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Businesses Become Easy Targets in Carbon Copy Prosecutions for Corruption Violations

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Imagine this nightmare scenario. You have just resolved corruption allegations with your home country's authorities. Weary from pouring through financial records, haggling over exorbitant penalties, and even firing close colleagues, you are glad to put the issue behind you. However, the very next day, you are notified that another country is launching an investigation for the same acts. Even worse, the authorities in the new investigation are partnering with your home country's prosecutors to share their investigative findings. Wish you could wake up? So did Total SA and Ralph Lauren[1] when they found themselves parties in "carbon copy prosecutions" - successive prosecutions in multiple jurisdictions arising out of the same factual basis[2].

Under international pressures to improve anti-corruption enforcement, national authorities view previously-prosecuted companies as easy targets. Simply by perusing the US Securities and Exchange Commission's (SEC's) and US Department of Justice's (DOJ's) web-accessible investigation announcements or by utilising information sharing agreements, resource-strapped agencies can launch investigations then extract substantial fines. This growing trend of carbon copy prosecutions has subjected companies to massive liability.

Anti-Corruption Laws on the Rise

A. International Organisations' Influence

The number of countries that have pledged to enact anti-corruption legislation has sky-rocketed in the past fifteen years. Originally signed by 29 countries in 1997[3], the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention now includes 40 parties[4] that represent roughly 80% of global exports.[5] Each of these countries has committed to implementing the OECD's rigorous anti-corruption standards, which resemble the terms of the US's Foreign Corrupt Practices Act (FCPA). Furthermore, the OECD Convention created the Working Group on Bribery, which calls for a rigorous peer review process. This group's publicised country evaluations have spurred countries to adhere to the Convention's high standards.

Additionally, in 2003, 167 parties adopted the UN Convention Against Corruption (UNCAC), which requires members to enact anti-corruption laws.[6] In 2009, the parties to UNCAC created the Implementation Review Group to evaluate countries' anti-corruption efforts and prescribe reforms.[7] Since then some of the largest countries in the world have passed strict anti-corruption legislation, including Brazil, Russia, China, India, and the UK.

B. Increased Enforcement

Not only are more countries adopting anti-corruption legislation, but there has been an increase in the number of countries actually enforcing their provisions. While according to TRACE International, the US is still the world-leader in corruption prosecutions, fifteen countries enforced their anticorruption laws against foreign companies for the first time in 2012.[8]

Greater Coordination for Anti-Corruption

C. International Organisations

In addition to increased enactment and enforcement of anti-corruption laws, increased coordination of corruption enforcement agencies has eased bringing carbon copy prosecutions. The OAS Treaty of 1996 called for members to allow extradition of bribe-taking officials and not to invoke bank secrecy laws as other nations investigated bribery allegations. Additionally, OECD's Working Group on Bribery has identified cross-border information sharing in bribery investigations as a key area for improvement for OECD members.[9] Similarly, UNCAC calls for members to exchange information, personnel, and technical assistance in corruption investigations.[10]

Multilateral development banks (MDBs) have also undertaken initiatives for cross-border information sharing to fight corruption. The World Bank, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank each have internal procedures calling for referring corruption investigation results to affected governments. Moreover, as the leading MDB to investigate corruption, World Bank leaders are advocating for procedures to prod national authorities into investigating their case referrals. Such procedures may include direct contacts with national law enforcement agencies, publicising when referrals are sent, and even suspending funding to countries that do not prosecute World Bank referrals.

D. The US's Role

The US has used these international investigation agreements to exchange information with foreign agencies. In addition to OECD and UNCAC directives, the SEC is party to several bilateral agreements and memoranda of understanding (MOUs) with nations to coordinate securities enforcement and anti-corruption efforts. Additionally, Section 21(a)(2) of the Securities Exchange Act of 1934, allows the SEC to investigate claims, share information, and compel document production on behalf of foreign securities agencies even if they have no preexisting agreement. The SEC may provide such assistance even if the person or entity is not regulated by the SEC and their actions would not violate US laws.[11]

Similarly, the DOJ has utilised several mutual legal assistance treaties (MLATs) with other countries to share information. While these treaties vary with each country, most of them provide for reciprocal information sharing as well as permission to pass the information on to other regulatory agencies like the SEC, production of documents, searches, and service of process.

US authorities have both given and received information through this cross-border investigatory network. For example, while France has not historically prosecuted corruption charges, French and American authorities have worked together since 2006 to investigate Total.[12] On 29 May 2013, the SEC and DOJ announced a Deferred Prosecution Agreement (DPA) with Total and acknowledged the assistance of French regulators.[13] On the same day, French authorities announced an investigation of Total based on the same corruption allegations and stated that they would seek information obtained by American agencies.[14] In addition to the information exchanged in the joint investigation, France and the US have a long-standing MLAT through which French authorities can obtain additional information.[15]

Even without participating in the investigation, some governments will launch an investigation after US agencies release their findings. For example, on April 22, 2013, the DOJ announced a Non-Prosecution Agreement (NPA) with Ralph Lauren for bribery in Argentina.[16] The next day, Argentine authorities announced that they were launching an investigation into the same matter,

which is still on-going.[17] Like France, Argentina has an MLAT with the US and has expressed that they will use the agreement to obtain information from the SEC and DOJ. [18]

Addressing Carbon Copy Prosecutions

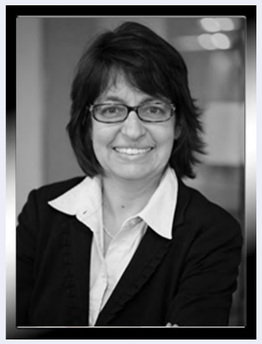
Although there are pitfalls with involving too many countries in an international corruption investigation, the best strategy to try to avoid carbon copy prosecutions is likely for companies facing anti-corruption issues in different countries to try to reach a universal settlement amongst all the jurisdictions. This has been occurring more and more frequently. For example, in 2010 Innospec negotiated a $40.2 million global settlement with the US and the UK, which was reduced from over $100 million due to Innospec's precarious financial condition.[19] Likewise, BAE Systems agreed to pay over $400 million in 2010 to the US and the UK,[20] and Johnson & Johnson agreed to a $77 million global settlement in 2011 with the US and UK. [21]

However, differences in corruption laws and prosecution procedures complicate arranging a global settlement. For example, in the US, self-disclosure of misconduct can substantially reduce FCPA penalties.[22] However, in the UK, newly appointed SFO Director David Green revised the Bribery Act Guidance to grant fewer benefits for self-reporting companies.[23] Additionally, while a negotiated resolution in one jurisdiction may not involve prosecution of individuals, carbon copy prosecutions may pursue executives involved in the corrupt acts. For example, even though there have been no individual prosecutions of Total executives in the US, French authorities have stated that they will pursue charges against Total executives.[24]

In order to navigate the challenges of negotiating a global settlement, companies are well advised to apprise themselves of the various anti-corruption laws that may have been triggered by their actions.[25] Companies should then seek to understand each interested government's treatment of self-disclosure and cooperation as well as identify which countries have information sharing agreements.[26] Next, companies should develop a strategy to ensure simultaneous self-disclosure.[27] Lastly, in negotiating resolutions, companies must determine whether they should include more countries in the settlement negotiations or leave them out and run the risk of a carbon copy prosecution.[28]

Conclusion

Carbon copy prosecutions are a growing threat to global businesses. As pressures to increase corruption prosecution and integrate cross-border investigations grow, enforcement agencies are taking aim at previously prosecuted companies. While cooperation with authorities was enough to mitigate liability in the past, companies must now develop complex strategies for how to best cope with prosecutions in multiple countries and undertake the delicate task of negotiating a global settlement to bring finality to the corruption allegations.



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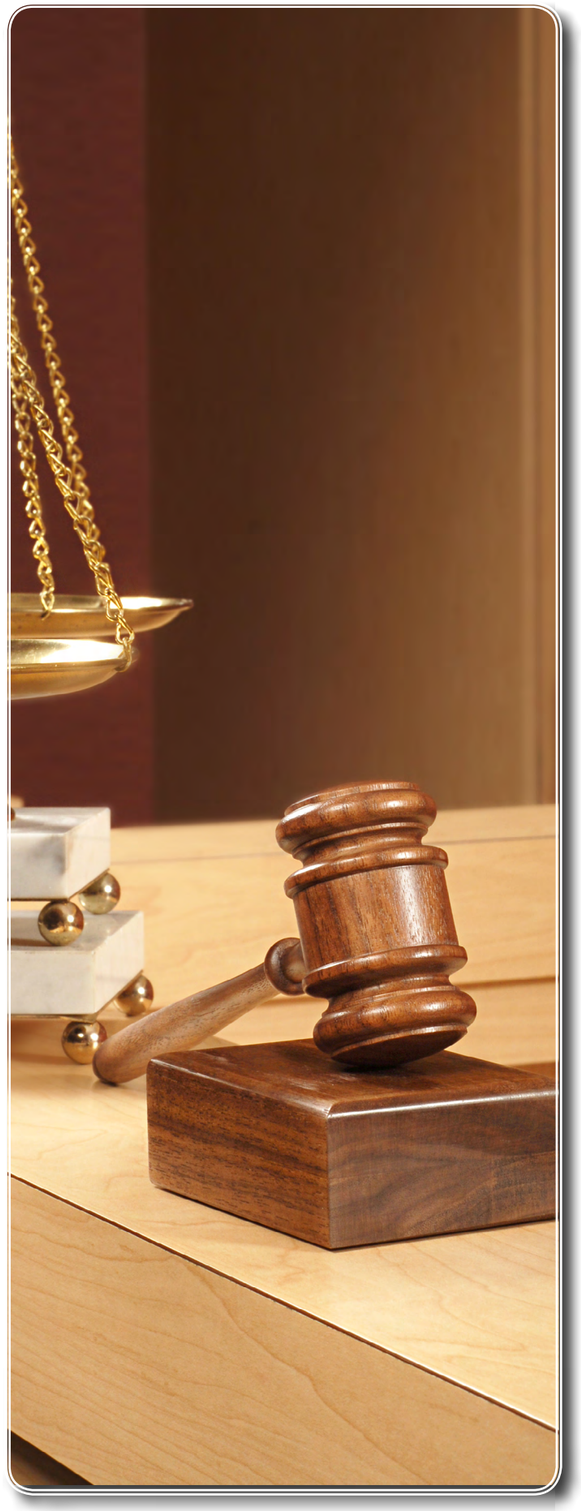

1 - For more information on the US investigation of Ralph Lauren, see Arnold & Porter LLP, SEC Enters into First FCPA Non-Prosecution Agreement (April 2013), http://www.arnoldporter.com/resources/documents/ADV413SecEntersIntoFirstFcpaNonProsecutionAgreement.pdf

2 - Andrew S. Boutros & T. Markus Funk, "Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in A Shrinking World, 2012 U. CHI. LEGAL F. 259, 269 (2012) (Boutros & Funk Article).

3 - Nicholas Bray, OECD Ministers Agree to Ban Bribery as a Means for Companies to Win Business, WALL ST. J. May 27, 1997, at A2.

4 - OECD Working Group on Bribery, Annual Report 2013, http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf

5 - OECD Working Group on Bribery, Annual Report 2011, http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2011.pdf

6 - U.N. General Assembly, United Nations Convention Against Corruption, A/58/422 (October 31, 2003), available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

7 - Mechanism for the Review of Implementation of the United Nations Convention Against Corruption, United NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CAC/IRG.html (last visited June 20, 2013).

8 - Trace, Global Enforcement Report 2012, https://s3.amazonaws.com/salesforce.traceinternational.org/html/pdf/GER_2012_Final.pdf

9 - OECD Annual Report 2013, supra note 4, at 4.
10 - UN Convention Against Corruption, supra note 6, at 40, 51.

11 - International Enforcement Assistance, SEC, http://www.sec.gov/about/offices/oia/oia_crossborder.shtml (last visited June 20, 2013).

12 - Christopher M. Matthews, Total SA Reserves €316 Million for FCPA Settlement, WALL ST. J., Aug. 3, 2012, http://blogs.wsj.com/corruption-currents/2012/08/03/total-sa-reserves-e316-million-for-fcpa-settlement/

13 - SEC, SEC Charges Total S.A. for Illegal Payments to Iranian Official, May 29, 2013, http://www.sec.gov/news/press/2013/2013-94.htm

14 - Tom Schoenberg & Tara Patel, Total Ends U.S. Bribe Probe as France Seeks CEO Charges, BLOOMBERG, May 29, 2013, http://www.bloomberg.com/news/2013-05-29/total-agrees-to-pay-398-million-to-settle-u-s-bribe-probe-1-.html; Matthew Saltmarsh, Paris Prosecutor Investigating French Oil Firm, NY TIMES, April 6, 2010, http://www.nytimes.com/2010/04/07/business/global/07iht-total.html?_r=0; Geraldine Amiel & Joe Palazzolo, Prosecutor Recommends Corruption Trial for Total, CEO, WALL ST. J., May 29, 2013, http://online.wsj.com/article/SB10001424127887324682204578513230302339730.html

15 - Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Dec. 10, 1998, http://www.state.gov/documents/organization/121413.pdf

16 - DOJ, Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty, April 22, 2013, http://www.justice.gov/opa/pr/2013/April/13-crm-456.html

17 - Ricardo Etchegaray, Escandalo Ralph Lauren: citan a declarar al titular de la AFIP, FORTUNAWEB, May 7, 2013, http://fortunaweb.com.ar/2013-05-07-121043-escandalo-ralph-lauren-citan-a-declarar-al-titular-de-la-afip/.
18 - Caso Ralph Lauren: ahora la AFIP pide a EE.UU. que de los nombres de los sobornados, POLITICA, April 23, 2013, http://www.clarin.com/politica/Caso-Ralph-Lauren-AFIP-EEUU_0_906509523.html; Alfredo Sainz, La AFIP Denuncio a Ralph Lauren, LANACION.COM, April 24, 2013, http://www.lanacion.com.ar/1575686-la-afip-denuncio-a-ralph-lauren.

19 - Sentencing Memo., United States v. Innospec Inc., No. 1:10-cr-00061 (D.D.C. 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/innospec-inc.html

20 - BAE, BAE Systems PLC. Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office, Feb. 5, 2010, http://www.baesystems.com/article/BAES_026388/bae-systems-plc-announces-global-settlement-with-united-states-department-of-justice-and-united-kingdom-serious-fraud-office?_afrLoop=4091147877880000&_afrWindowMode=0&_afrWindowId=null&baeSessionId=yJHtRQGQ1yhHBsR1JKyhjBFtnSS7b1ZTS8lvn2Qk2yjLL8nhj2v7!1889691659#%40%3F_afrWindowId%3Dnull%26baeSessionId%3DyJHtRQGQ1yhHBsR1JKyhjBFtnSS7b1ZTS8lvn2Qk2yjLL8nhj2v7%2521889691659%26_afrLoop%3D4091147877880000%26_afrWindowMode%3D0%26_adf.ctrl-state%3Djscj6indw_4

21 - SFO, DePuy International Limited Ordered to Pay £4.829 million in Civil Recovery Order, April 8, 2011, http://www.foley.com/files/DePuy_SFO_Release_18apr11.pdf

22 - DOJ, A Resource Guide to the U.S. Foreign Corrupt Practices Acts, Nov. 2012, http://www.justice.gov/criminal/fraud/fcpa/guide.pdf

23 - Samuel Rubenfeld, SFO Tightens Self-Reporting Rules in Revised Bribery Act Guidance, WALL ST. J., Oct. 9, 2012, http://blogs.wsj.com/corruption-currents/2012/10/09/sfo-tightens-self-reporting-rules-in-revised-bribery-act-guidance

24 - Tom Schoenberg & Tara Patel, Total Ends U.S. Bribe Probe as France Seeks CEO Charges, BLOOMBERG, May 29, 2013, http://www.bloomberg.com/news/2013-05-29/total-agrees-to-pay-398-million-to-settle-u-s-bribe-probe-1-.html

25 - Boutros & Funk Article, supra note 1.

26 - Id.

27 - Id.

28 - Claudius O. Sokenu, Securities Regulations & Law, 43 BNA 12 (2011), available at http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_SecuritiesRegulation&LawReport_032111.pdf