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BLOG

The Revival of Corporate Monitorships in Global FCPA Resolutions

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The U.S. Department of Justice's latest Foreign Corrupt Practices Act (FCPA) resolution with Glencore plc and related entities raises new questions about independent compliance monitors, and whether they are back to stay. In October 2021, Deputy Attorney General Lisa Monaco announced revised DOJ guidance on corporate monitorships.[1] The DOJ's announcement suggested a reversal of a trend seen over the past few years—specifically, a declining use of monitorships in FCPA resolutions. As Monaco explained, "the decision to use monitors must also include consideration of how the monitorship is administered and the standards by which monitors are expected to do their work," but the Department will "study how we select corporate monitors, including whether to standardize our selection process across the divisions and offices."[2] Indeed, in 2020 and 2021, the Justice Department did not impose any independent compliance monitors despite its FCPA enforcement action.[3]

Fast-forward to spring 2022, and there appears to be somewhat of a revival in the use of corporate monitorships. On April 20, 2022, the DOJ announced that as part of its FCPA resolution with Stericycle Inc., the U.S.-based waste management company would pay more than $84 million and be required to retain an independent compliance monitor.[4] Then, just a month later on May 24, 2022, the DOJ again imposed a corporate monitorship.

This time, the DOJ announced that Swiss-based mining and commodities trading company Glencore pleaded guilty, and as part of its coordinated solution with U.S., U.K., and Brazilian authorities, agreed to pay over $1.1 billion to settle FCPA violations and conspiracy to engage in commodity price manipulation.[5] As part of this resolution, Glencore would be required to retain an independent compliance monitor for three years.[6]

Glencore's guilty plea arises out of a decades-long scheme by Glencore and its subsidiaries to pay more than $100 million to third-party intermediaries, with a significant portion of the payments used to pay bribes to officials in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela, and the Democratic Republic of Congo. Between 2007 and 2018, Glencore paid approximately $79.6 million through intermediary companies in order to retain business and secure advantages with state-owned and controlled entities in these countries. The payments were concealed by entering into sham consulting agreements, paying inflated invoices, and using intermediary companies to make corrupt payments to foreign officials.[7]

In addition to the bribery charges, Glencore's trading arm (Glencore Ltd.) pleaded guilty to commodity price manipulation charges arising out of its engagement in the trade of oil. From at least January 2011 to August 2019,

employees conspired to manipulate benchmark price assessments published by S&P Global Platts for fuel oil products, specifically, intermediate fuel oil 380 CST at the Port of Los Angeles and RMG 380 fuel oil at the Port of Houston. Employees sought to unlawfully enrich themselves and Glencore Ltd. by increasing profits and reducing costs on contracts to buy and sell physical oil, as well as certain derivative positions that Glencore Ltd. held. The company submitted orders to buy and sell to Platts with the intent to artificially push the price assessment up or down.[8]

The resolution requires Glencore to pay a criminal fine of more than $428 million and to forfeit more than $272 million. For commodity price manipulation, the company will pay a criminal penalty of over $341 million, and criminal forfeiture of over $144 million. The DOJ has agreed to credit over $242 million in payments that the company makes to the Commodity Futures Trading Commission (CFTC) in a related, parallel civil proceeding. Additionally, the U.K.'s Serious Fraud Office (SFO) reached a separate parallel resolution with the Brazilian Ministerio Publico Federal (MPF) and the CFTC.

The resolution also requires Glencore to implement changes to its Ethics and Compliance programs and to retain an independent monitor to oversee and report on its implementation.[9]

Key Takeaways

1. DOJ WILL LIKELY DEVOTE MORE RESOURCES TOWARDS INVESTIGATING BRIBERY AND MARKET MANIPULATION IN COMING YEARS.

Glencore's resolution results in total penalties of $1.5 billion for the worldwide resolution. That amount represents the tenth-largest FCPA settlement in history,[10] nine of which occurred over the last approximately six years.[11] In resolving the U.S. investigations, Attorney General Merrick B. Garland reiterated the Justice Department's commitment to investigating bribery and market manipulation, noting that the Justice Department "will continue to bring to bear its resources on these types of cases, no matter the company and no matter the individual."[12]

2. LACK OF DISCLOSURES AND FAILURE TO DISCIPLINE RESPONSIBLE EMPLOYEES MAY PREVENT CREDIT FOR COOPERATION.

In reaching an agreement, the DOJ considered the nature, seriousness, and pervasiveness of the conduct, spanning over a decade, in numerous countries, and involving high-level agents of the company. Glencore did not receive full cooperation and remediation credit. The DOJ's fine was 15% below the recommended guidelines because of the company's cooperation, but Glencore did not receive full credit because it "did not consistently demonstrate a commitment to full cooperation."[13] The DOJ cited Glencore's failure to voluntarily and timely disclose the conduct, and its failure to swiftly discipline culpable employees, which "involved high-level employees and agents of the company."[14]

3. ETHICS AND COMPLIANCE PROGRAMS REMAIN SIGNIFICANT IN IDENTIFYING CONDUCT AND RESOLVING CHARGES.

As a part of the plea agreement for both charges, Glencore has agreed to retain an independent compliance monitor for three years.[15] In addition, the company agreed to cooperate with ongoing investigations and modify existing compliance and ethics programs which were found to be inadequate. Glencore first disclosed an investigation into FCPA-related offenses in July 2018. Since 2018, Glencore states that it has invested in remedial measures and enhanced its compliance program, including the following:

- Strengthening its Code of Conduct and launching a comprehensive global awareness and training campaign;
- Establishing a centralized, independent compliance function and in 2020, appointing a new Head of Compliance;
- Instituting a comprehensive business partner management program, including reducing the Company's use of third-party businesses generating intermediaries and employing end-to-end controls to oversee their engagement; and

- Implementing extensive monitoring and testing mechanisms to assess whether internal controls are effective, and to foster continuous improvement.[16]

Many of these compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor for a term of three years. Yet, the imposition of a corporate monitor in this enforcement action, as well as in Stericycle's case, signals a revival of the DOJ's effort to insist on the use of independent compliance monitors. This trend is likely to continue in both civil and criminal contexts, and companies should expect to see an uptick in the use of corporate monitorships in FCPA resolutions going forward.

For further information or questions on this topic, please contact Johanna Rae Hudgens (Associate, Antitrust & Competition), David Kolansky (Associate, General Litigation), or your Winston & Strawn relationship attorney.

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[1] Press Release, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime*, Dep't of Just. (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[2] *Id.*

[3] *2021 Year-End FCPA Update*, Gibson, Dunn & Crutcher LLP (Jan. 25, 2022), https://www.gibsondunn.com/2021-year-end-fcpa-update/.

[4] Press Release, *Stericycle Agrees to Pay Over $84 Million in Coordinated Foreign Bribery Resolution*, Dep't of Just. (Apr. 20, 2022), https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution.

[5] Press Release, *Glencore Enters Guilty Pleas to Foreign Bribery and Market Manipulation Schemes*, Dep't of Just. (May 24, 2022), https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes.

[6] *Glencore Admits Bribery, Manipulation in Global Settlement*, Law360 (May 24, 2022), https://www.law360.com/articles/1496312/glencore-admits-bribery-manipulation-in-global-settlement. Glencore will also admit to foreign corruption charges in the U.K.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Glencore Pays $700 Million to Resolve Widespread FCPA Offenses*, The FCPA Blog (May 24, 2022), https://fcpablog.com/2022/05/24/glencore-pays-700-million-to-resolve-widespread-fcpa-offenses/.

[11] *Wall Street Bank Earns Top Spot on FCPA Blog Top Ten List*, The FCPA Blog (Oct. 26, 2020), https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/.

[12] Press Release, *supra* note 1.

[13] Press Release, *supra* note 1.

[14] Law360, *supra* note 6; *see also* Press Release, *supra* note 1.

[15] *Id.*

[16] *Glencore Reaches Coordinated Resolutions with US, UK, and Brazilian Authorities,* Glencore (May 24, 2022), https://www.glencore.com/media-and-insights/news/glencore-reaches-coordinated-resolutions-with-us-uk-and-brazilian-authorities.

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