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Enforcement Actions

Glencore Pleads Guilty and Agrees to Pay $1.1 Billion to Multiple Authorities, But Can It Change?

By Lori Tripoli, *Anti-Corruption Report*

The DOJ's May 24, 2022, announcement that subsidiaries of Switzerland-based commodity trading and producing company Glencore plc (Glencore) had entered guilty pleas for conspiracy to violate the FCPA and conspiracy to commit commodity price manipulation and agreed to pay more than $1.1 billion to resolve the matter might leave some wondering whether the company snagged a good deal and whether it actually can make meaningful change given its seemingly widespread problems. The settlement does require the CEO and the head of compliance to personally certify to the DOJ that the company has met its compliance obligations at the end of the monitoring period, following through on Assistant Attorney General Kenneth Polite, Jr.'s announcement of that policy in March.

U.S. officials did not exactly blunt their descriptions of what transpired. "The scope of this criminal bribery scheme is staggering," U.S. Attorney Damian Williams said at the time the pleas were announced. Glencore International A.G. "paid bribes to secure oil contracts," he continued. It "paid bribes to avoid government audits," he said. The company "bribed judges to make lawsuits disappear," Williams noted, adding that Glencore International "paid bribes to make money," he said. "It did so with the approval, and even encouragement, of its top executives."

Both the FCPA violation as well as the commodity price manipulation issue were described in strong terms. "In the foreign bribery case, Glencore International A.G. and its subsidiaries bribed corrupt intermediaries and foreign officials in seven countries for over a decade," said Assistant Attorney General Kenneth Polite, Jr. in a press release. "In the commodity price manipulation scheme, Glencore Ltd. undermined public confidence by creating the false appearance of supply and demand to manipulate oil prices," he continued.

The deal is also a reminder that the CFTC can reach beyond CFTC-registered companies as it targets corruption.

See "Lessons from Telecom Giant Ericsson's Billion-Dollar Record-Setting Deal" (Jan. 8, 2020).

A Significant Deal and a Rare Guilty Plea

The "settlement is noteworthy because it resulted in a guilty plea," Warren T. Allen II of WTAII told the Anti-Corruption Report. "According to Stanford University's data, this is the first corporate guilty plea this year in an FCPA matter, there was only one last year, and there were three in 2020," he observed. "By comparison, DOJ concluded one [deferred prosecution agreement] DPA in an FCPA matter this year, two in 2021, and eight in 2020," Allen continued. "Moreover, many more cases are simply resolved administratively by the SEC," he said.

"A guilty plea by a corporation is rare in FCPA cases," Allen noted.

The Glencore deal, in the end, "is a massive resolution that clearly will bite," observed David Simon, a partner at Foley & Lardner. Yet, given "the context – the long history of company scandals (including involving senior executives like founder Marc Rich and partner Daniel Gertler) and the bribery scheme alleged (which involves something like $100 million in hard-core bribes paid in a bunch of different countries over an extended period of time)," Simon continued, "getting closure and the opportunity to move forward is a very significant benefit for the company, even at this high price."

Glencore International founder Marc Rich, who died in 2013, was pardoned by then-President Bill Clinton in 2001 after fleeing the country following an indictment for tax fraud and for trading Iranian oil during the 1979 hostage crisis.

Still, full closure on this chapter of Glencore's existence could still be somewhat remote. "Glencore might be underestimating the continuing fallout from open proceedings outside of the U.S., the impact on the company of individual prosecutions, potential civil claims by victims of the bribery schemes, and the on-going impact of the monitorships – consider what Ericsson is currently dealing with – and the challenge of fundamentally changing the culture," Simon said.

In 2019, Swedish telecommunications giant Ericsson agreed to the appointment of a monitor in a deferred prosecution agreement. In April 2022, Ericsson CEO Börje Ekholm announced the company is "engaging" with the DOJ regarding DPA breach notices it had received.

See "A Different Kind of FCPA Settlement: What Corporate Defendants and 'Victims' Can Learn From the Nokia-Ericsson Civil Resolution" (Jul. 21, 2021).

A Coordinated Resolution on Multiple Fronts

In addition to Glencore International entering a guilty plea for conspiracy to violate the FCPA, Glencore Ltd., based in New York, also pleaded guilty in the District of Connecticut to a commodity price manipulation conspiracy. At about the same time, the Serious Fraud Office also announced that Glencore Energy (UK) Ltd. is pleading guilty to seven counts of bribery associated with its oil operations. It pleaded guilty on June 21, 2022. Glencore also is settling with Brazilian authorities, according to the Glencore International plea agreement.

Glencore had no previous criminal history although subsidiaries had been subject to prior enforcement actions including the conviction in 2012 of a Rotterdam subsidiary for bribes paid to an E.U. official and a civil settlement with the Ontario Securities Commission in 2018 by Katanga Mining Ltd.

FCPA Violation

Glencore International pleaded guilty to one count of conspiracy to violate the FCPA. While it did not receive voluntary disclosure credit, it did receive cooperation credit under the Sentencing Guidelines for cooperating with the U.S. government's investigation. Glencore also received partial credit for cooperation under the FCPA Corporate Enforcement Policy for, among other things, providing information it obtained through its own investigation and for producing documents as well as translations of documents.

The company also undertook remedial measures, including terminating employees involved in the misconduct, establishing a centralized compliance function and hiring a head of compliance, improving its management of business partners, enhancing compliance monitoring and risk assessment with increased head count and the use of data analytics, and requiring global anti-corruption compliance and business ethics training.

Still, the company must pay a fine of $428.5 million and acknowledge criminal forfeiture liability of $272 million. While that is a high-dollar amount in the minds of some, one might be left wondering whether a settlement for $700 million to resolve FCPA problems is really going to make much of an impact in a company that had $203 billion in revenue in 2021.

"The settlement of the U.S. action cost just under 15 percent of the company's reported net income attributable to shareholders for 2021, so it's not a slap on the wrist," Allen observed. In addition to the fine and criminal forfeiture, Glencore "doubtlessly incurred significant costs and disruptions investigating this matter for more than three years," he continued. "The company reported net income attributable to shareholders of $5 billion in 2021, so this settlement will make an impact," Allen noted. Moreover, expenses are likely to continue. "Although some of the amounts are credited to address the company's liability in other jurisdictions, it will continue to incur additional related costs for years during monitorship," Allen said.

Still, the deal is one step toward putting this entire mess in the past. "Getting closure and the opportunity to move forward is a very significant benefit for the company, even at this high price," said Simon. "They clearly want to turn the page and move forward," he continued.

Can the Monitor Shift the Culture?

In its FCPA settlement, Glencore International agreed to the imposition of a monitor for three years. Given the widespread bribery efforts that seemingly plenty of people within the organization knew

about (as documented in the statement of facts accompanying the plea deal), transitioning from that sort of culture to one of compliance may not be an easy task.

"Overlaying a best-in-class compliance program on a corporate culture that condones illegal conduct gets you nowhere," Simon noted. "It appears that, historically, the corporate culture at Glencore was pretty bad," he observed. "This is a company that has been involved in numerous scandals and seems to have a long history of, at a minimum, operating close to, if not over, the line," Simon said. "If the allegations in the DOJ filings are true, bribery seems to have been fundamental to the way Glencore has done business for many, many years. A deep-seated culture like that is very hard to change," he said.

A key challenge for the monitor "will be to determine whether the 'corporate mind' and culture of the firm really has changed," Simon noted.

The key may be to reward appropriate conduct. "Companies can only incentivize and penalize employees," Allen observed. "Conduct – good or bad – that is rewarded will proliferate, and conduct that is penalized will decrease," he explained. "No company will ever be able to ensure all of its employees everywhere follow the laws and behave ethically; but companies can and do change their cultures by adjusting what they reward and penalize," Allen said.

See "Leveraging Policies and Culture: A Recipe for Success" (May 26, 2021) and our guest article series: "Behavioral Ethics and Economics, Compliance Culture and Meeting DOJ's Compliance Expectations (Part One of Two)" (Jun. 26, 2019); Part Two (Jul. 10, 2019).

Compliance Certifications, Too

The deal also requires the CEO and the head of compliance to personally certify the company has met its compliance obligations at the end of the monitoring period.

There is "value in requiring very careful, systematic review of the compliance program by the senior executives ultimately responsible for it," Simon said. "A requirement to sign a certification changes the dynamic inside the firm and will likely produce a process for very careful review and assessment cascading down the organization and potentially involving sub-certifications (not unlike the SOX 302 process for public companies) – all of which leads to a more careful, comprehensive and complete assessment of the program," Simon said.

"A CCO who has to certify may be able to use that exposure to command compliance resources and attention," Simon said.

"The certification could give a CCO some real leverage to build the kind of compliance program the DOJ expects," Allen said. The CCO's ability to "withhold certification might dramatically increase her or his power towards end of the period," he continued.

Even if a CCO certifies and compliance obligations have not been met, the DOJ probably "will not penalize individual executives based solely on these certifications if the executives acted diligently,

followed a reasonable process to get comfortable with the certification, and generally acted in good faith," Allen predicted.

If a CCO declines to certify, "the DOJ would likely take the position that the lack of certification is a breach of the plea agreement and leverage its ability to bring additional charges to obtain the company's eventual compliance," Allen predicted. The DOJ would probably "initially attempt to extend the supervision period and impose additional reporting requirements, but these are always going to be fact specific," he noted.

See "Can Compliance Certifications Empower CCOs?" (Apr. 27, 2022).

What About Individual Accountability?

Whether the right people have been held accountable for Glencore's wrongdoing remains to be seen.

"Prosecuting individuals in the United States for conduct abroad imposes challenges that practically assure most of the wrongdoers in FCPA cases will never be held accountable (unless other jurisdictions pursue actions against them)," Allen observed. "The statement of facts in the Glencore settlement describes conduct that spans more than a decade in multiple jurisdictions," he noted. "As a practical matter, most of the conduct here occurred abroad and involved people who are not U.S. nationals," Allen said. "Indeed, a related civil suit in New Jersey was dismissed in 2020 because the witnesses or evidence related to the claims are located abroad, Allen said.

In *Church v. Glencore PLC*, the U.S. District Court for the District of New Jersey dismissed a claim brought by shareholders against Glencore PLC based on forum non conveniens.

See our three-part series on the Monaco Memo: "A Roll Back on Individuals and Cooperation" (Jan. 19, 2022); and "A Shift in the Monitorship Cost/Benefit Analysis" (Feb. 2, 2022).

Meanwhile, at the CFTC

The CFTC issued a cease-and-desist order against Glencore International AG, Glencore Ltd. and Chemoil Corporation (collectively, Glencore) finding that Glencore "engaged in a scheme to manipulate oil markets and defraud other market participants through corruption and misappropriation of material nonpublic information" from 2007 to at least 2018. Glencore Ltd. also pleaded guilty in the District of Connecticut to one count of conspiracy to commit commodity price manipulation. The appointment of a monitor is a part of the plea agreement and the cease-and-desist order.

The order cites inappropriate behavior that included bribes and kickbacks to employees and agents of state-owned entities in Brazil, Cameroon, Nigeria and Venezuela as well as misappropriation of confidential information from employees and agents of state-owned entities, including in Mexico.

Under the cease-and-desist order, a civil monetary penalty and disgorgement of $1,186,345,850 will be offset up to $852,797,810 by the amount of payments made pursuant to criminal resolutions with the DOJ. Under the plea agreement, Glencore Ltd. is to forfeit about $144 million in proceeds and pay a criminal fine of more than $341 million.

"The total award of $1.186 billion is the largest settlement amount ever at the CFTC," observed Stacie Hartman, a partner at Steptoe & Johnson. "Expect to see the agency stay focused on this type of conduct – not only manipulation which it has traditionally policed but also misappropriation and foreign corruption, two of its newer initiatives," she continued.

Indeed, her comments are echoed in a statement issued by the CFTC at the time the settlement was announced. The CFTC "will work with its enforcement partners around the world to ensure that the U.S. markets operate free of manipulation and corruption, and the CFTC will impose substantial and robust sanctions against those market participants who engage in such conduct." said CFTC Acting Director of Enforcement Gretchen Lowe.

The recent spike in fuel prices may have an impact on where regulators look for trouble. "The focus on manipulation of benchmarks has remained constant since the LIBOR cases, but this case comes at a time of heightened attention when ordinary Americans are feeling the pressure of astronomical fuel prices," Hartman said. "There is no logical tie between the current skyrocketing of gas prices and Glencore's conduct, which was found to run from 2007-18," she acknowledged. "But anything that relates to fuel prices, even whereas here it is less direct and relates to benchmark prices of indices such as published by S&P Global Platts, is going to garner regulatory attention," Hartman said.

The takeaway for other mining and commodities companies is that "The CFTC is watching your conduct – and not solely your trading on the markets they police," said Hartman. "When the CFTC created a task force for foreign corruption and another for insider trading a few years ago, both new areas for the agency, we expected there must be pending investigations that would ripen into enforcement actions in these areas," she noted. "What wasn't predictable was the scale of foreign corruption found in this and the couple of other corruption cases, or the high number of cases brought for misappropriation of material non-public information," Hartman continued

The CFTC "will continue policing trading to protect the integrity of the markets – but will look far beyond actual trading to detect misconduct that may affect the markets it oversees," Hartman said. "And this all applies to companies even if not registered with the CFTC – any interaction with their markets could bring you within the CFTC's crosshairs," she noted. "Neither Glencore, nor the Vitol entities in the first foreign corruption case brought by the CFTC in December 2020, were registered with the CFTC," Hartman observed.

See "Vitol Settles First CFTC Action Involving Foreign Corruption, Defers Prosecution With DOJ" (Dec. 16, 2020).