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Can a Whistleblower Derail a Deferred Prosecution Agreement?

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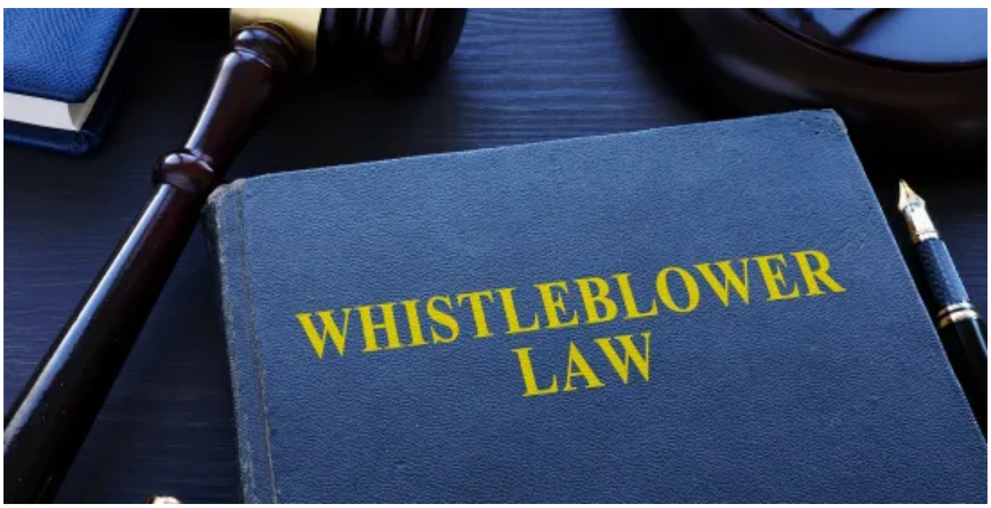

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A recent whistleblower suit could impact a company's deferred prosecution agreement ("DPA") potentially leading to further investigation by DOJ and additional penalties.

violations and retaliation. The lawsuit comes after Freepoint entered into a three-year DPA with DOJ in 2023 for FCPA violations. The DPA stemmed from an alleged conspiracy to bribe a state-owned company in South America. Under the DPA, Freepoint was required to pay over $98 million in criminal fines, substantively enhance its corporate governance and compliance program, as well as report to DOJ any subsequent felony violations of law.

Freepoint resolved a parallel civil enforcement action by the Commodity Futures Trading Commission ("CFTC") in 2023 for charges that Freepoint engaged in unlawful misconduct to obtain non-public competitive fuel oil cargo bidding information as well as confidential market intelligence regarding shipping and negotiation activities. The CFTC ordered Freepoint to pay a civil monetary penalty of $61 million and disgorgement of over $30 million. The settlement with the CFTC acknowledged and credited a portion of the criminal fine and forfeiture made by DOJ.

Whistleblower Suit

A former Freepoint senior analyst, Andrew Martin, alleges in his whistleblower suit that two Freepoint superiors urged and pressured him to conduct illegal insider trading by using proprietary information. According to the complaint, Martin claims that two senior executives attempted to maximize company profits by engaging in market manipulation schemes to acquire non-public information from producers and refiners of oil and gas, "pressur[ing] other Freepoint employees to steal and illegally disseminate proprietary copyrighted information." The complaint indicates that these allegations occurred both before and after Freepoint entered its DPA with DOJ.

Martin reported concerns regarding the two relevant executives and their unethical behavior through internal channels, including raising his concerns to Freepoint's CEO. The complaint goes on to state that Martin's employment was terminated soon before an alleged scheduled site visit by the FBI to confirm Freepoint's adherence with the DPA's requirements. According to the complaint, Martin received positive feedback from superiors and peers for his work, although Freepoint identified "performance" as one of the grounds for the termination.

Potential Implications

DPA Breach Risk

Freepoint's DPA requires the company to continue to cooperate with DOJ and other law enforcement and regulatory authorities as well as report misconduct and any felony violations. If misconduct or violations are discovered, the company also must pursue the appropriate remediation. DOJ references Freepoint's cooperation in DOJ's investigation and the remedial measures the company took as factors DOJ weighed when reaching the DPA resolution. Such remedial steps included, in

The nature of the recent whistleblower complaint, which could potentially demonstrate compliance failures – including inadequate remediation of the root cause misconduct and insufficient reporting and investigation processes – as well as retaliation concerns in terminating a compliance whistleblower, may ultimately impact Freepoint's successful completion of its DPA. Specifically, the company's ability to demonstrate it is taking the necessary steps to make robust enhancements to its compliance, reporting, investigation, and remediation processes may be undermined.

Possible DOJ Actions

In light of the whistleblower suit, DOJ may determine to proceed with further investigation of the matter, which could expose Freepoint to additional scrutiny. Depending on the outcome of any further potential investigation, DOJ could levy additional penalties and fines on the company, including the extension of the DPA terms beyond 2026. To that end, while we may be seeing a shift away from the imposition of compliance monitors, it is possible that a confirmed DPA violation could be renewed grounds to justify requiring a compliance monitor when reassessing risk of recurrence.

Moreover, with Freepoint having already acknowledged the charges under the DPA for the bribery scheme as well as taken responsibility for the involved personnel, it may be difficult for the company to have much leverage or negotiating power if DOJ concludes the DPA was violated.

Takeaways and Recommended Actions

While valuable for all companies, for those companies currently under a DPA, it is especially imperative to maintain heightened vigilance for any potential violations or misconduct, ensuring that the necessary steps are taken to remediate and disclose, as is appropriate. This may involve, for instance, maintaining open dialogue with prosecutors, considering proactive compliance audits, frequent evaluation of compliance program effectiveness, as well as reviewing and strengthening internal reporting mechanisms, investigation processes, and whistleblower protections.

Overall, robust whistleblower programs are essential as retaliation allegations could compound underlying violations. With DOJ's shift from a "presumption" of a declination to a "clear path to declination," companies may now be more inclined to report and voluntarily self-disclose. Further, with DOJ soliciting whistleblowers and encouraging whistleblowers to come forward with various awards (see our prior alerts here and here), companies will need to consider how this impacts prospective and historical issues, as evidenced with Freepoint.

PRESS RELEASE

Former Connecticut-Based Energy Trader Convicted of International Bribery Scheme

Thursday, September 26, 2024

For Immediate Release

Office of Public Affairs

A federal jury in Bridgeport, Connecticut, convicted a former oil and gas trader today for his role in a nearly eight-year long scheme to bribe Brazilian government officials and to launder money to secure business for two Connecticut-based commodities trading companies.

According to court documents and evidence presented at trial, Glenn Oztemel, 65, of Westport, Connecticut, paid bribes to officials of Petróleo Brasileiro S.A. (Petrobras), the Brazilian state-owned oil and gas company, to obtain lucrative contracts for Arcadia Fuels Ltd. (Arcadia) and Freepoint Commodities LLC (Freepoint).

"Glenn Oztemel paid and laundered more than $1 million in bribes to employees of Brazil's state-owned oil and gas company to obtain lucrative contracts for his commodities-trading companies in Connecticut," said Principal Deputy Assistant Attorney General Nicole M. Argentieri, head of the Justice Department's Criminal Division. "Bribing public officials to win business undermines the rule of law and creates unfair competition. Today's verdict reaffirms the Criminal Division's commitment to combatting foreign corruption that violates U.S. law."

"Bribery and money laundering are well-established federal crimes," said U.S. Attorney Vanessa Roberts Avery for the District of Connecticut. "This conviction serves as another warning to anyone involved in the financial industry who seeks to gain an unfair advantage and illegally profit, both here in the U.S. and abroad. This office and our law enforcement partners will continue to keep a watchful eye to ensure that representatives from U.S. businesses operating overseas comply with our nation's laws."

"Individuals and companies who collude to thwart free market competition through bribery ultimately erode public trust in the marketplace," said Assistant Director in Charge Akil Davis of the FBI Los Angeles Field Office. "Today's conviction demonstrates the commitment of the FBI and our partners to investigate anti-competitive behavior and hold accountable those who try to cheat the system for their own benefit and profit."

The trial evidence showed that, between 2010 and 2018, Oztemel worked as a senior oil and gas trader — first at Arcadia and then at Freepoint. With the assistance of others, Oztemel paid and caused the payment of bribes to Petrobras officials for their assistance in helping Arcadia and Freepoint to obtain and retain fuel oil contracts with Petrobras and by providing Oztemel and others with confidential information regarding Petrobras' fuel oil business. Oztemel and his co-conspirators caused Arcadia and Freepoint to make corrupt payments — disguised as purported consulting fees and commissions — to a third party intermediary and agent, Eduardo Innecco, 74, knowing that Innecco would pay a portion of those funds to Brazilian officials, including to Houston-based Petrobras trader Rodrigo Berkowitz.

To conceal the scheme, Oztemel, Innecco, and their co-conspirators used coded language like "breakfast" and "freight deviation" to refer to the bribes and communicated using personal email accounts, encrypted messaging applications, disposable phones, and fictitious names like "Spencer Kazisnaf" and "Nikita Maksimov." In total, Oztemel paid more than $1,000,000 in bribes, which were split between Berkowitz and other Petrobras officials in Brazil. The bribe money moved from the trading companies to shell companies around the world controlled by Innecco, who then made payments to a bank account in Uruguay controlled by Berkowitz's father.

The jury convicted Oztemel of conspiracy to violate the Foreign Corrupt Practices Act (FCPA), conspiracy to commit money laundering, three counts of violating the FCPA, and two counts of money laundering. He faces a maximum penalty of five years in prison on each of the FCPA and conspiracy to violate the FCPA counts, and a maximum penalty of 20 years in prison on each of the money laundering and money laundering conspiracy counts. A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

Charges against Oztemel and Innecco were unsealed on Feb. 17, 2023. In a superseding indictment returned on Aug. 29, 2023, both were charged alongside Oztemel's brother, Gary Oztemel. Gary Oztemel pleaded guilty to money laundering on June 24. In May 2023, Innecco was arrested in France and his extradition to the United States is pending. An indictment is merely an allegation, and Innecco is presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

In a related matter, in December 2023, Freepoint admitted to bribing officials in Brazil in violation of the anti-bribery provisions of the FCPA. Freepoint entered into a deferred prosecution agreement with the Criminal Division's Fraud Section and the U.S. Attorney's Office for the District of Connecticut. As a part of the resolution, Freepoint agreed to pay more than $98 million in criminal penalties and forfeiture.

The FBI Los Angeles Field Office's International Corruption Squad investigated the case. The Justice Department's Office of International Affairs and authorities in Brazil, Latvia, Switzerland, and Uruguay provided assistance with the investigation.

Trial Attorneys Allison McGuire and Clayton P. Solomon and Assistant Chief Jonathan P. Robell of the Criminal Division's Fraud Section and Assistant U.S. Attorney Michael McGarry for the District of Connecticut are prosecuting the case.

The Criminal Division's Fraud Section is responsible for investigating and prosecuting FCPA and Foreign Extortion Prevention Act (FEPA) matters. Additional information about the Justice Department's FCPA and FEPA enforcement efforts can be found at www.justice.gov/criminal/fraud/fcpa.

Updated February 6, 2025

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Press Release Number: 24-1209

Related Content

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).

RESOURCES | BLOG

Largest REMIT Fine Ever Issued by Romanian Energy Regulator

RegTrail | 09 February, 2024

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This week ANRE, the Romanian energy regulator, fined four firms for REMIT violations associated with wash trading.

ANRE's enforcement (click here – the document is in Romanian) will undoubtedly come as a shock to European wholesale energy markets as it is individually and collectively the largest enforcement action by monetary value issued by a National Regulatory Authority (NRA) for REMIT violations.

Since the first enforcement action in 2015, total REMIT enforcement fines amounted to € 220.7 million in aggregate thus the ANRE fines represent roughly 48.9% of the total fines issued. For further details on historic REMIT enforcement decisions since 2015, ACER provides a detailed table with hyperlinks to each decision (click here).

The ANRE enforcement decision does not provide significant detail however below are case facts that can be gleaned from the brief four page press release:

- The companies executed 'A to B to A' wash trades related to the same electricity product, for the same volume, at different price levels, between January and February 2021 which gave, or were likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products (as per the REMIT Article 2 (2)(a)(i) definition);
- Transactions were carried out on the OPCOM (the operator of the Romanian Electricity and Natural Gas market) Centralised Market for Continuous Double Trading of Bilateral Electricity Contracts (CM-OTC);

According to other sources the design of the Romanian power market retail price capping mechanism would mean that anti-competitive activities would also likely have resulted in damages to public finances (rather than to consumers) which might explain the unusually harsh penalties.

The four firms were fined as follows:

1. Tinmar Energy S.A.: RON 363,982,051.85 (approx. € 73.12 million);
2. Nova Power & Gas S.R.L.: RON 100,106,676.12 (approx. € 20.11 million);
3. EFT Furnizare S.R.L.: RON 50,497,126.22 (approx. € 10.15 million); and
4. Freepoint Commodities Europe LLP: RON 22,917,465.30 (€. EUR 4.6 million).

Both Tinmar Energy and Freepoint Commodities have appealed the decision (according to ACER's overview of REMIT sanctions) while EFT and Nova Power are able to appeal but have not appealed as of the date of the enforcement announcement.

PRESS RELEASE

Commodities Trading Company Agrees to Pay Over $98M to Resolve Foreign Bribery Case

Thursday, December 14, 2023

For Immediate Release

Office of Public Affairs

Freepoint Commodities LLC (Freepoint), a commodities trading company based in Stamford, Connecticut, has agreed to pay over $98 million to resolve an investigation by the U.S. Justice Department into violations of the Foreign Corrupt Practices Act (FCPA) stemming from the company's involvement in a corrupt scheme to pay bribes to Brazilian government officials.

Freepoint has also agreed to disgorge more than $7.6 million to the Commodity Futures Trading Commission (CFTC) in a related matter.

"As today's resolution demonstrates, the Criminal Division remains resolute in our fight against bribery and corruption," said Acting Assistant Attorney General Nicole M. Argentieri of the Justice Department's Criminal Division. "Our dedicated prosecutors are working tirelessly to hold both corporations and culpable individuals to account. Let this case also send a reminder that our policies offer the greatest benefits to companies that are proactive and act with urgency."

According to court documents, Freepoint entered into a three-year deferred prosecution agreement (DPA) with the department in connection with a criminal information filed in the District of Connecticut. The information charges the company with conspiracy to violate the anti-bribery provision of the FCPA for its scheme to pay bribes to Brazilian government officials to secure business with Brazil's state-owned and state-controlled oil company, Petróleo Brasileiro S.A. – Petrobras (Petrobras).

"This office and our federal law enforcement partners are keeping a watchful eye on those not only involved in the financial industry, but all U.S. businesses that operate overseas, to ensure that they are complying with our nation's laws," said U.S. Attorney Vanessa Roberts Avery for the District of Connecticut. "This hefty financial sanction and deferred prosecution agreement should both serve as a deterrent to illegal conduct in the U.S. and abroad, and as a reminder that the Justice Department incentivizes those who report illegal conduct and work with us to correct wrongdoing."

Between approximately 2012 and 2018, Freepoint and its co-conspirators paid bribes to Petrobras officials in exchange for confidential information about pricing and bids submitted by Freepoint's competitors. Freepoint and its co-conspirators concealed the scheme by communicating using code words and encrypted messaging applications, engaging in sham negotiations, and funneling the bribes through an intermediary who used offshore bank accounts and shell companies. Freepoint earned over $30 million in profits in connection with the scheme.

"This case exemplifies the FBI's relentless fight against corruption and our commitment to holding companies accountable for criminal business practices," said Assistant Director Michael Nordwall of the FBI's Criminal Investigative Division. "The FBI, along with our domestic and international partners, will continue to aggressively combat these crimes and work to level the playing field of the global marketplace."

"This resolution and the indictment of three individuals demonstrate the commitment by the FBI and the Justice Department to holding accountable both corrupt companies and actors — wherever they are — for their illicit business activity," said Assistant Director in Charge Donald Alway of the FBI Los Angeles Field Office. "Our tireless work with partners around the globe ensures that businesses earn their contracts and that consumers are protected from inflated prices."

Pursuant to the DPA, Freepoint has agreed to pay a criminal penalty of $68 million and administrative forfeiture in the amount of $30,551,150. Freepoint has also agreed to continue cooperating with the department in any ongoing or future criminal investigation relating to this conduct. The department will credit up to one-third of the criminal penalty against amounts that Freepoint pays to resolve an investigation by law enforcement authorities in Brazil for related conduct. The department will also credit up to 25% of the forfeiture amount against disgorgement that Freepoint pays the CFTC in a related matter.

The department reached this resolution with Freepoint based on a number of factors, including, among others, the nature and seriousness of the offense. Freepoint received credit for its cooperation with the department's investigation, which included (i) promptly and thoroughly responding to requests by the department by producing and summarizing relevant documents and other information; (ii) engaging in significant efforts to aggregate and analyze complex financial information and trade data for more than 4,000 transactions; (iii) making company officers and employees available for interviews, and arranging separate counsel where appropriate; (iv) providing all relevant facts known to it, including information about the individuals involved in the conduct. However, in the initial phases, Freepoint's cooperation was limited in degree and impact, and largely reactive.

Freepoint also engaged in remedial measures, including: (i) conducting an analysis of the causes of the underlying conduct and undertaking appropriate remediation to address those root causes and taking additional steps to improve its compliance program, including by retaining an advisory firm to evaluate its third-party compliance program; (ii) overhauling its third-party compliance and risk management program, including through the implementation of enhanced risk-based due diligence, screening, ongoing monitoring and oversight procedures, and the implementation of FCPA training for third-party agents; (iii) reducing the use of third-party intermediaries; (iv) implementing a global agent onboarding and tracking procedure; (v) strengthening its corporate governance and risk management structures, including through the utilization of data and metrics to evaluate risk, enhancing the independence and stature of its compliance function, and hiring additional, experienced compliance personnel; (vi) updating the company's global anti-bribery and corruption policy to include FCPA red flags; (vii) implementing a process for reporting and investigating allegations of misconduct; and (viii) conducting testing of its third-party compliance program.

In light of these considerations, the criminal penalty calculated under the U.S. Sentencing Guidelines reflects a 15% reduction off the bottom of the applicable guidelines fine range.

The department has recently charged three individuals in relation to Freepoint's bribery scheme, including:

- Glenn Oztemel, who allegedly worked as a senior oil trader at Freepoint and caused Freepoint to make corrupt payments to an intermediary, which were disguised as purported consulting fees and commissions, and which were used to pay bribes to Petrobras officials.
- Gary Oztemel, the brother of Glenn Oztemel, who allegedly used his company Oil Trade & Transport S.A. to corruptly assist Freepoint in obtaining or retaining business in Brazil.
- Eduardo Innecco, who worked as an agent for Freepoint and received purported consulting fees and commissions that he allegedly used to pay bribes to Petrobras officials on behalf of Freepoint.

The case against Glenn Oztemel, Gary Oztemel, and Eduardo Innecco is pending.

The FBI Los Angeles Field Office is investigating the case, with assistance from the FBI's International Corruption Unit.

Trial Attorneys Allison L. McGuire and Clayton P. Solomon and Assistant Chiefs Derek J. Ettinger and Jonathan P. Robell of the Criminal Division's Fraud Section and Assistant U.S. Attorney Michael McGarry for the District of Connecticut are prosecuting the case. The U.S. Attorney's Office for the Eastern District of New York also provided significant assistance.

The Justice Department's Office of International Affairs and authorities in Brazil, Latvia, Switzerland, and Uruguay provided assistance in the matter.

The Criminal Division's Fraud Section is responsible for investigating and prosecuting FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal/fraud/fcpa.

An indictment is merely an allegation. All defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

DPA Information

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Topic

FOREIGN CORRUPTION

Components

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