Blogs
June 09, 2022

On May 24, 2022, Glencore International A.G. ("Glencore"), a multi-national resource extraction and commodities trading company, pleaded guilty in the Southern District of New York to one count of conspiracy to violate the anti-bribery provision of the Foreign Corrupt Practices Act ("FCPA").

The same day, its subsidiary, Glencore Ltd., separately pleaded guilty in the District of Connecticut to one count of conspiracy to engage in commodity price manipulation.

At the same time, Glencore, Glencore Ltd., and Chemoil Corporation (another Glencore subsidiary) also settled a parallel enforcement matter brought by the Commodity Futures Trading Commission ("CFTC") alleging commodity price manipulation involving foreign corruption in violation of the Commodities Exchange Act ("CEA").

Glencore and its subsidiaries have agreed to pay over $1.1 billion to the Department of Justice ("DOJ") and the CFTC to resolve these three U.S. enforcement matters, which are part of a coordinated global resolution with criminal and civil authorities in at least the United States, the United Kingdom, and Brazil. Notably, the three resolutions highlight the more aggressive approach to corporate enforcement previewed in public statements by DOJ officials under the Biden Administration, as well as the CFTC's continued interest in pursuing market manipulation and fraud involving foreign corruption.

Alleged Misconduct

In the FCPA matter, Glencore admitted to engaging in a scheme to bribe government officials to obtain and retain crude oil business with state-owned and state-controlled entities in Brazil, Cameroon, the Democratic Republic of Congo, Equatorial Guinea, Ivory Coast, Nigeria, and Venezuela.

In the commodity price manipulation matter, Glencore Ltd, admitted to manipulating U.S. benchmark prices for certain fuel oil products. Additionally, according to the CFTC, Glencore and its subsidiaries "made corrupt payments in exchange for improper preferential treatment and access to trades with . . . [state-owned entities in Brazil, Cameroon, Nigeria, and Venezuela] . . . . to increase Glencore's profits from certain physical and derivatives trading in oil markets around the world, including U.S. physical and derivatives markets."

Both DOJ plea agreements noted that Glencore received only partial credit for cooperation and remediation under the DOJ's Corporate Enforcement Policy because Glencore failed to voluntarily self-disclose its conduct, fully cooperate with the DOJ's investigation, and fully engage in timely and appropriate remediation. Both agreements also described Glencore's compliance program as "inadequate" during the relevant time periods, while acknowledging recent enhancements to the program including increasing the compliance program's annual operating budget, adding additional compliance positions, and improving compliance technology infrastructure.

Robust DOJ Enforcement

The two Glencore DOJ resolutions may mark a turning point in U.S. criminal corporate enforcement, providing a roadmap for a more aggressive approach endorsed by DOJ officials under the Biden Administration. Prior to the Glencore resolutions, evidence of this new DOJ approach to corporate enforcement was primarily limited to policy statements from DOJ officials. In its resolutions with Glencore, however, the DOJ seems to have implemented its stated policies by employing both existing and new enforcement tools that go beyond financial penalties.

First, in the FCPA matter, the DOJ required the parent company Glencore -- rather than one of its subsidiaries -- to plead guilty to conspiracy to violate the anti-bribery provision of the FCPA. While parent company liability is not unprecedented, past corporate resolutions typically have involved a plea entered by a subsidiary rather than directly by the parent or no plea at all, with the DOJ opting for a deferred or non-prosecution agreement. By requiring Glencore to plead guilty, the resolution may be a signal that the DOJ will be less receptive to arguments from future corporate defendants that a guilty plea is unnecessary or carries too many collateral consequences relative to deferred and non-prosecution agreements to be warranted.

Second, as part of the plea agreements, the DOJ imposed on Glencore three-year independent compliance monitors to assess and monitor the company's compliance with the agreements and evaluate the effectiveness of its compliance program. This additional requirement may reflect the DOJ's renewed emphasis on monitorships, which DOJ officials previewed in 2021. Indeed, the Glencore resolution is the second corporate FCPA resolution in 2022 in which the DOJ has required an independent compliance monitor.

Third, the DOJ took a significant new step by requiring Glencore's CEO and its Head of Compliance to certify on behalf of the company that Glencore has implemented a "compliance program that is reasonably designed to detect and prevent violations of [the Commodities Laws and] the FCPA and other applicable anti-corruption laws throughout the Company's operations." Notably, the certification forms to be completed by Glencore's representatives include language stating that the certifications constitute material statements and representations by the signatories and the company for purposes of the False Statements statute (18 U.S.C. § 1001) and constitute records, documents, or tangible objects for purposes of the Obstruction of Justice statute (18 U.S.C. § 1519).

Kenneth Polite, Assistant Attorney General for the Criminal Division, recently previewed the DOJ's plans to require corporate compliance certifications in DOJ resolutions, noting that such requirements are "not punitive" but rather seek to ensure that "Chief Compliance Officers and their functions . . . have true independence, authority, and stature within the company." Despite AAG Polite's comments, however, corporate entities and their officers who are required to execute such certifications in future corporate enforcement actions may face real risk of additional criminal liability if those certifications are perceived to be inaccurate.

Foreign Corruption and the CFTC

Meanwhile, the CFTC's settlement with Glencore and its subsidiaries may reflect a continued interest by the commodities regulator in pursuing violations of the CEA involving foreign corruption. In March 2019, the CFTC's then-director of enforcement emphasized the CFTC's commitment to "enforcing the CEA provisions that encompass foreign corrupt practices," and the regulator issued an enforcement advisory indicating that it might recommend no civil monetary penalties for certain non-registrants that voluntarily and timely self-report, fully cooperate, and appropriately remediate CEA violations involving foreign corrupt practices. However, because the CFTC does not directly enforce the FCPA, its commitment to pursuing matters involving foreign corruption was uncertain at that time. The Glencore enforcement action now marks the CFTC's second enforcement action for violations of the CEA involving foreign corruption brought in parallel to a DOJ FCPA resolution, suggesting enforcement actions involving foreign corruption remain an area of interest for the regulator.

Financial institutions and other companies engaging in activity subject to the CEA should be mindful of the CFTC's ongoing interest in foreign corruption and should consider steps to ensure anti-corruption compliance programs directly address market conduct subject to CFTC jurisdiction.

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