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Enforcement Actions

Honeywell's Well-Done Damage Control? How It Settled the Petrobras Problem and Dodged a Monitor

By Lori Tripoli, *Anti-Corruption Report*

In a deal that in some measure is emblematic of recent DOJ policy statements on matters like cooperation and prior criminal history, Honeywell UOP, a U.S. subsidiary of Honeywell International Inc. (collectively with Honeywell International, Honeywell), entered into a three-year deferred prosecution agreement to resolve a criminal charge alleging the company conspired to violate the FCPA by offering a $4 million bribe to a now former executive Petróleo Brasileiro S.A. (Petrobras) in Brazil. The deal, announced in Dec. 2022, is part of a coordinated resolution with authorities in the United States and Brazil.

In all, Honeywell agreed to pay more than $160 million to resolve parallel investigations. Under the DPA, Honeywell UOP will pay a criminal penalty of $79 million with a credit of up to $39.6 million for payments to authorities in Brazil. Honeywell International agreed to pay an additional $81 million in disgorgement and prejudgment interest to resolve a parallel investigation by the SEC for problems in Brazil and in Algeria (with an offset up to $38.7 million for payments to Brazilian authorities).

While resolution of the matter represents a bit of an expensive payout, Honeywell UOP managed to avoid a criminal conviction as well as the imposition of a monitor—even though it did not voluntarily disclose. "The Honeywell case is a perfect example of how Honeywell maximized damage control," Michael Himmel, a partner at Lowenstein Sandler, said.

"Honeywell's remedial measures demonstrate that companies engaging in significant remediation prior to and during government investigations can benefit in the type and scope of their resolutions with the DOJ and SEC," said James Tillen, a member of Miller & Chevalier.

This is the first article in a two-part series on the resolution.

See "Staying Ahead of the New U.S. Anti-Corruption Strategy" (Mar. 2, 2022) and "Trends in and Nuances of Negotiating NPAs, DPAs and Declinations" (Nov. 11, 2020).

Problems in Brazil and Algeria

Between 2010 and 2014, according to the DPA, Honeywell UOP offered a bribe in an effort to win a $425 million contract from state-owned Petrobras to develop an oil refinery. The company won the contract after entering into an agreement with a sales agent to fund and pay the bribe to the high-ranking Petrobras executive.

"Honeywell UOP conspired to bribe a high-ranking official at Petrobras to win a contract from the company, effectively stifling competition," said Acting Assistant Director in Charge Michael Glasheen of the FBI Washington Field Office in a press release. The case "exemplifies corporate misconduct on a global level," said U.S. Attorney Alamdar Hamdani for the Southern District of Texas in a press release.

The SEC's order addresses both events concerning Petrobras as well as bribes a Belgian subsidiary of Honeywell International paid to a government official in Algeria in an effort to obtain business with state-owned oil company Sonatrach.

"For years, Honeywell neglected to implement sufficient internal accounting controls to mitigate against known corruption risks in countries like Brazil and Algeria," said Charles Cain, Chief of the SEC Enforcement Division's FCPA Unit in a press release. "This failure created an environment in which Honeywell employees and agents could and did facilitate bribes," he continued.

See our three-part series on takeaways from the Petrobras settlement: "Deal With SEC and DOJ to Resolve Allegations of Systemic Bribery" (Oct. 17, 2018); "State-Owned Entity, Victim and Perpetrator" (Oct. 31, 2018); "Lessons on Preventing Top-Down Corruption" (Nov. 14, 2018).

What Honeywell Did Right

Although Honeywell UOP did not receive voluntary disclosure credit from the DOJ since it did not alert the government to the corrupt bribery scheme, it did receive full credit for cooperation. It and parent company Honeywell International also undertook significant remedial action that, ultimately, resulted in a DPA rather than a criminal guilty plea and a deal that does not include a monitorship.

"All In" on Cooperation

"Even without a voluntary disclosure, full cooperation credit is possible," noted Jay Holtmeier, a partner at WilmerHale. "If a determination to cooperate has been made, the key is to go all in," he suggested. "Be proactive, be forthright, be responsive to government requests, and, most importantly, communicate with the government about your investigative steps and your progress," Holtmeier said.

Deputy Attorney General Lisa Monaco has "given a number of speeches in which she la -
tain suggestions that corporations should follow if they want to maximize damage contr y

get caught up in criminal conduct," Himmel said. "One of the things that Monaco talked about was the notion of giving information to the DOJ, and the SEC, too, that the government is not aware of," he continued. "Honeywell did that," Himmel noted.

"Honeywell also turned over fruits of its internal investigation, made detailed presentations to the DOJ, facilitated interviews, and affirmatively separated wrongdoers from the company," Himmel said. "All of those things check off the boxes Lisa Monaco mentioned as means of maximizing damage control," he continued.

"Honeywell's subsidiary checked off every box, and that is why it got the outcome it did," Himmel said.

See "Top FCPA Officials Discuss the State of Compliance and Advise on Negotiations, Presentations and When to Cooperate" (Dec. 21, 2022).

Significant Remedial Action

Indeed, Honeywell International and its affiliates undertook "extensive remedial measures," according to the DPA. For example, Honeywell UOP disclosed evidence about which the DOJ was unaware, made detailed presentations to the DOJ, facilitated interviews with employees, and produced pertinent documents, some of which were located outside the United States, and translations.

Honeywell also "made changes to its compliance program by investing resources, hiring experienced and qualified personnel, and working to create a culture of compliance at all levels, as well as undertaking various disciplinary measures (including termination) and 'taking steps to eliminate' the use of risky third party intermediaries," Tillen noted. "The DPA notes that the remediation began prior to commencement of the investigation," he continued.

"The SEC describes that the remediation included terminating employees who engaged in the misconduct in Brazil, phasing out the use of sales agents, and improving policies, procedures, and financial controls over third parties," Tillen said.

The approach seems to have paid off for the company. Despite Honeywell UOP "not receiving credit for timely voluntary disclosure—a requirement emphasized in the Monaco Memo and in public speeches by senior DOJ officials—the company still qualified for 25% discount in fines and avoided a corporate monitor," Tillen observed. Although the Monaco Memo emphasizes voluntary disclosure, "the Honeywell resolution suggests that the DOJ will still reward significant cooperation and remediation in the absence of voluntary disclosure, consistent with U.S.S.G. and existing FCPA Corporate Enforcement Policy considerations," Tillen said.

See our four-part series on the Monaco Memo: "A Roll Back on Individuals and Cooperation" (Jan. 19, 2022); "A Shift in the Monitorship Cost/Benefit Analysis" (Feb. 2, 2022); "Considering All Prior Misconduct" (Feb. 16, 2022); and "The Corporate Crime Advisory Group" (Mar. 2, 2022).

A Deal Without a Monitor

Honeywell UOP managed to avoid the imposition of a monitor even though it did not voluntarily disclose and even though its parent company does not entirely have an unblemished track record. "That is the real takeaway here: No monitor was appointed," Himmel said.

In some measure, this could be attributable to the limited scope of the compliance problem being resolved. "While the size of the Brazil transaction was significant, the overall charged conduct was not widespread," Holtmeier explained. "In addition, both the DOJ and SEC noted the company's significant remedial steps prior to the resolution, presumably convincing the authorities that a monitor was not necessary," he continued.

See "DOJ, Private Practitioners and Past Monitors Discuss Best Practices and Trends in Corporate Monitorships" (Nov. 9, 2022) and "Revised Monaco Memo Affects Compensation, Clawbacks and Monitorships" (Oct. 26, 2022).

About That Prior History

"The DOJ announced in 2021 that it would consider 'all' prior criminal, civil, and regulatory enforcement actions of defendant companies and their affiliates in determining appropriate resolutions, including whether a DPA or NPA was appropriate," Holtmeier explained. "The Honeywell DOJ resolution noted that the defendant subsidiary had no prior enforcement resolutions, but the Honeywell parent had a 2011 criminal environmental resolution and other Honeywell affiliates had prior civil and administrative settlements," he noted.

Apparently, a slightly tarnished background is not a deal breaker for the government. "The DOJ ultimately permitted the Honeywell subsidiary to enter into a DPA and receive full cooperation credit, suggesting that DOJ's new broader consideration of criminal and regulatory history may not negatively impact a company's settlement if the prior conduct is sufficiently removed in time and subject matter," Holtmeier said.

"On a general note, the decision regarding the appointment of a monitor says more about what the authority expects from the company in the future, than from what happened in the past," observed Eloy Rizzo Neto, a partner at Demarest in São Paulo.

Perhaps frequent offenders can rest a bit more easily.

See "How the Revised Monaco Memo Alters Deal Making and Strategy" (Oct. 12, 2022); and "A PR Blitz as DOJ Fine-Tunes Its Corporate Enforcement Policies" (Sep. 28, 2022).

No Monitor, but Post-Deal Self-Reporting

As part of its DPA (page 54, or D-1), Honeywell has to submit several reports addressing ıce program reviews. It also has to submit a work plan for the reviews to the DOJ.

The compliance reporting is applicable to both Honeywell UOP and Honeywell International. "The DOJ is in essence indirectly (as they rely on reports prepared by the companies) supervising both Companies' compliance programs for the term of the DPA, especially their ability to prevent future misconduct," Rizzo said.

Nevertheless, "the choice for this supervision, instead of the appointment of an independent monitor may suggest the recognition, by the DOJ, of the Company's capacity to properly review and test its compliance program on its own," Rizzo said.

The DOJ "has regularly required self-reporting by companies subject to DPAs and NPAs where no monitor has been imposed," Holtmeier noted. "This allows the DOJ to assess a company's compliance with its post-resolution obligations without requiring the more intrusive step of a monitor," he continued.

In contrast, the SEC "is much less consistent in determining whether to require post-resolution reporting," Holtmeier said. "It did not require it here," he noted.