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Damage Control: The Impact of Cooperation and Remediation on FCPA Settlements

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This article reviews recent Foreign Corrupt Practices Act settlements.

The last six months have been a busy time for the regulators charged with enforcing the Foreign Corrupt Practices Act ("FCPA"). The United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") brought enforcement actions against six companies (and certain of their subsidiaries), resulting in almost $700 million in criminal fines, civil monetary penalties, and disgorgement. Two actions resolved in 2013 resulted in sanctions that rank among the top 10 in the history of FCPA enforcement: Total S.A.'s $398 million settlement now ranks fourth, and Weatherford International's $152.6 million now ranks tenth. The trend toward big cases continued in the New Year — Alcoa, Inc.'s ("Alcoa") $384 million settlement, announced in January 2014, was the fifth largest ever.

Meanwhile, U.S. enforcement authorities continue their public drumbeat that vigorous enforcement of the FCPA is here to stay. On November 19, 2013, Charles Duross, then Deputy Chief of the Fraud Section of the

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DOJ's Criminal Division, told attendees at the International Conference on the FCPA that the DOJ expects to bring "very significant cases, top 10 quality type cases" in 2014.[1] In a keynote address at the same conference, Deputy Attorney General James Cole echoed Duross's prediction that the DOJ would be bringing more major FCPA cases.[2] And Andrew Ceresney, director of the SEC's Division of Enforcement, continued the theme when he reflected on the SEC's large increase in FCPA enforcement actions over the last 10 years. He concluded his remarks warning that the SEC "will remain the vigilant cop on the beat when it comes to the FCPA."[3]

FCPA settlements are the product of private negotiations between a company and enforcement authorities, so it often is difficult to discern fully the rationale underlying the settlement terms. Moreover, many FCPA investigations never come to light, perhaps because the company elected not to self-report, or the authorities quietly declined to enforce. The DOJ and the SEC nevertheless continue to focus on the importance of a company's cooperation with the government's investigation and the remedial measures the company takes in response to suspected wrongdoing, emphasizing that cooperation and remediation can impact significantly the ultimate resolution. As detailed below, recent cases appear to confirm the point — real cooperation and effective remediation will influence not only the size of the monetary penalties, but also whether the regulators will insist on a compliance monitor, and, if so, in what form.

ELEMENTS OF COOPERATION

As described in the FCPA Resource Guide published last year, the DOJ's Principles of Federal Prosecution of Business Organizations "recognize that resolution of corporate criminal cases by means other than indictment, including non-prosecution and deferred prosecution agreements, may be appropriate in certain circumstances."[4] Among the key factors to be considered when deciding whether to indict a company are "the corporation's willingness to cooperate in the investigation of its agents" and "the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies."[5] Moreover, "[w]hen calculating penalties

for violations of the FCPA, DOJ focuses its analysis on the U.S. Sentencing Guidelines," which envision reduced penalties for cooperation and remediation.[6] The DOJ this past year agreed to criminal fines discounted by approximately 30 percent from the bottom of the Guidelines range from three cooperating companies, and it agreed to fines at or close to the bottom of the Sentencing Guidelines for three other cooperating companies.

Cooperation and remediation also impacted the DOJ's decisions whether to impose an outside monitor. In 2013, the DOJ required compliance monitors in three of the last four FCPA enforcement actions that it resolved. In each case, the DOJ acknowledged the company's cooperation and agreed to a "hybrid" monitoring arrangement — an independent compliance monitor for half the term of the company's deferred prosecution agreement ("DPA") followed by self-reporting for the other half.

To be sure, full-term independent compliance monitors have not disappeared from the scene, and the DOJ still may require a monitor if it feels one is warranted. Total, for example, agreed to retain a compliance monitor for the full term of its three-year DPA.[7] Total's settlement was based on allegations that the company violated the FCPA by paying over $60 million in bribes to intermediaries of an Iranian official between 1995 and 2004.[8] The long duration of the scheme and large size of the bribes appears to have led the DOJ to conclude that the company's internal compliance program, standing alone, would be inadequate to prevent future misconduct, and that an outside monitor was necessary.

On the civil enforcement side, the SEC has set forth a framework for evaluating cooperation by companies in its so-called "Seaboard Report." As the FCPA Resource Guide summarizes, the Seaboard Report identifies four broad measures of cooperation:

1. self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
2. self-reporting of misconduct when it is discovered, including conducting a thorough review of the misconduct, and promptly disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;

3. remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct; and
4. cooperation with law enforcement authorities, including providing SEC staff with all information relevant to the underlying violations and the company's remedial efforts.

In January 2010, the SEC's Division of Enforcement announced its Cooperation Initiative, which expanded the range of options available in resolving enforcement matters. The Cooperation Initiative authorized the Staff of the SEC's Enforcement Division to use non-prosecution agreements ("NPAs") and DPAs to encourage greater cooperation in reporting securities law violations and assisting in investigations. The staff used this authority this past year, issuing its first NPA in an FCPA enforcement action.

RECENT ENFORCEMENT ACTIONS ILLUSTRATE THE CREDIT GIVEN FOR COOPERATION AND REMEDIATION

Recent cases tend to illustrate the benefits of cooperation and remediation.

Ralph Lauren Corp.

Ralph Lauren Corp.'s cooperation and its remedial efforts led to the first ever SEC NPA in an FCPA matter and $1.6 million in combined SEC and DOJ sanctions. In its press release announcing the settlement, the SEC heralded this NPA as an example of the "substantial and tangible" benefits that companies may earn through the SEC Enforcement Division's Cooperation Initiative.[9]

The SEC and DOJ investigations stemmed from allegations that, between 2005 and 2009, Ralph Lauren's subsidiary in Argentina ("RLC Argentina") paid bribes to government officials through a customs broker.[10] RLC Argentina employees had raised concerns about the customs broker in 2010 after reviewing a newly implemented Ralph Lauren worldwide FCPA policy. Ralph Lauren initiated an internal investigation of the allegations and, within two weeks of uncovering improper payments and gifts, self-reported its pre-

liminary findings to the SEC and DOJ.[11]

The SEC decided not to charge Ralph Lauren with FCPA violations, citing "the company's prompt reporting of the violations on its own initiative, the completeness of the information provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation."[12] Ralph Lauren's remedial efforts included implementing:

- an amended anticorruption policy and translation of the policy into eight languages;
- enhanced due diligence procedures for third parties;
- an enhanced commissions policy;
- an amended gift policy; and
- in-person anti-corruption training for certain employees.[13]

At a September 2013 conference sponsored by the American Bar Association, Kara Brockmeyer, Chief of the SEC Division of Enforcement FCPA unit, elaborated on the SEC's decision, saying that the NPA was intended to reward Ralph Lauren's cooperation and remediation. The SEC nevertheless had decided against declining an enforcement action, because Ralph Lauren did not have a pre-existing compliance program and because the alleged misconduct spanned multiple years.[14] Despite Ralph Lauren's lack of a pre-existing compliance program, the DOJ did not require compliance monitor, perhaps giving the company credit for its 2010 implementation of a global anti-corruption policy and subsequent internal investigation.

Alcoa

On January 8, 2014, a subsidiary of U.S.-based aluminum producer Alcoa, pleaded guilty in Pennsylvania federal court to violating the FCPA's anti-bribery provision. The subsidiary agreed to pay the DOJ $209 million in criminal fines and to forfeit $14 million to resolve charges that it paid millions of dollars in illicit payments to officials in the Kingdom of Bahrain through a middleman in London.[15] Alcoa agreed to pay the SEC an additional $161 million in disgorgement — $175 million less the $14 million

forfeiture to the DOJ — to resolve civil violations of the FCPA's anti-bribery, books and records, and internal controls provisions.[16]

Alcoa's settlement is the fifth largest of all time. Nevertheless, the criminal fine was less than half the bottom of the fine range under the Sentencing Guidelines ($446 million).[17] The DOJ explained that the substantial reduction was appropriate in light of factors including Alcoa's financial condition; the SEC's sanctions; and Alcoa's substantial cooperation with the DOJ, including making employees available for interviews and collecting, analyzing, and organizing information; and remedial efforts undertaken by Alcoa, including hiring new legal and ethics compliance officers and implementing enhanced due diligence reviews of third-party consultants.[18] The plea agreement did not contemplate imposing a monitor on the company, perhaps due to the company's enhanced remedial measures and compliance program.

Archer Daniels Midland Company

On December 20, 2013, the DOJ and the SEC announced the resolution of parallel enforcement actions against Archer Daniels Midland Company ("ADM"), a global food processor based in Decatur, Illinois, and a subsidiary involving allegations of FCPA violations.[19] The DOJ and the SEC alleged that, between 2002 and 2008, ADM subsidiaries paid roughly $22 million to two vendors to pass on bribes to Ukrainian government officials as part of a scheme to obtain over $100 million in value-added tax ("VAT") refunds, and that ADM failed to implement policies and procedures sufficient to prevent these bribes.

To settle the DOJ's charges, ADM's Ukrainian subsidiary, ACTI Ukraine, pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay a $17.8 million criminal fine.[20] The criminal fine reflects a $1.3 million deduction commensurate with the fine imposed by German authorities on ADM's German subsidiary, as well as an approximately 30 percent reduction from the bottom of the Sentencing Guidelines fine range, in recognition of ACTI Ukraine's "timely, voluntary, and thorough disclosure of the conduct," its cooperation with the DOJ, and its "early, extensive, and unsolicited remedial efforts."[21]

ADM itself entered into an NPA with the DOJ addressed to "the company's failure to implement an adequate system of internal financial controls to

address the making of improper payments both in Ukraine and by an ADM joint venture in Venezuela."[22] In its press release, the DOJ acknowledged ADM's voluntary disclosure of the conduct at issue and its extensive cooperation with the DOJ, "including conducting a world-wide risk assessment and corresponding global internal investigation, making numerous presentations to the department on the status and findings of the internal investigation, voluntarily making current and former employees available for interviews, and compiling relevant documents by category for the department; and ADM's early and extensive remedial efforts."[23]

To settle the SEC's charges, ADM consented to the entry of a final judgment ordering the company to pay disgorgement of approximately $33.3 million plus prejudgment interest of $3.1 million.[24] The final judgment also requires ADM to report on its FCPA compliance efforts for a three-year period. Like the DOJ, the SEC took into account ADM's cooperation and significant remedial measures, "including self-reporting the matter, implementing a comprehensive new compliance program throughout its operations, and terminating employees involved in the misconduct."[25]

Diebold Inc.

Diebold Inc. also reportedly received credit for cooperation when it resolved charges of FCPA-related offenses based upon the conduct of its subsidiaries in China, Indonesia, and Russia. To resolve the matter, Diebold entered into a DPA with DOJ, and agreed to pay a $25.2 million penalty to the DOJ and $22.97 million in disgorgement and pre-judgment interest to the SEC.[26] The Ohio-based provider of ATMs and bank security systems was charged with making approximately $3 million in payments in China, Indonesia, and Russia from 2005 to 2010 to win contracts with government-owned and government-controlled banks in China and Indonesia and private banks in Russia.[27] The $25.2 million fine reflects a 30 percent discount from the bottom of the fine range calculated under the Sentencing Guidelines.[28] The DPA with the DOJ acknowledges Diebold's voluntary disclosure of the matter, "extensive internal investigation," commitment to enhancing its compliance program and internal controls, and agreement to continue to cooperate with the DOJ in any ongoing investigation of company officers and employees.[29]

Yet even with Diebold's remediation and enhanced compliance program, the DOJ required a monitor. The Diebold DPA states that, "in light of the specific facts and circumstances of this case and the Company's recent history, including a previous accounting fraud enforcement action by the Securities and Exchange Commission, the Department believes that the Company's remediation is not sufficient to address and reduce the risk of recurrence of the Company's misconduct and warrants the retention of an independent corporate monitor."[30] Perhaps in recognition of Diebold's "commitment to enhancing" its compliance program and internal controls, the DPA imposed an independent monitor for only half of the term of the DPA and allowed the company to self-report for the remaining time.[31]

Weatherford International

Just as cooperation can lead to a reduction in penalties assessed by the enforcement authorities, lack of cooperation can result in an increase in penalties assessed. The SEC this year penalized Weatherford International for its early lack of cooperation in the SEC's investigation. The DOJ and the SEC had brought parallel enforcement actions against the company based on allegations that the company failed to implement an effective system of controls to prevent officials at Weatherford subsidiaries from providing "bribes and improper travel and entertainment for foreign officials in the Middle East and Africa to win business, including kickbacks in Iraq to obtain United Nations Oil-for-Food contracts."[32] The DOJ alleged that Weatherford "knowingly failed to establish effective corruption-related internal accounting controls designed to detect and prevent corruption-related violations, including FCPA violations."[33] Weatherford allegedly realized over $50 million in profits from business obtained through the use of illicit payments in Africa and the Middle East.[34]

To settle the FCPA charges, Weatherford Services pleaded guilty to violating the anti-bribery provisions of the FCPA.[35] In addition, Weatherford International agreed to pay $152.8 million to the U.S. government, including "a $1.875 million penalty assessed in part for lack of cooperation early in the investigation."[36] The underlying misconduct cited in support of the penalty included informing the SEC staff that an employee was missing or dead when he remained employed by Weatherford, allowing employees to delete

emails prior to the imaging of their computers, and permitting potentially complicit employees to collect documents subpoenaed by the SEC staff.[37]

As part of the settlement, Weatherford also agreed to retain an independent corporate compliance monitor for a period of 18 months, and to self-report to the SEC for an additional 18 months.

CONCLUSION

Cooperation and remediation continue to be significant factors in the resolution of FCPA enforcement actions. The DOJ and SEC have reduced penalties and imposed hybrid monitoring where companies charged with FCPA related offenses have thoroughly investigated any potential misconduct, cooperated with the regulators' investigation, and instituted a comprehensive compliance program designed to detect and deter violations of the FCPA. Companies appear to gain substantial benefits from cooperation and remediation even in cases where the company's misconduct is pervasive.

Similarly, when considering whether to require independent monitoring, the DOJ evaluates the extent of the company's pre-existing compliance program and the remediation it undertakes. In the best case, as with Ralph Lauren or a declination, no monitor will be required; in the worst, as with Total, a monitor for the full term of the DPA will be imposed. For cases that fall in between, the DOJ has shown increased willingness to impose a hybrid structure, with a full-monitor for part of the term and self-reporting for the rest.

NOTES

[1] Brian Mahoney, *Expect More Big FCPA Cases In 2014: DOJ, SEC Officials*, Law360 (Nov. 19, 2013), *available at* http://www.law360.com/articles/489940/doj-sec-officials-say-more-major-fcpa-cases-coming-in-2014.

[2] Brian Mahoney, *FCPA Crackdown Relies On Business Attys, Deputy AG Says*, Law360 (Nov. 19, 2013), *available at* http://www.law360.com/internationaltrade/articles/490063/fcpa-crackdown-relies-on-business-attys-deputy-ag-says-.

[3] Andrew Ceresney, Co-Director of the Division of Enforcement, SEC, Keynote Address at the International Conference on the Foreign Corrupt Practices

Act (Nov. 19, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370540392284.

[4] FCPA Resource Guide at 52-53.

[5] *Id.* at 53.

[6] *Id.* at 68.

[7] Deferred Prosecution Agreement, *United States v. Total, S.A.*, Crim. No. 1:13CR00239 (E.D. Va. May 29, 2013), Dkt. Entry No. 2, ¶¶ 10-13, *available at* http://www.justice.gov/iso/opa/ resources/939201352910374699852 4.pdf.

[8] *See* Press Release, Justice Dep't, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), *available at* http://www.justice.gov/opa/pr/2013/ May/13-crm-613.html; Press Release, SEC, SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013), *available at* http://www.sec.gov/news/press/2013/2013-94.htm.

[9] Press Release, SEC, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), *available at* http://www.sec.gov/news/press/2013/2013-65.htm [hereinafter "Ralph Lauren SEC Release"].

[10] *Id.*

[11] SEC Non-Prosecution Agreement with Ralph Lauren Corporation (Apr. 18, 2013) at Ex. A, Statement of Facts ¶ 11, *available at* http://www.sec.gov/news/press/2013/2013-65-npa.pdf [hereinafter "Ralph Lauren SEC NPA"].

[12] Ralph Lauren SEC Release, *supra* note 9.

[13] Ralph Lauren SEC NPA, *supra* note 11, at Ex. A, Statement of Facts ¶ 12.

[14] *Remarks of Charles Duross and Kara Brockmeyer at the ABA's 2013 FCPA Conference*, Main Justice (Oct. 2, 2013), *available at* http://www.mainjustice.com/justanticorruption/2013/10/02/remarks-of-charles-duross-and-kara-brockmeyer-at-the-abas-2013-fcpa-conference/.

[15] Press Release, DOJ, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (Jan. 9, 2014), *available at* http://www.justice.gov/opa/pr/2014/January/14-crm-019.html.

[16] Press Release, SEC, SEC Charges Alcoa With FCPA Violations (Jan. 9, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.UtCHsdJDu-M; *see also* Cease and Desist Order, *In the Matter of Alcoa, Inc.* (Jan. 9, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-71261.pdf. Alcoa's joint venture partner Alumina Limited is responsible for 37.5 percent of the FCPA settlement. *See* Alumina Ltd., Report

of Foreign Issuer (Form 6-K), at 1 (July 9, 2013), *available at* http://www.sec.gov/Archives/edgar/data/857071/000119312513285422/d565756d6k.htm.

[17] Plea Agreement, ¶ 35, *United States v. Alcoa World Alumina LLC*, No. 2:14-cr-00007 (W.D. Pa. Jan 9, 2014), *available at* http://www.post-gazette.com/attachment/2014/01/09/ALCOA-World-Alumina-Plea-Agreement.pdf.

[18] *Id.*

[19] Press Release, DOJ, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), *available at* http://www.justice.gov/opa/pr/2013/December/13-crm-1356.html [hereinafter "DOJ ADM Release"]; Press Release, SEC, SEC Charges Archer-Daniels-Midland Company With FCPA Violations (Dec. 20, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139#.UrTJVlKA1dh [hereinafter "SEC ADM Release"].

[20] *Id.*

[21] Plea Agreement at ¶ 16, *United States v. Alfred C. Toepfer Int'l (Ukraine) Ltd.,* No. 2:13-cr-20062 (C.D. Ill. Dec. 23, 2013), Dkt. Entry 9, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alfred-c-toepfer-international/acti-plea-agreement.pdf.

[22] DOJ ADM Release, *supra* note 19.

[23] *Id.*

[24] SEC ADM Release, *supra* note 19.

[25] *Id.*

[26] Press Release, SEC, SEC Charges Diebold with FCPA Violations in China, Indonesia, and Russia (Oct. 22, 2013), *available at* http://www.sec.gov/litigation/litreleases/2013/lr22849.htm; Press Release, DOJ, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty (Oct. 22, 2013), *available at* http://www.justice.gov/opa/pr/2013/October/13-crm-1118.html.

[27] *Id.*

[28] Deferred Prosecution Agreement, *United States v. Diebold, Inc.*, Case No. 5:13CR464 (N.D. Ohio Oct. 22, 2013), Dkt. Entry 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf.

[29] *Id.*

[30] *Id.* ¶ 4.

[31] *Id.*

[32] Press Release, SEC, SEC Charges Weatherford International With FCPA Violations (Nov. 26, 2013), *available at* http://www.sec.gov/News/PressRelease/

Detail/PressRelease/1370540415694 [hereinafter "SEC Weatherford Release"]; *see also* Press Release, DOJ, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), *available at* www.justice.gov/opa/pr/2013/November/13-crm-1260.html [hereinafter "DOJ Weatherford Release"]; Deferred Prosecution Agreement at Attachment A, Statement of Facts, ¶¶ 14-32, *United States v. Weatherford Int'l Ltd.*, No. 4:13-cr-00733 (S.D. Tex. Nov. 26, 2013), Dkt. Entry 4, *available at* www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-DPA.pdf [hereinafter "Weatherford DPA"]; Complaint, *SEC v. Weatherford Int'l Ltd.*, ¶ 2, No. 4:13-cv-03500 (S.D. Tex. Nov. 26, 2013), Dkt. Entry 1, *available at* www.sec.gov/litigation/complaints/2013/comp-pr2013-252.pdf [hereinafter "SEC Weatherford Complaint"].

[33] Weatherford DPA, at Statement of Facts ¶ 7.

[34] SEC Weatherford Complaint, ¶ 2; Weatherford DPA, at Statement of Facts ¶ 33.

[35] Plea Agreement, *United States v. Weatherford Servs., Ltd.*, No. 4:13-cv-00734 (S.D. Tex. Nov. 26, 2013), Dkt. Entry 4, *available at* www.justice.gov/criminal/fraud/fcpa/cases/weatherford-services-ltd/Weatherford-Services-Plea-Agreement.pdf; Weatherford DOJ Release. Under the plea agreement, Weatherford Services Limited agreed to pay the United States a fine of $420,000, which is the bottom of the fine range calculated under the United States Sentencing Guidelines. Weatherford's DPA recognizes that any criminal penalty imposed upon Weatherford Services Limited will be deducted from Weatherford's penalty.

[36] SEC Weatherford Release, *supra* note 32; DOJ Weatherford Release, *supra* note 32.

[37] *See also* SEC Weatherford Complaint, ¶ 52.