Aug. 28, 2024

Cooperation Credit

Obligations Linger Despite Freepoint's Settlements With DOJ and CFTC

By Lori Tripoli, *Anti-Corruption Report*

In December 2023, Stamford, Connecticut-based commodities trading company Freepoint Commodities LLC (Freepoint) settled a charge of conspiracy to violate the anti-bribery provisions of the FCPA with the DOJ, and misappropriation-based fraud charges with the Commodity Futures Trading Commission. These charges stemmed from a scheme to pay bribes to Brazilian government officials to obtain business from Petróleo Brasileiro S.A. – Petrobras, Brazil's state-owned and state-controlled oil company. The matter has not quite been put to rest given the upcoming trial of an individual associated with the scheme and the company's obligation to cooperate in ongoing investigations. The Anti-Corruption Report spoke with experts in the field to understand the long tail on FCPA settlements and where Freepoint stands more than half a year after its settlement.

See "Gunvor Pays Over $661M for Bribes to Petroecuador" (Apr. 10, 2024).

Terms of the Deals

In exchange for a deferred prosecution agreement (DPA) with the DOJ, Freepoint agreed to a criminal penalty of $68 million and a forfeiture of approximately $30 million. The company also agreed to pay about $7.6 million in disgorgement to resolve the investigation into its conduct by the CFTC. Only approximately $45 million of the criminal penalty is to be paid to the U.S. Treasury because Freepoint received a $22-million credit for its payment to authorities in Brazil for violations of Brazilian law involving the same conduct. Additionally, the roughly $7 million the company agreed to pay to resolve the CFTC matter is credited against the forfeiture amount.

The DOJ and CFTC settlements "highlight that lapses in compliance programs and internal controls can result in multiple regulatory risks, including parallel anti-corruption and insider trading enforcement actions," Margot Laporte, a partner at Dorsey & Whitney, told the Anti-Corruption Report.

See "Trends in and Nuances of Negotiating NPAs, DPAs and Declinations" (Nov. 11, 2020).

Reactive Rather Than Proactive Cooperation

Interestingly, Freepoint received cooperation credit despite the company's limited cooperation at the outset. The DPA specifically notes that "in the initial phases, the Company's cooperation was limited in degree and impact, and largely reactive."

In this case, the difference between reactive and proactive cooperation was likely that Freepoint did not voluntarily self-disclose relevant facts initially, Adam Safwat, a partner at Foley Hoag, told the Anti-Corruption Report. Nevertheless, the DPA "makes it clear that Freepoint eventually began providing more substantial, timely and helpful cooperation, and therefore was able to earn some cooperation credit," he suggested. With this deal, the DOJ may be indicating "that it is willing to give some credit for some helpful cooperation, and that it is never too late to start providing significant cooperation, even if the company's earlier responses to the allegations could have been more forthcoming."

Indeed, had the company taken a different approach, it might have avoided a DPA altogether. "Freepoint received only a 15% reduction off the low end of the Sentencing Guidelines fine range, but the company might have been eligible for up to 50% off," observed Warren T. Allen II, a principal at Miles & Stockbridge. Indeed, had the company self-reported and fully cooperated, "it might have been eligible for a declination," he said. The Justice Manual suggests companies receive more credit for "proactive, rather than reactive" cooperation because reactive disclosures generally are less likely to be timely or helpful, he explained. The DOJ Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP) incorporates the same language and makes clear that "the most substantial benefits only are available to companies that provide 'full cooperation,' and 'proactive,' timely disclosures," he continued. Ultimately, "timely disclosure of previously unknown information and facts that the government would have difficulty obtaining adds the most value by preserving investigators' time and resources."

The takeaway for companies that might find themselves in a similar position – under investigation, not voluntarily disclosing and perhaps dragging their feet in their interactions with authorities – is that they still might achieve a palatable resolution of their problems. "Although Freepoint earned less credit than it could have had it timely self-disclosed and fully cooperated from the start, the DPA demonstrates that companies in Freepoint's position still have the opportunity to earn some cooperation credit by, for example, promptly and thoroughly responding to requests from regulators, producing documents and making employees available for interviews, engaging in substantial efforts to aggregate and analyze large volumes of complex documents and information, and undertaking significant remedial measures," Laporte said. Freepoint also notably avoided the imposition of a compliance monitor.

See "Deputy Assistant AG Miller Discusses Robust DOJ Anti-Corruption Efforts, Stressing Individual Accountability, Self-Reporting, Remediation and Cooperation" (Mar. 1, 2023).

Increased Risk to Senior Officers

Although the company managed to avoid the imposition of a compliance monitorship, Freepoint's deal imposed significant obligations on senior officers within the organization. "Consistent with the DOJ's

recent practice, the settlement includes enhanced compliance reporting requirements and a 'Compliance Certification' signed by the CEO and CCO," Jonathan Sack, a partner at Morvillo Abramowitz, told the Anti-Corruption Report. In addition to certifying that the company implemented an anti-corruption compliance program that meets the requirements set forth in the DPA and that it is "reasonably designed to detect and prevent violations of the anti-corruption laws throughout the Company's operations," the certification "states that it constitutes 'a material statement and representation' by the CEO and CCO for the purposes of 18 U.S.C. § 1001," he continued. That statutory provision criminalizes false statements made to government agents.

Provisions such as these "increase the risk to senior officers by making them individually responsible for confirming the implementation of corporate reforms and thus more likely to seek expert outside assistance and implement robust compliance programs," according to Sack.

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

The Importance of Diligence

The conduct at issue in Freepoint's settlement highlights the need for strong third-party due diligence, as well as vetting and supervising employees.

Third-Party Due Diligence Remains a Must

"Freepoint paid approximately $3.9 million in corrupt commission payments to its agent, a Brazilian oil and gas broker, who in turn paid bribes to Brazilian officials to obtain confidential information that helped Freepoint win business with Petrobas," Sack explained. "The corrupt commission payments were made pursuant to a service provision agreement to an offshore entity incorporated in Liberia and controlled by the agent and concealed through the use of email accounts not connected to Freepoint, coded language, and sham negotiations," he noted. "The scheme also involved the use of a company, owned by the brother of a Freepoint trader, to facilitate 'back-to-back' trades as a customer of Freepoint."

Ultimately, the company's troubles "reinforce the importance of a strong due diligence program that scrutinizes third party relationships as well as policies regarding conflicts of interest and customer relationships," Sack said.

See "Doing More With Less: Tools for Managing Third-Party Risk With Scarce Resources" (Apr. 28, 2021).

Employees That Come With Baggage

Freepoint's statement at the time of the settlement noted that the resolutions "stem from activity by individuals that commenced prior to their joining Freepoint and was inconsistent with Freepoint's values. . . ."

"The DPA expressly acknowledges that the misconduct predated the individuals' employment at Freepoint, so the company's statement was reasonable insofar as it noted a fact that the government as well as the corporate defendant regarded as relevant to a full understanding of the misconduct," Sack observed. At the same time, he continued, "this fact highlights the importance of robust supervision of employees and compliance policies and procedures."

"Whether the individuals' earlier misconduct could have been discovered by the company and should have raised red flags is very difficult to say; it depends on facts not apparent from public filings," Sack said.

See "Fewer Individual Charges and More Focus on Third Parties in 2023's FCPA Enforcements" (Feb. 28, 2024).

After the Deluge

Following a significant settlement such as this one, an organization might be inclined to "clean house" to ensure that any bad behavior does not reoccur. "To obtain an optimal outcome from resolving a government criminal investigation, a company must fully remediate the misconduct, which includes a 'root cause' analysis of the acts and omissions that led to the violations of law," Sack suggested.

To that end, the results of such an analysis "need to be reflected in enhancements to company compliance programs and internal controls," Sack said. These remediation efforts will ordinarily include "terminating employees who directly participated in the misconduct and may include terminating or disciplining employees who failed to exercise appropriate oversight and respond promptly to red flags," he explained. Of course, he added, "what is appropriate and required will depend on the facts of a particular case."

Tone at the Top

One area that may necessitate attention following a significant settlement concerns the tone at the top. "An organization like Freepoint can meaningfully change the 'tone at the top' by implementing genuine and robust compliance structures, openly supported by senior management, around all of the company's businesses, providing meaningful opportunities for employees to report misconduct, and acting responsively to investigate and resolve any reports of misconduct no matter the level of the corporate chain that is involved," Sack advised.

See "Tone at the Top: Considered Crucial Factor for Successful Corporate Compliance" (May 24, 2023).

The Role of the GC

A GC who was not part of the problem "can play an important role in helping the company to navigate through the investigation," Safwat said. Indeed, an adept GC might strengthen their position by "helping

to implement substantial remediation under any DOJ resolution and resolving any remaining collateral issues," he explained.

"Living through an investigation can give a GC helpful context to help advise current or new management about not only resolving the matter, but how to position the company going forward to address regulatory risk," Safwat posited.

As a practical matter, the viability of a GC after a settlement depends on a number of factors, "including the nature and extent of the misconduct and the degree to which red flags or other indicia of misconduct came to the general counsel's attention before the investigation began," Sack said. A GC who was not involved in or aware of misconduct "may actually be instrumental in implementing necessary remediation and enhancing reporting and compliance structures," he noted.

Remediation Continues Over the Term of the DPA

Ongoing reporting obligations mean that the conclusion of the deal will have continuing impact. "Under the terms of the DPA, Freepoint made broad representations including that it would 'promptly' report 'any evidence or allegation of conduct that may constitute' an FCPA anti-bribery violation," Laporte said. The company's ongoing disclosure obligation "concerns not only 'evidence' but also 'allegations' of conduct that 'may' constitute a violation," she noted.

"The DOJ can, and has, interpreted companies' ongoing disclosure obligations pursuant to this and similar language in DPAs in the broadest possible sense," according to Laporte.

Generally, companies subject to ongoing cooperation and disclosure obligations "often must incur significant costs and expenditures of internal resources to establish processes and controls in order to timely identify potentially reportable information, assess the information, promptly report the information to the DOJ, and monitor ongoing compliance with the DPA's terms," Laporte continued.

See "Noticing Red Flags, Cultivating Company Culture Key to Compliance" (May 24, 2023).

An Industry Sweep?

The enforcement action taken against Freepoint was one of several relatively recent actions against international commodities trading companies that might be characterized as an industry sweep. Earlier this year, multinational commodities trader Trafigura Beheer BV, which has primary operations in Switzerland, pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay more than $126 million in a fine and forfeiture for paying bribes to Brazilian officials to obtain business illegally. It then entered into a settlement with the CFTC in June for insider trading, market manipulation and impeding possible whistleblower communications. Also this year, Swiss-based Gunvor S.A. resolved an investigation into FCPA violations related to its dealings with Ecuador's state-owned and -controlled oil company, Petroecuador, by entering into a plea agreement and committing to pay more than $661 million.

Collectively, the settlements "show that U.S. authorities are aggressively targeting corruption schemes that affect global financial markets," Laporte said. "Both the DOJ and CFTC have signalled heightened focus on foreign corrupt payments by global commodities trading companies," she continued.

Freepoint's resolutions are one of "several parallel actions against commodities trading companies brought by the DOJ and CFTC over the last several years arising out of schemes to make corrupt payments in exchange for material nonpublic information in order to trade physical commodities or derivative products," Laporte said.

In some measure, the industry is vulnerable to corruption. "The commodities industry has and will continue to present substantial corruption risk because, in many emerging markets, it involves state control over extraction of and trading in highly valuable products," Safwat noted. "The recent string of DOJ enforcement actions in this space is designed to warn and encourage companies to invest in compliance, in part by increasing the monetary risks of the failure to do so," he cautioned.

"Establishing significant internal controls over higher risk touch points is critical in this space," Safwat stressed.

Freepoint's settlements "reinforce the importance of identifying high-risk activities and areas early and preferably before embarking on a business venture or contract and both doing upfront due diligence and planning compliance efforts before an issue arises," Sack said. "If the activity goes forward and legal issues follow, prompt investigation is needed to develop an effective legal strategy and mitigate the risks to the company."

DOJ enforcement over the past 10 years has focused on corruption in the Latin America energy sector and resulted in many settlements, Sack reported. Companies involved in the commodities industry "should take note and assess their own policies, reporting mechanisms, and compliance programs for weaknesses that could potentially result in misconduct," he said.

See "Trafigura Settlement Forms Part of DOJ's Years-Long Oil Scheme Probe" (Apr. 24, 2024).

Ongoing Cooperation Obligations

Despite having settled allegations against the company in late 2023, Freepoint has not fully left its bribery and corruption issues behind, particularly with several trials and sentencings pending for individuals involved in the wrongdoing.

Several Court Proceedings Pending

The trial of Glenn Oztemel, who is accused of working as a senior oil trader at Freepoint and causing the company to make corrupt payments to an intermediary, is scheduled to begin in September in federal court in Connecticut. His brother Gary Oztemel, who had been charged for allegedly using his company, Oil Trade & Transport S.A., to help Freepoint inappropriately obtain or retain business in Brazil, entered into a plea agreement in June 2024 for violation of 18 U.S.C § 1957, which bars monetary

transactions in criminally derived property derived from unlawful activity. Although sentencing originally was scheduled for September 16, Gary Oztemel has sought a postponement until after the conclusion of his brother's trial, which may extend until October according to court documents.

A third individual, Eduardo Innecco, has also been charged. Innecco, who is a citizen of Brazil and Italy, allegedly used consulting fees and commissions he received as an agent for Freepoint to pay bribes to Petrobras officials on behalf of the company. According to a court decision denying Glenn Oztemel's motion to dismiss the charges against him, Innecco is in France awaiting extradition proceedings.

A Burden and Uncertainty for the Company

With these court proceedings still pending, Freepoint may be called on to participate as part of its agreement to future cooperation in its settlement with the DOJ, which raises a number of concerns.

First, assisting with the DOJ's individual prosecutions could be onerous. "While the individuals involved in the misconduct no longer are affiliated with Freepoint, the obligation to continue cooperating with the government may be time-consuming," Sack predicted. "The amount of time and effort devoted to cooperation will depend on what is left of the investigation and further prosecutions," he explained. If trial proceeds as expected in September, cooperation could require attention from both the company's attorneys and possibly employees who have relevant information. Although that cooperation may potentially be challenging, it "should ordinarily not interfere with operations of the company, but that is a very fact-specific issue," he cautioned.

Another concern is that the trial in Connecticut could put the company's deals with the DOJ and CFTC at risk. "If new facts or evidence emerge during the course of the trial that Freepoint has not previously disclosed to the DOJ, and of which Freepoint was aware or should have been aware (in DOJ's view), the DOJ could deem any failure to disclose as a breach of Freepoint's broad, ongoing disclosure obligations under the terms of the DPA," said Laporte.

In a worst-case scenario, the company "could face a range of potential sanctions, including the government concluding that the company violated the DPA and warrants prosecution for the underlying misconduct" if it "fails to provide continued cooperation or otherwise breaches its obligations set forth in the DPA," Sack warned.

See also "DOJ's New VSD Program Offers NPAs to Individuals Who Can Help Catch Bigger Fish" (May 8, 2024).

© 2024 Mergermarket Limited. All rights reserved.