Anti-Corruption Report
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INTERNAL INVESTIGATIONS

Five Considerations in Cross-Border Anti-Corruption Matters

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The FCPA recently celebrated its 40th birthday. For most of those four decades, the United States has dominated international anti-corruption enforcement, however, new global players and partners are emerging: the U.K., France and Brazil have become key partners with the United States on anti-corruption actions. That is continuing – in fact, just this summer, Honeywell International Inc. announced that both the United States and Brazil are investigating the company for potential FCPA violations.

Beyond just partnering with the U.S., nations around the world are developing and strengthening their own enforcement mechanisms. This is creating new dynamics for anti-corruption enforcement, with the potential for both complementary and conflicting overlap. This article discusses five growing trends to consider in the area of cross-border anti-corruption investigations and actions.

See "Piling On? Examining the Reality of Multi-Jurisdictional FCPA Resolutions" (Jul. 11, 2018).

1) New Tools and More Cooperation

Players in the international anti-corruption landscape are looking to the United States both for cooperation and as a model for developing their own anti-corruption regimes.

DPAs in the U.K.

In a keynote address at last year's International Conference on the Foreign Corrupt Practices Act in Washington, D.C., the director of the U.K.'s Serious Fraud Office (SFO), Lisa Osofsky, highlighted the U.K.'s developments in anti-corruption enforcement, particularly, the U.K. Bribery Act of 2010. She specifically noted that the SFO was beginning to use deferred prosecution agreements (DPAs) to resolve U.K. corruption actions.

Since DPAs were introduced in the United Kingdom in 2014, the SFO has secured at least four such agreements, which have yielded more than $837 million (£670 million) in penalties. In 2018, the SFO announced the end of the U.K.'s first DPA, confirming that Standard Bank PLC (now known as ICBC Standard Bank PLC) had fully complied with its terms, which included $26 million in fines and disgorgement of profits.

See "Osofsky's American Dream for the SFO" (Feb. 20, 2019).

Rolls-Royce Case Reveals Tripartite Cooperation

The U.K.'s introduction of these enforcement tools complements its cross-border cooperation with the United States. In 2017, Rolls-Royce plc, the U.K.-based manufacturer and distributor of power systems for the aerospace, defense, marine and energy sectors, agreed to pay the United States nearly $170 million as part of an $800-million global resolution of investigations by the DOJ and U.K. and Brazilian authorities into allegations of a long-running scheme to bribe government officials in exchange for government contracts.

As part of the company's resolution with the U.K.'s SFO, Rolls-Royce entered into a DPA and admitted to paying additional bribes or failing to prevent bribery payments in connection with Rolls-Royce's business operations in China, India, Indonesia, Malaysia, Nigeria, Russia and Thailand between approximately 1989 and 2013. Rolls-Royce ultimately agreed to pay a total fine of $604,808,392 (£497,252,645).

In its agreement with Brazilian authorities, Rolls-Royce also agreed to pay a penalty of approximately $25,579,170, for the company's role in a conspiracy to bribe foreign officials in Brazil between 2005 and 2008. Per the DOJ, because the conduct underlying the Brazilian resolution overlapped the conduct underlying part of the DOJ resolution, the DOJ credited the $25,579,170 that Rolls-Royce agreed to pay in Brazil against the total fine in the United States. Therefore, the total amount due to the United States was $169,917,710, and the total amount of penalties that Rolls-Royce agreed to pay was more than $800 million.

See "SFO's de Silva Talks International Cooperation Logistics" (Jun. 12, 2019).

French Reforms and Cooperation

France, too, has attempted to bolster anti-corruption enforcement, specifically, with the anti-corruption law known as "Sapin II" enacted in December 2016 (and named for former French Finance Minister Michel Sapin). According to reports, France introduced Sapin II to bolster the ability of the French Parquet National Financier (PNF) and the (new) Agence Française Anticorruption (AFA) to prosecute corruption. For example, for the first time in France, Sapin II authorizes the PNF (like its American counterparts) to grant DPAs (*Convention judiciaire d'intérêt public*).

Following these reforms, in June 2018 France and the United States achieved their first coordinated resolution in a foreign bribery case. Global French-based financial services institution Société Générale S.A. (Société Générale) and its wholly owned U.S. subsidiary, SGA Société Générale Acceptance N.V., agreed to pay a combined total penalty of more than $860 million to resolve charges with criminal authorities in the United States and France. This includes $585 million relating to a multiyear scheme to pay bribes to officials in Libya and $275 million for violations arising from its manipulation of the London Interbank Offered Rate (LIBOR).

Moreover, SGA Société Générale Acceptance N.V. agreed to plead guilty in the Eastern District of New York in connection with the resolution of the foreign bribery case. Together with approximately $475 million in regulatory penalties and disgorgement that Société Générale has agreed to pay to the Commodity Futures Trading Commission in connection

with the LIBOR scheme, the total penalties to be paid by the bank exceed $1 billion. Société Générale also reached a settlement with the PNF in Paris relating to the Libya corruption scheme – the United States will credit the $292,776,444 that Société Générale will pay to the PNF under its agreement, amounting to 50 percent of the total criminal penalty otherwise payable to the United States.

See "What SocGen and Legg Mason Say About French and American Enforcement" (Jul. 11, 2018).

2) Cross-Border Double Jeopardy Concerns

Entities subject to enforcement actions in one jurisdiction should recognize that they might also be subject to additional enforcement actions in other jurisdictions based on the same alleged conduct. As we have discussed in a previous article, the Fifth Circuit's 2010 holding in *United States v. Jeong* is particularly illustrative. In *Jeong*, the defendant, a South Korean national, was convicted and sentenced in a South Korean court for bribing a U.S. public official. Subsequently, the defendant was indicted in the United States for the same underlying conduct. The court held that the United States' and South Korea's membership in the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions did not prohibit the defendant from prosecution in multiple nation-states for the same underlying acts. In essence, the defendant received no cross-border protection against double jeopardy.

Notwithstanding *Jeong*, double jeopardy protections may drive other cross-border resolutions. For example, in 2011, the U.K.'s SFO issued a press release stating that it declined to criminally prosecute DePuy Inc., a subsidiary of Johnson & Johnson, "by the principles of double jeopardy" because the DOJ had already entered into a DPA with the company. Nevertheless, the SFO did enter civil fines against the company.

See "Is the Pie Getting Bigger? Double Jeopardy in the Age of International Cooperation" (Sep. 5, 2018).

3) Cross-Border Financial Implications

Cross-border cases have certain financial implications of which practitioners and their clients should take note. For example, the DOJ has credited corporations for fines they pay to foreign governments that have cooperated with the United States in their related matters. In the 2017 matter discussed above, because the conduct underlying the Brazilian resolution overlapped the conduct underlying part of the DOJ's resolution, the DOJ credited the $25.6 million that Rolls-Royce agreed to pay in Brazil and it credited the $292,776,444 that Société Générale will pay to the PNF under its agreement, equal to 50 percent of the total criminal penalty otherwise payable to the United States.

The multi-jurisdictional cases against Siemens executives also help demonstrate, in part, some additional cost implications. In 2011, the United States indicted eight former executives and agents of Siemens under the FCPA for their alleged role in a scheme to bribe Argentinian

officials. Media reports suggested that at least three of these individuals collectively faced nearly $2 million in fines and other penalties in the United States. Those three individuals, along with others charged in the United States, were also separately charged in 2013 by the Argentinian government. Along with substantial civil monetary penalties in the United States, some of these individuals also faced criminal charges in Argentina.

See "Former Siemens Executives Receive Record-Breaking Individual FCPA Fines in Default Judgment" (Feb. 19, 2014).

4) Cross-Border Monitorships

As cross-border enforcement actions evolve, practitioners should be aware of the increased potential for international corporate monitors. For example, in 2010, Innospec Inc. pleaded guilty to defrauding the United Nations, violating the FCPA and violating the U.S. embargo against Cuba. The case was a coordinated global enforcement action by the DOJ, the SEC and the U.K.'s SFO (among other agencies). As part of its plea agreement with the DOJ, Innospec agreed to retain an independent compliance monitor to oversee the implementation of an anti-corruption and export control compliance program and that monitor reported to both U.S. and U.K. authorities.

Likewise, as part of the global Société Générale resolution, the United States contemplated a DOJ-appointed monitor. However, reports suggest that the DOJ declined to appoint a monitor because the French government had already enforced its own, ongoing monitoring.

See "Adelle Elia of LBI Offers Insights on Working Effectively With a Monitor" (Jul. 24, 2019).

5) Cross-Border Privilege and Privacy Complexities

When an investigation crosses borders, there is an extra layer of complexity to document collection and review, particularly because of privilege and privacy concerns. What may otherwise be privileged information in the United States may not receive the same protections in other countries. In 2017, for example, German authorities raided the German office of U.S.-based law firm Jones Day, which was conducting an internal investigation in Germany for Volkswagen. Applying Germany's attorney-client privilege laws, a German court upheld the constitutionality of the raid and ruled that German investigators could review the seized files.

Similarly, privacy laws vary among nation states – sometimes presenting conflicts regarding the information that companies may retain. For example, while certain U.S. laws require companies to retain specific records and customer/client data for several years, the GDPR in Europe provides that certain customer/client data must be erased from company files within months of receipt. Such conflicts may complicate the degree to which a target company's information may be retained in the course of a cross-border, multi-jurisdictional enforcement matter.

Practitioners should note differences in privilege and privacy standards, which may potentially affect cross-border investigations. See "How Will the GDPR Affect Due Diligence?" (Mar. 21, 2018).

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