Cross-Border Cooperation: Coordinated Anti-Bribery Resolutions & Anti-Piling On Policy

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In recent years, US companies assessing potential anti-corruption risks in their overseas operations have confronted the reality that the Foreign Corrupt Practices Act (FCPA) is no longer the only law that poses a credible risk of prosecution. Although cross-border cooperation among law enforcement agencies is not new, the coordination of global anti-corruption resolutions is on the rise as regulators in the US and foreign jurisdictions continue strengthening frameworks for sharing information and as foreign authorities develop more sophisticated expertise in rooting out corruption. Nicole Argentieri, the Acting Assistant Attorney General for the Department of Justice's (DOJ) Criminal Division, underscored this point when she **remarked** that "coordination among international law enforcement partners is one of the most important developments in white collar enforcement over the last decade."

The DOJ formally recognized the benefits of coordinating multi-jurisdictional resolutions when it **adopted** the Policy on Coordination of Corporate Resolution Penalties, better known as the "Anti-Piling On Policy," in May 2018. The Anti-Piling On Policy encourages DOJ prosecutors to coordinate with "other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct." In particular, DOJ prosecutors are **directed** to "consider the amount of fines, penalties, and/or forfeiture paid to . . . foreign enforcement authorities" to avoid assessing duplicative penalties, forfeiture, and disgorgement for the same misconduct. Though the DOJ initially memorialized the policy, the FCPA Resource Guide makes clear that both the DOJ and Securities & Exchange Commission (SEC) "strive to avoid" piling on.

Since the DOJ adopted the Anti-Piling On Policy in May 2018, there have been at least 18 FCPA settlements in which the SEC and/or DOJ have credited amounts paid—or expected to be paid—to foreign regulators. This represents approximately 29% of all FCPA settlements with companies reached during this period. The 29% figure excludes matters resolved by declination with disgorgement and treats any parallel enforcement action against related companies—e.g., companies with a parent-subsidiary relationship—as one matter. The amounts credited to foreign authorities in coordinated resolutions vary on a case-by-case basis. For example, in the Amec Foster Wheeler settlement, the SEC and DOJ agreed to offset 72% and 58% of their respective settlement amounts to account for payments made to authorities in Brazil and the UK. The amounts credited for payments made to Brazilian authorities accounted for 87% of what was owed in Brazil. By contrast, in the case against J&F Investimentos, the DOJ agreed to offset only 7% of the amount J&F Investimentos was ordered to pay in Brazil.

Of the 18 coordinated global resolutions executed since May 2018, the SEC has been involved in 11 while the DOJ has been involved in all 18. The fact that the SEC and DOJ are both involved in a coordinated settlement does not mean both entities will agree to credit payments made to foreign regulators, however. For instance, in the case involving J&F Investimentos, the SEC did not provide for any offsets, but the DOJ did. Though neither the SEC or DOJ have articulated a policy for determining the appropriate offset in a given case, the DOJ's policy requires prosecutors to **consider** amounts paid to authorities in other jurisdictions—both foreign and domestic—the egregiousness of the misconduct, and the "adequacy and timeliness of a company's disclosures." A wrongdoer's recidivism may also play a role. In one instance, the SEC declined to credit an investment bank's payments to foreign and domestic authorities in parallel proceedings involving the same core underlying facts. Though the SEC's public charging papers are silent on the decision, the SEC may have refused to credit because the investment bank had previously entered into settlement agreements with the SEC for violating the securities laws. Moreover, unlike typical FCPA cases where the DOJ and SEC bring charges under the same statutory regime, the SEC charged the investment bank with violating the FCPA while the DOJ brought wire fraud charges.

The willingness of different regulators to provide offsets can be understood—at least in part—through the principles underlying different enforcement tools. For instance, disgorgement is intended to deprive "wrongdoers of their netprofitsfrom unlawful activity." See Liu v. SEC, **140 S. Ct. 1936**, **1940** (U.S. 2020). If a wrongdoer's ill-gotten gains are disgorged to one regulator, different authorities investigating the same conduct will be limited—at least in theory—from recovering additional sums through disgorgement. For example, in March 2022, the DOJ declined prosecution of Jardine Lloyd Thompson Group Holdings Ltd. (JLT) but ordered JLT to disgorge $29,081,951. In its declination letter, the DOJ **noted** that it would credit up to 100% of its disgorgement amount against amounts eventually paid to the UK Special Fraud Office (SFO) for the same underlying conduct. Similar principles apply to forfeiture and confiscation. Danske Bank's recent settlement with the SEC and DOJ, although not an FCPA case, is an illustrative example. Danske Bank agreed to **forfeit** $2 billion to resolve the DOJ's fraud charges related to the bank's anti-money laundering compliance. In a parallel proceeding, the SEC **ordered** Danske Bank to pay a $178.6 million civil penalty and $234.4 million in disgorgement and prejudgment interest. The SEC deemed the disgorgement and prejudgment interest amounts satisfied by the forfeiture amount paid to the DOJ.

In reaching these cross-border agreements, US officials have partnered with many foreign enforcement authorities, including—but not limited to—the SFO, the Parquet National Financier of France, and the Public Prosecutors' Office in the Netherlands. The DOJ has also **signaled** that it plans to continue building relationships with law enforcement agencies in new jurisdictions. Indeed, in December 2022, the DOJ coordinated its first FCPA resolution with authorities in South Africa. The DOJ also coordinated its first-ever foreign bribery resolution with Colombian authorities in August 2023. On the other hand, US regulators entered coordinated settlements with their Brazilian counterparts far more often than with regulators in any other jurisdiction. Since May 2018, Brazilian authorities were involved in 61% of all settlements coordinated with foreign regulators—i.e., 11 of 18. Even in cases where a coordinated, global resolution was not reached, the

DOJ and SEC frequently acknowledge the assistance they receive from Brazilian authorities, including the Brazilian Controller General of the Union (CGU), the Attorney General of the Union (AGU), and the Federal Public Ministry (MPF).

In 2022 alone, Brazilian and American officials coordinated the resolution of three FCPA settlements. For example, GOL Linhas Aéreas Inteligentes S.A. (Gol) agreed to pay the SEC and DOJ $157 million to resolve FCPA charges relating to a bribery scheme involving Brazilian politicians. As part of the settlement, Gol will also pay $3.4 million to the AGU and CGU. The SEC and DOJ each offset $1.7 million—i.e., a total of $3.4 million—to account for the penalties imposed in Brazil. In another example, in April 2022, Stericycle, Inc. agreed to pay $80.7 million to resolve FCPA charges stemming from misconduct in Argentina, Brazil, and Mexico. Of that total, the SEC deducted from its share an amount equal to one-third of Stericycle's ill-gotten gains—i.e., $4.2 million—as an offset for disgorgement payments made to Brazilian authorities. The DOJ similarly agreed to credit up to $17.5 million—approximately one-third of the total criminal penalty—paid to the Brazilian authorities.

This multi-jurisdictional approach simultaneously presents certain risks and benefits for companies faced with potential liability under several anti-corruption statutes. First and foremost, companies should be aware that allegations of bribery and corruption may subject them to investigations and possible enforcement actions by regulators in multiple countries. As noted above, the willingness of enforcement authorities to share information across borders expands the scope of evidence available to them and can influence the legal theories pursued by such authorities. In addition to greater legal exposure, managing simultaneous investigations inherently becomes more complex and burdensome when different laws, procedural rules, languages, and cultural norms are at play. Therefore, hiring local counsel will become a necessity.

At the same time, coordinated resolutions can—and likely will—inure to the benefit of companies looking to resolve anti-corruption charges in multiple jurisdictions. Gol Airlines and Stericycle are just two examples where US authorities credited a significant portion of the amounts paid to foreign authorities. Had those companies not sought to reach a global resolution, the amounts paid in penalties and disgorgement would likely have been millions of dollars greater. A company's willingness to settle with overseas regulators can also factor into a declination decision by US authorities. For instance, in December 2022, the DOJ formally declined prosecution of Safran S.A. for FCPA violations committed by its German subsidiary. In making its declination decision, the DOJ **noted** that, among other things, Safran intended "to accept responsibility and resolve liability of its German subsidiary EVAC in connection with an ongoing investigation by German authorities." Similarly, foreign regulators may be less inclined to pursue a case when US authorities reach an appropriate resolution with a US-based company. For example, US regulators recently entered into an FCPA settlement with a chemical manufacturer. Shortly after, the Dutch Public Prosecutors' Office announced that it would dismiss its criminal case against that company's Dutch subsidiary, citing close coordination with American authorities. Finally, the efficiencies of bringing all regulators to the same table along with the intangible benefits of finality and certainty also favor pursuing a global resolution.

With that said, varied investigation speeds and timelines pose a challenge for companies seeking to pursue a coordinated settlement. The DOJ's Anti-Piling On Policy even **counsels** against entering coordinated resolutions where there is a "risk of unwarranted delay in achieving a final resolution." That is why companies under investigation in multiple jurisdictions should be cognizant of the pace at which different investigations are progressing and regularly evaluate whether a coordinated resolution makes sense. Fortunately, US authorities appear willing to offset at least a portion of amounts that are expected to be paid to overseas regulators in the future if the timing of the resolutions does not perfectly match up. For example, the DOJ recently agreed to credit up to $11 million in payments expected to be made to German authorities pursuant to a separate resolution that had not yet been executed.

Coordinated resolutions may also impact how post-settlement undertakings are imposed. In 2021, the SEC, the DOJ, and their international counterparts resolved investigations into a Swiss investment bank. As part of the resolution, the DOJ noted in its press release that the Swiss regulators had appointed a third-party monitor to review the bank's compliance measures for its operations in high-risk countries. Neither the SEC nor DOJ appointed an independent monitor of their own, which may have been influenced by the fact that US authorities were satisfied with the action of the Swiss regulators.

The willingness of enforcement agencies to avoid duplicative penalties presents certain opportunities and challenges for companies under investigation for possible anti-corruption violations. Although the risks posed by the FCPA are not new, corporate leadership should be aware of the increasing prevalence and importance of global resolutions. This can help inform region-specific compliance programs and, when necessary, decisions about when and to whom wrongdoing should be disclosed.