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DOJ FCPA Corporate Enforcement Policy

Deciphering Mixed Signals: The Impact of ABB Ltd.'s (Third) FCPA Resolution

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On December 2, 2022, the Swiss-based global technology company ABB Ltd. (ABB) entered into a three-year deferred prosecution agreement (DPA) and agreed to pay over \$315 million in criminal penalties in connection with violations of the FCPA. ABB subsidiaries ABB Management Services Ltd. and ABB South Africa (Pty) Ltd. have each pleaded guilty of conspiracy to violate the anti-bribery provisions of the FCPA.

The DOJ's action is part of a coordinated global settlement that includes the SEC and government authorities in South Africa, Switzerland, and Germany. In the SEC's parallel case, ABB has agreed to pay \$75 million in civil penalties.

This ABB resolution is the first FCPA-related settlement in which United States' prosecutors publicly acknowledged coordinated efforts with South African authorities. This resolution also makes ABB the first and only corporate entity to be convicted of violating the FCPA three separate times. This is especially noteworthy because the terms of the DPA do not require the appointment of an independent compliance monitor—a common penalty imposed on recidivist corporations. In fact, Deputy Attorney General Lisa O. Monaco has been outspoken in her commitment to promote a shift towards incorporating more corporate monitors in criminal resolutions moving forward. Thus, in many respects, the ABB resolution confuses more than clarifies. Are corporate monitors back “en vogue” as recent DOJ policy pronouncements suggested? Or will corporate monitors be the exception and not the rule moving forward? And should we expect to see a continued expansion of the list of countries around the world, in particular emerging markets historically viewed as high-risk for corruption, that are willing to cooperate with U.S. authorities to prosecute corporate wrongdoing? If so, the compliance risk calculus for companies operating in Africa and elsewhere may need to change.

See [“ABB Settles With Multiple Authorities for Its Third FCPA Strike”](#) (Dec. 7, 2022).

The Bribery Scheme

In 2007, the South African government authorized the construction of the Kusile Power Station (Kusile), a coal-fired power plant in Witbank, South Africa. The Kusile is run by Eskom Holdings Limited (Eskom), a state-owned and controlled energy company. In 2013, after learning of the potential for obtaining lucrative engineering contracts for the construction of Kusile, ABB created a “Capture Team” staffed by its corporate executives to develop a strategy for securing said contracts.

In 2014, a South African government official (South African Official) employed at Eskom introduced a subcontractor executive (Subcontractor 1), a South African citizen, to an ABB executive on the Capture Team. This introduction ultimately led to a business relationship between ABB and Subcontractor 1, whose primary involvement included bribing Eskom executives who, in return, would provide confidential, internal Eskom information used by ABB to help it secure Eskom’s contracts.

The plan worked. On March 10, 2015, Eskom awarded its engineering contract to ABB-South Africa for approximately \$160 million. In addition, on May 13, 2015, ABB-South Africa signed its subcontract with Subcontractor 1 for approximately \$7.2 million. Under the subcontract, ABB-South Africa made an advance payment to Subcontractor 1 for around \$720,000, “despite knowing it was intended to reach [South African Official] thereby bypassing various internal processes and financial controls” *In re Abb Ltd.*, [Exchange Act Release No. 96444](#) (Dec. 3, 2022) (SEC Order) ; *United States v. ABB South Africa (Pty) Ltd.*, No. 1:22-CR-222 (Plea Agreement, A-8) (E.D. Va. Dec. 2, 2022) (listing the advance payment as \$798,000).

In October 2015, the Capture Team, at the suggestion of South African Official, developed a relationship with a different subcontractor executive (“Subcontractor 2”) who was “an individual closely connected with a close personal friend of [South African Official],” according to the SEC Order.

According to ABB’s Plea Agreement with the DOJ, ABB-South Africa employed Subcontractor 2 as an ABB subcontractor for the Kusile project despite “Subcontractor 2 fail[ing] multiple aspects of ABB’s routine diligence, raising questions among ABB personnel based in South Africa and the United States about Subcontractor 2’s qualifications and financial stability.”

The parties later carried out “variation orders,” which were additional work contracts meant to inflate the costs of ABB’s work on the Kusile project. Payments to Subcontractor 2 were intended to benefit South African Officials. Ultimately, as discussed below, the scheme was uncovered through a mixture of disclosure, cooperation and investigative journalism.

ABB’s Past Conduct

Notably, this is not the first—or even the second—time ABB has been charged with violating the FCPA. In 2004, ABB’s U.S. and United Kingdom-sub-sidiaries [pleaded guilty](#) to violations of the FCPA.

The charges involved bribery to Nigerian, Angolan, and Kazakhstan government officials. Criminal and civil penalties stemming from these enforcement actions totaled over \$16 million.

In 2010, **ABB entered into a DPA** for violating the anti-bribery provisions of the FCPA and for conspiracy to violate the anti-bribery provisions of the FCPA. ABB's deferred prosecution agreement included guilty pleas from its U.S. and Jordan-based subsidiaries for FCPA violations for bribes and kickbacks to government officials in Mexico and Iraq. Criminal and civil penalties stemming from these violations totaled over \$58.3 million.

Apparent Conflicts Between the Monaco Memos and the Most Recent ABB Ltd. Settlement

On October 28, 2021, Deputy Attorney General Monaco released a Memorandum (the 2021 Memorandum) announcing broad policy shifts within the DOJ strengthening corporate enforcement policies and prosecution efforts of corporate criminal conduct. The 2021 Memorandum addressed four major changes to department policy: 1) the creation of a Corporate Crime Advisory Group; 2) a renewed emphasis on considerations into corporate recidivism; 3) the need for full corporate disclosure about the individuals responsible for any misconduct; and 4) revisions to corporate monitorship guidance.

On September 15, 2022, Deputy Attorney General Monaco issued a second Memorandum (the 2022 Memorandum) on additional revisions to the DOJ's policies for prosecuting corporate crime based on the Corporate Crime Advisory Group's review of the DOJ's current corporate enforcement efforts. In it, Deputy Attorney General Monaco expanded upon many of the departmental policy changes, including how a corporation's criminal history will be evaluated and what factors will be considered when determining if an independent compliance monitor should be imposed.

See "[Revised Monaco Memo Affects Compensation, Clawbacks and Monitorships](#)" (Oct. 26, 2022).

No Monitor Despite Recidivism

The 2022 Memorandum explained that "not all instances of prior misconduct . . . are equally relevant or probative." As such, the DOJ will more strongly "disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company." Although the consideration of all prior misconduct could possibly chill a company's desire to self-report a relatively small or minor infraction, the 2022 Memorandum clarified that "nothing in [the Memorandum] should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the [DOJ]."

Indeed, in her September 15, 2022, Remarks on Corporate Criminal Disclosure for New York University Law School's Program on Corporate Compliance and Enforcement, Deputy Attorney General Monaco declared that "for the first time ever," every DOJ "component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure."

Considering the DOJ's recent pronouncements of its strengthened stance against corporate recidivism and its renewed support for monitorship, the ABB resolution is surprising in that no monitor was imposed.

During Deputy Attorney General Monaco's Keynote Address at the American Bar Association's 36th National Institute on White Collar Crime, Deputy Attorney General Monaco explicitly signaled that "to the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance." In fact, Deputy Attorney General Monaco's 2021 Memorandum provided that "[w]here a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, [DOJ] attorneys should consider imposing a monitorship." Or "where a corporation's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary."

To the benefit of transnational corporations, Deputy Attorney General Monaco's 2022 Memorandum greatly expanded upon this guidance. The Memorandum clarified that "the [DOJ] will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of the resolution, it also demonstrates that it has implemented and tested an effective compliance program." Further on, the 2022 Memorandum set forth ten non-exhaustive factors for the DOJ to consider when assessing whether a compliance monitor should be appointed as part of the resolution of a corporate criminal matter. The factors underscored voluntary self-disclosure, tested compliance programs, and the pervasiveness of the offending or re-offending conduct.

See "[How the Revised Monaco Memo Alters Deal Making and Strategy](#)" (Oct. 12, 2022).

The Factors in ABB

According to the DOJ's December 2, 2022, press release concerning ABB's third FCPA resolution, the factors warranting ABB's lenient resolution included:

- "ABB's *demonstrated intent to disclose the misconduct promptly to the department,*"
- "ABB's extraordinary cooperation with the department's investigation,"
- "ABB's extensive remediation, including carrying out a root-cause analysis of the misconduct and making significant investments in compliance personnel, compliance testing, and monitoring through the organization,"
- "ABB's commitment to further enhance its compliance program and internal controls, including enhanced reporting provisions that require ABB, during the pendency of the DPA, to meet with the department at least quarterly and to submit yearly reports regarding the status of its remediation efforts, the results of its testing of its compliance program, and its proposals to ensure that its compliance program is reasonably designed, implemented, and enforced, so

that it is effective in deterring and detecting violations of the FCPA and other applicable anti-corruption laws,”

- “ABB’s agreement to concurrently resolve separate investigations by authorities in South Africa and Switzerland, as well as the SEC, and its anticipated resolution of a related investigation by German authorities,” and “ABB’s agreement to continue to cooperate with the department in ongoing investigations.”

ABB’s Plea Agreement with the DOJ revealed that ABB received no “voluntary disclosure credit . . . because they did not voluntarily and timely disclose to the Offices the conduct described.” Notably, the Plea Agreement explained that “within a very short time of learning of the misconduct, the Parent Company contacted the Fraud Section [of the DOJ] and scheduled a meeting to discuss matters under investigation by the Fraud Section and the Parent Company.” While not entirely transparent, the Plea Agreement does reveal that ABB failed to beat out a published “media report” that illuminated the bribery scheme to the extent that the DOJ no longer required full disclosure to prosecute.

ABB did, however, receive “full credit for their extraordinary cooperation with the Offices’ investigation” because they “promptly provid[ed] information obtained through its internal investigation,” “[made] regular and detailed factual presentations to the Offices.” They also: 1) “voluntarily [made] foreign-based employees available for interviews in the United States;”; 2) “produc[ed] relevant documents located outside the United States to the Offices in ways that did not implicate foreign data privacy laws;”; and 3) “collect[ed], analyz[ed], and organiz[ed] voluminous evidence and information that it provided to the Offices.”

The importance of “cooperation” is all the more clear following Assistant Attorney General Kenneth A. Polite’s January 17, 2023, Remarks at Georgetown University Law School. Helpfully, Assistant Attorney General Polite outlined several concrete examples of what “extraordinary” cooperation may require, such as “when an individual begins to cooperate immediately, and consistently tells the truth; individuals who allow us to obtain evidence we otherwise couldn’t get, like quickly obtaining and imaging their electronic devices, or having recorded conversations; [and] cooperation that produces results, like testifying at a trial or providing information that leads to additional convictions.”

See “[Corporate Enforcement Policy Revisions: A More Amenable DOJ Looks to Negotiate](#)” (Feb. 1, 2023).

New Insight on Application of DOJ Policy and Discretion

From all of this, interested parties can take away new insights concerning the DOJ’s prosecutorial discretion and their approach to corporate recidivists.

For one, independent compliance monitors will not in fact always be imposed against an offending (or reoffending) corporation. The extent to which the ABB resolution is a one-off or becomes a predictable DOJ practice remains to be seen; however, corporations operating in high-risk jurisdictions

or high-risk industries should follow ABB's playbook of "prompt" disclosure and "extraordinary" cooperation (DOJ's words, not ours).

In addition, transnational corporations must understand the significance of conducting their root-cause analysis and remedial measures well before settlement discussions with any involved enforcement agency so that there is sufficient time to build, implement, and test new control framework. In high-risk jurisdictions, corporations must assure continuous monitoring of payments from and to government and state-owned entities. As can be seen from the language of ABB's DPA, significant weight will be awarded to voluntary self-disclosure, even if it is not made simultaneous to discovery. Clearly, there is a reason "timely disclosure" is the first policy revision listed in the 2022 Memorandum. It is no coincidence that the first factor warranting ABB's lenient resolution was ABB's prompt intent to disclose its uncovered misconduct.

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

Looking Forward: A Potential Paradigm Shift for Anti-Corruption Efforts on the African Continent

Finally, it is notable that the ABB settlement is the first FCPA-related settlement in which United States prosecutors have expressly credited coordinated efforts with South African authorities. The ABB resolution could possibly indicate a shift in enforcement efforts in South Africa and the larger African continent.

This is especially likely following the DOJ's agreement to credit up to one-half of the \$315 million criminal penalty against amounts the company pays to authorities in South Africa in related proceedings—an enormous sum in comparison to the budgets of many developing nations. Such an outcome likely will encourage foreign governments and foreign regulatory authorities to act more decisively against allegations of corruption and bribery within their borders and to cooperate in future FCPA-related investigations led by U.S. authorities.

Furthermore, in the ABB matter, South African authorities chose to bring corruption charges against the South African Official involved. This shift illustrates a potentially welcoming change to South Africa's stance against corruption and bribery by prosecuting the demand side of corruption, the corrupt officials, not just the supply side, multinational corporations. Moreover, the ABB matter comes on the heels of South Africa's National Prosecuting [Authority's decision to bring criminal charges](#) against the South African branch of McKinsey & Company for bribery and corruption.

If this pattern continues, we will likely continue to see an increase of anti-corruption enforcement efforts from local regulators and law enforcement not only in South Africa, but also across the African continent.

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