The DOJ Sends Strong Messages Regarding Corporate Cooperation in Criminal Matters

During prepared remarks in April 2015, Assistant Attorney General Leslie R. Caldwell discussed corporate cooperation in criminal FCPA investigations.[1] AAG Caldwell emphasized that a company's self-disclosure of issues to the DOJ, and cooperation in any subsequent inquiry, need not result in excessive costs and business disruption. AAG Caldwell warned, however, that refusing to cooperate with a DOJ investigation will have "consequences" for those involved.

These recent remarks were made against the backdrop of a string of FCPA enforcement actions, and a number of public comments by DOJ officials. Taken together, these items may provide greater clarity into the range of outcomes for companies faced with FCPA-related issues.

Perhaps most significantly, in late 2014 French power and transportation company Alstom SA agreed to pay the DOJ a record-setting criminal penalty of $772 million in connection with a guilty plea for violations of the FCPA's books and records and internal controls provisions. Following an extensive government investigation conducted without the company's cooperation, Alstom and its subsidiaries admitted to bribing government officials for projects with state-owned entities in Indonesia, Egypt, Saudi Arabia, the Bahamas, and Taiwan, and to attempting to conceal the bribes through sham consulting services. In reaching the $772 million figure, the plea agreement specifically pointed to Alstom's failure to voluntarily report the conduct, and also its refusal to cooperate thoroughly "until after the Department had publicly charged multiple Alstom executives and employees," which "impeded the Department's investigation and prosecution" into the matter.

In the DOJ's press release on *Alstom*, the DOJ noted that, even without a company's cooperation, "the department will identify criminal activity at corporations and investigate the conduct ourselves, using all of our resources, employing every law enforcement tool, and considering all possible actions, including charges against both corporations and individuals." The Department noted that the investigation was conducted with extensive international cooperation, including the authorities in Indonesia, the UK, Germany, Italy, Singapore, Saudi Arabia, Cyprus, and Taiwan.

In the months leading up to the *Alstom* settlement, a series of comments from AAG Caldwell and other DOJ attorneys warned of the DOJ's views on self-disclosure of potential wrongdoing and cooperating fully with federal investigations. These statements included:

- "When criminal misconduct is discovered, a critical factor in the department's prosecutorial decision making is the extent and nature of the company's cooperation."[2]
- "For a company to receive full cooperation credit following a self-report, it must root out the misconduct and identify the individuals responsible, even if they are senior executives."[3]
- "[C]ompanies are always quick to tout voluntary disclosure of corporate misconduct and the breadth of an internal investigation. What is sometimes given short shrift, however, is in many ways the heart

[1] Joel Schectman, Wall Street Journal, *DOJ: Critics Wrong to Question Wisdom of Self-Reporting* (April 20, 2015).

[2] Leslie R. Caldwell, Assistant Attorney General, Department of Justice – Criminal Division, Remarks at the 22nd Annual Ethics and Compliance Conference (October 1, 2014).

[3] *Id.*

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of effective corporate cooperation: whether that cooperation exposed, and provided evidence against, the culpable individuals who engaged in criminal activity . . . ."[4]
- "If a company works with us, it not only helps the Department, but it helps itself. . . . But if a company chooses not to cooperate, or it cooperates too little and too late, those choices also have consequences."[5]

To illustrate the divergent paths of companies facing potential misconduct, the DOJ offered the following examples:

- ***Marubeni Corporation***, a consortium partner with Alstom, paid an $88 million criminal fine and plead guilty to eight FCPA charges for bribing Indonesian officials in connection with a $118 million contract. Marubeni's decision to not cooperate resulted in "an extensive multi-tool investigation involving recordings, interviews, subpoenas, mutual legal assistance treaty requests, the use of cooperating witnesses, and more."
- ***BNP Paribas*** paid an $8.9 billion monetary penalty and pled guilty to violations of U.S. economic sanctions against Sudan, Iran, and Cuba. The DOJ cited BNP Paribas' lack of cooperation as a "crucial factor" and opined that it "would have been in a much better position" if it had "fully cooperated with the government investigation from the outset."
- ***Alcoa, Inc.*** reached a $384 million FCPA settlement with the DOJ and SEC for funneling bribes to Bahraini officials through a middleman. The DOJ publically commended Alcoa for its cooperation, which included an extensive internal investigation, proffers to the government, making current and former employees available for interviews, and the provision of relevant documents. Although Alcoa paid a criminal fine of $209 million, it was well under the minimum $446 million fine suggested by the U.S. Sentencing Guidelines, and absent cooperation credit the maximum fine for Alcoa could have exceeded $1 billion.
- ***PetroTiger Ltd.*** avoided any charges after it chose to voluntarily disclose bribes paid by its top executives to a Colombian official for a $39 million contract, and "cooperated fully with the department's investigation."
- ***Morgan Stanley*** received a declination from the DOJ due to, according to the DOJ, Morgan Stanley's robust internal compliance program, its voluntary disclosure of the conduct, and the company's effective cooperation with the DOJ in its investigation of the individual responsible for the conduct.

An even more recent example can be seen in Goodyear Tire & Rubber Co.'s $16.2 million settlement with the SEC in February 2015. The SEC Order emphasized Goodyear's voluntary disclosure and "significant cooperation," which included production of documents and reports from the company's internal investigation, as well as responses to requests for documents that may not have been otherwise available to the SEC. Goodyear promptly halted the improper payments upon discovery, disciplined employees (including executives), and implemented significant improvements to its compliance program. Notably, the $16.2 million settlement with the SEC represented disgorgement and prejudgment interest, but did not include a monetary penalty. Additionally, Goodyear stated that the SEC settlement "fully resolve[d] all outstanding issues related to these investigations," suggesting that the DOJ may not be pursuing its own charges.

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[4] Marshall L. Miller, Principal Deputy Assistant Attorney General, Department of Justice – Criminal Division, Remarks at the Global Investigation Review Program (September 17, 2014).
[5] Leslie R. Caldwell, Assistant Attorney General, Department of Justice – Criminal Division, Remarks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (November 19, 2014).

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Cases such as *Alstom*, *Marubeni*, and *BNP Paribas* on the one hand, and *Alcoa*, *PetroTiger*,*Morgan Stanley* and *Goodyear* on the other, illustrate possible costs, benefits, and pitfalls in the disclosure and cooperation calculation. These cases, along with the recent DOJ commentary, suggest that the DOJ is attempting to demonstrate tangible benefits related to disclosure and cooperation – including potentially reduced costs and lessor penalties. Further, these cases reflect extensive international law enforcement cooperation, demonstrating the continued intensity of global anti-corruption enforcement in the U.S. and abroad. In responding to potentially improper conduct, companies should weigh carefully these various considerations.

If you have any questions, please contact your usual Ropes & Gray advisor.

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