example, over the past five years DOJ and the SEC have twice hosted international training sessions that attracted hundreds of foreign prosecutors from dozens of countries to Washington, D.C., for days of trainings on anti-corruption investigations. The programming and networking that resulted surely opened avenues of communication and referral bases that did not exist in the past.

See "DOJ's 2019 Enforcement Activities Demonstrate a Continued Commitment to FCPA Enforcement" (Aug. 7, 2019).

Generous Fine Sharing With Foreign Authorities

More tangibly, however, DOJ and SEC have been delivering in an area that is most profoundly appreciated by foreign authorities – their pocketbooks. Over the past several years, DOJ and SEC entered into global coordinated resolutions with foreign authorities, resulting in billions of dollars of criminal fines. Remarkably, DOJ and the SEC shared much of their fines and disgorgement amounts with the foreign governments, which has sparked incredible goodwill and trust that foreign governments can benefit from working alongside the United States as they investigate and prosecute international corruption cases.

Brazil

The best example of DOJ's and the SEC's sharing efforts can be seen in the global resolutions that have been brought with Brazilian prosecutors in connection with their Operação Lava Jato (Operation Car Wash) investigation. The cases typically have involved prosecutors from the Brazilian public prosecutor (Ministério Público Federal or MPF) and the Controladoria-Geral da União (CGU).

To date, there have been coordinated corporate resolutions stemming from Operation Car Wash with six companies: Odebrecht S.A., Braskem S.A., Rolls-Royce plc, Keppel Offshore & Marine Ltd. (Keppel), Petrobras and TechnipFMC.

Brazil has received approximately $3.66 billion of the $5.9 billion (or 62%) in total fines, penalties, and disgorgement in the Car Wash cases. The coordinated U.S. and Brazilian investigation has revealed that numerous multinationals paid massive bribes to government officials, including employees of Brazil's state-owned oil company, Petrobras, in order to obtain lucrative contracts. The companies typically funded these bribes by inflating the prices of Petrobras contracts through collusive bid rigging, with a portion of the inflated contract proceeds kicked back to Petrobras officials responsible for awarding the contracts and other Brazilian government and political officials.

To date, Brazilian prosecutors have obtained convictions for over 150 individuals in connection with the scandal. The Brazilian investigation's success is in part due to legislation enacted by the Brazilian government in 2013 that, among other things, followed the U.S. model and allowed prosecutors to resolve cases through plea bargaining, which rewarded cooperating defendants with more lenient sentences.[2]

In U.S. enforcement actions relating to Operation Car Wash, DOJ credited substantial criminal penalties paid to Brazilian (and other) international authorities, with Brazil receiving the lion's share of the criminal fines. For example, as part of its $1.78 billion global resolution with DOJ, the SEC and the Brazilian authorities, Petrobras entered an NPA with DOJ that involved a criminal penalty of $853.2 million. The Department credited 10% ($85.3 million) of that penalty to the SEC and 80% ($682.5 million) to Brazil, with DOJ receiving only 10% of the total amount.

Similarly, Odebrecht paid portions of its $2.6-billion criminal fine to Brazilian and Swiss authorities under its plea agreement, with Brazil receiving 80% ($2.08 billion), and the remaining 20% split evenly between the U.S. and Switzerland.[3]

In the related Braskem resolution, the U.S. again agreed to credit the amounts Braskem paid to Brazilian and Swiss authorities, with Brazil receiving 70% ($442.8 million) of the $632 million criminal penalty, and the U.S. and Switzerland splitting equally the remaining 30% ($94.8 million each).

In a $422.2-million DPA with Singapore-based Keppel and its U.S. subsidiary, DOJ credited the amounts paid to Brazil ($211.1 million, representing 50% of the total penalty) and Singapore ($105.5 million, representing 25% of the total penalty).

In its resolution with Rolls-Royce, DOJ credited $25.5 million to Brazil, which is the full amount of the penalty attributable to conduct that took place in Brazil.

More recently, TechnipFMC plc (formed by the merger of Paris-based Technip SA and Houston-based FMC Technologies Inc.) and its U.S. subsidiary agreed to pay Brazil $214.3 million in penalties – 72% of the $296.1-million criminal fine assessed – and the U.S. again agreed to credit the amount paid to Brazilian authorities under a DPA.

See "The View From a Brazilian Prosecutor" (Jan. 10, 2018).

France

The SocGen case was another landmark in international cooperation, marking the first coordinated resolution reached by DOJ and French authorities in a foreign bribery case. As part of an $860-million DPA with DOJ involving a bribery scheme in Libya and manipulation of the London InterBank Offered Rate (LIBOR), SocGen agreed to pay a $585-million penalty to resolve the bribery allegations. SocGen settled with French authorities related to the alleged Libyan bribery, and the U.S. agreed to credit the approximately $292 million paid to France, which amounted to 50% of the criminal penalty otherwise payable to the U.S.

Perhaps surprisingly, the French public prosecutor was not involved in the TechnipFMC case, despite heightened expectations following its role in the coordinated Société Générale S.A. (SocGen)

resolution. TechipFMC has stated that the French investigation is ongoing.

Dutch, Swedish and British Fine Sharing

In other jurisdictions, the percentages of penalties shared with foreign authorities also involved substantial sums of money flowing to regulators abroad. VimpelCom, which is headquartered in Amsterdam, and its Uzbek subsidiary Unitel LLC, entered a $795-million global resolution with U.S. and Dutch authorities in 2016 to resolve charges that the company bribed an Uzbek government official to gain access to the Uzbek telecommunications market.

In its DPA with VimpelCom, DOJ calculated a total criminal penalty of $460.3 million, and credited 50% ($230 million) of the penalty against VimpelCom's related resolution and fine with the Dutch public prosecutor. In its settlement with the SEC, VimpelCom agreed to pay $375 million in disgorgement, to be split between the SEC and Dutch authorities as well.

In another Uzbek case that DOJ and the SEC resolved through a DPA with Telia Company AB (Telia, formerly Telia Sonera AB) and a plea by its Uzbek subsidiary, DOJ credited approximately 50% ($274 million) of the $548.6-million total criminal penalty against the money paid to Dutch authorities pursuant to the company's resolution with the Netherlands.

Sweden, which at the time of the resolution limited corporate fines for foreign bribery to approximately €1.2 million ($1.4 million), did not receive a portion of the criminal penalty. Telia also agreed to pay $457 million in disgorgement to the SEC, and the SEC agreed to credit up to 50% of this amount against any disgorgement that Telia later paid to the Netherlands and Sweden.

The Netherlands also received a substantial share in the global resolution and DPA with Dutch-based SBM Offshore N.V. (SBM). In the SBM case, DOJ credited the $240 million that SBM had paid to Dutch authorities several years prior, as well as undetermined future penalties to be paid to Brazilian authorities, when arriving at a $288-million penalty for bribery schemes across five different countries.

Finally, Rolls-Royce also entered into a landmark DPA with the U.K., Brazil and DOJ, in which the U.K. received the vast majority of fine amounts. In its $800-million resolution, the company admitted to paying bribes in six countries, including Brazil. The U.S. received only $170 million of the total fine amount, crediting $25.5 million to Brazil for the conduct that occurred in Brazil. The U.K. received over $600 million (or £497.3 million).

International Cooperation Is Unique to Anti-Corruption Efforts

The sharing mechanism by DOJ and the SEC in these recent FCPA cases stands in contrast to how similar cases were handled with foreign authorities in other legal contexts. The U.S. authorities did not share criminal penalties or disgorgement of profits to the same degree in other international enforcement contexts. For example, of the $2.5 billion in penalties and disgorgement that DB Services (UK) Limited paid to resolve charges of manipulating LIBOR and conspiring with other banks to fix prices relating to the Yen LIBOR, the U.K.'s Financial

Conduct Authority only recovered about 14% (or $344 million), with the remainder provided to U.S. authorities.[4]

See "How the New French Guidance on Deferred Prosecution Eligibility Affects Settlement Negotations" (Oct. 30, 2019).

The Mutually Beneficial Relationships Resulting From Coordination, Cooperation and Fine Sharing

The sharing of criminal penalties in anti-corruption resolutions provides a substantial incentive for foreign authorities to refer cases to DOJ and the SEC and to cooperate closely with them in large, international anti-corruption investigations. This cooperation has proven to be mutually beneficial for law enforcement. In addition to making it easier for DOJ and the SEC to gain access to evidence and witnesses abroad, cooperation affords foreign law enforcement the opportunity to learn from DOJ and the SEC's institutional knowledge about anti-corruption and white-collar enforcement, especially against corporate targets.

In practice, collaborating with their foreign counterparts has also made DOJ and the SEC far more adept at obtaining evidence and accessing foreign witnesses than ever before. The consequence is that U.S. prosecutors now are poised to build and bring larger and more robust cases, strengthening the government's bargaining position when negotiating resolutions and plea deals with companies and individuals.

More Countries Are Passing Laws and Adding Tools to Prosecute Corporate Crimes

DOJ has increasingly utilized DPAs and NPAs to resolve FCPA cases over the last 15 years, with one source calculating approximately 124 instances during that time. While some other countries have already followed the U.S.'s lead by legislatively authorizing DPAs, more jurisdictions are moving toward U.S.-style enforcement by adding DPAs and NPAs to their legal frameworks.

The OECD's Working Group on Bribery, which was established 25 years ago, has monitored the now 44 signatory countries' enactment, implementation and enforcement of criminal laws prohibiting foreign bribery. Between February 1999 and December 2017, the OECD Convention signatories imposed criminal sanctions (including plea agreements, DPAs and NPAs) on a total of 184 legal entities.

According to the OECD, the U.S. imposed sanctions on the most legal entities (125) for foreign bribery, followed in a distant second by Germany, with only 11 such sanctions. As many as 27 OECD countries have yet to impose sanctions on any legal entity for foreign bribery.[5] Many of the signatories that have imposed sanctions on legal entities for committing foreign bribery have only done so in a small number of cases. This perhaps explains why the Chairman of the SEC recently bemoaned the state of international enforcement, stating that when it comes to anti-corruption enforcement, the U.S. is "acting largely alone and other countries may be incentivized to play, and I believe some are

in fact playing, strategies that take advantage of our laudable efforts."

However, international enforcement is on the rise and the lagging nature of corporate enforcement outside the U.S. is bound to pick up as countries begin to incentivize corporate self-reporting and cooperation through DPA and NPA-style resolutions. Several countries, including the U.K., Brazil, France, Canada and Singapore, have already added DPA and NPA-style resolutions to their legal frameworks. These resolutions generally allow companies to avoid prosecution in exchange for the imposition of penalties, restitution, compliance program reforms and cooperation obligations. The U.K., Brazil and France have had DPAs in place for several years: the U.K. and Brazil since 2013 and France since 2016.

To date, the U.K. has entered into five DPAs, and France has entered into seven of its DPA-equivalents – *conventions judiciaire d'intérêt public* (CJIPs). France recently issued guidelines to explain how French authorities intend to implement CJIPs and promote corporate cooperation. Among other things, the guidelines state that any fine or compliance monitor that a prosecutor may impose in a CJIP may be calculated to account for foreign sanctions in internationally coordinated resolutions.

Canada and Singapore enacted legislation in 2018 to implement DPA-style resolutions, although neither country has, to date, reached a resolution under the new laws. Singapore's DPA-style resolution in the Keppel case predated and no doubt triggered the adoption of its new legal framework for DPAs.

Meanwhile, Brazil expanded its use of DPAs by adding them to the enforcement framework for Brazil's Securities and Exchange Commission (CVM) as of September 1, 2019. The so-called "supervision agreements" will incentivize companies to cooperate with CVM inquiries by offering between one-third and two-thirds reductions to penalties in return, or by allowing the company to avoid an adverse action altogether.

Other countries are in the process of implementing DPA-style resolutions. Germany is considering legislation that would permit NPA and DPA-like corporate resolutions, and the German Corporate Sanctions Act, if enacted, would offer reduced penalties to companies that, among other things, cooperate with the investigation and implement compliance programs

Australia, on the other hand, had legislation that would have authorized DPAs pending in Parliament beginning in December 2017, but that legislation lapsed on July 1, 2019. It is unclear whether the legislation will be revived. Meanwhile, the Australian government announced in April 2019 that it had commissioned the Australian Law Reform Commission to comprehensively re-examine Australia's corporate criminal responsibility laws. The review is expected to conclude by April 2020.

Operational Takeaways

The cooperation between U.S. prosecutors and regulators, combined with changes in foreign corporate enforcement frameworks, indicates that international anti-corruption enforcement and the associated criminal penalties will only continue to grow in years to come. Given today's international enforcement regime, companies cannot ignore issues that may present in foreign jurisdictions, as there

is now a much higher likelihood that evidence of bribery and corruption may be detected by foreign authorities and shared with DOJ and the SEC. That factor, among many others, should be considered when determining whether it makes sense for a company to self-report misconduct to U.S. authorities.

The involvement of multiple authorities also frequently brings competing and conflicting demands for information and cooperation. Responding to one authority's requests could be viewed by another as jeopardizing its investigation or even violating its laws. For example, a U.S. subpoena may seek documents that violate European data privacy laws or prematurely signal to targets that they are under investigation, which could seriously jeopardize the ability of a company to resolve its case favorably in a coordinated manner. In such circumstances, it is essential for a cooperating company to engage frequently with the investigating authorities and devise a uniform approach of engagement to deconflict requests and find common expectations for cooperation.

In addition, just as DOJ's "anti-piling on" policy encourages DOJ prosecutors to coordinate resolutions with other federal, state and local authorities to avoid imposing duplicative fines, it is imperative for multinational companies to coordinate with U.S. and foreign authorities alike before entering into a globally coordinated resolution to minimize the likelihood of receiving duplicative sanctions and penalties in different jurisdictions for the same conduct. When faced with multiple related investigations by prosecutors in different jurisdictions, a company that is bent on resolving the matter should coordinate the approach and push for a coordinated global resolution to best manage the collateral consequences of the resolution and limit their public relations impact to a single "bad news day," rather than a series of derogatory press releases that trickle out over weeks, months or even years.

The landscape has changed, and how a company responds to each situation will vary based on the demands of the respective authorities. But one thing is clear: international corruption is now truly an international phenomenon.

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[1] In chronological order, the cases are: VimpelCom Ltd; Odebrecht S.A. and Braskem S.A.; Rolls-Royce Ltd.; Telia Company AB; SBM Offshore N.V.; Keppel Offshore & Marine Ltd.; Société Générale S.A.; Petróleo Brasileiro S.A.; and TechnipFMC plc. The 2008 resolution with Siemens AG and the 2010 resolution with Innospec Ltd. were the only global resolutions between 2007 and 2016. Siemens involved a coordinated resolution with the German authorities and the World Bank, and it remains one of the largest ever FCPA cases, though as this article shows, Siemens was an outlier in

size and scope until enforcement began to rise over the past few years.

[2] Lei No. 12,850, de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.8.2013 (Braz.).

[3] Odebrecht acknowledged that a $4.5-billion fine would be appropriate, but represented to the government that it could only pay $2.6 billion. DOJ agreed to a $2.6-billion fine subject to an ability-to-pay analysis. After that analysis, a U.S. court entered a $2.6-billion judgment against Odebrecht, with the U.S. to receive $93 million, Brazil to receive $2.39 billion, and Switzerland to receive $116 million.

[4] Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (April 23, 2015). Notably, DOJ did not share any of the penalty with France for the LIBOR- related conduct in the SocGen resolution referenced above.

[5] Publicly available data shows that 26 of the 44 OECD signatories have never sanctioned a company for foreign bribery-related offenses. There is no information available for Russia.