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SETTLEMENTS

Recordbreaking Alstom Criminal FCPA Settlement Results from Wide-Ranging Bribery Scheme and Lack of Cooperation

By Nicole Di Schino

The Department of Justice ended 2014 with its largest criminal FCPA enforcement action yet. On December 22, 2014, Alstom S.A. (Alstom), agreed to pay $772 million to resolve charges relating to a widespread, multi-national bribery scheme involving tens of millions of dollars of bribes paid to foreign officials across the globe.

The French engineering, power and transportation giant pleaded guilty to a two-count criminal information charging it with violating the FCPA by falsifying its books and records and failing to implement internal controls. Alstom's Swiss subsidiary also pleaded guilty to a criminal information charging it with conspiring to violate the anti-bribery provisions of the FCPA and two of its U.S. subsidiaries entered into deferred prosecution agreements admitting that they conspired to violate the anti-bribery provisions of the FCPA. (See the Alstom Power DPA and Alston Grid DPA).

Not only did Alstom receive the highest criminal FCPA settlement to date, it is paying the second largest overall fine and penalty in FCPA history. (Siemens is the largest.) Edward Kang, a partner at Alston & Bird, told The FCPA Report that the settlement "further confirms that FCPA enforcement remains a high priority for the government, and companies should continually monitor their FCPA risks and routinely revisit their compliance programs to prevent and detect possible violations."

The breadth of the Alstom bribery scheme and its ramifications were unique, but the elements that made up the scheme, including trouble with consultants, disguising bribes as charitable contributions and paying for foreign officials' travel and entertainment, were familiar.

The government's handling of the matter and public statements also raised familiar themes – highlighting the benefits of self-reporting and cooperation and applauding the international cooperation contributing to the successful investigation. According to the government's statements in press conferences and the documents accompanying the settlement, Alstom not only failed to self-report violations to the government, it also failed to cooperate in a meaningful manner until well into the investigation. See also "*Compliance Lessons from Total S.A.'s $398 Million FCPA Settlement: Foreign Cooperation, Compliance Monitors, Broad Jurisdiction and the Effect of Reluctant Cooperation with the DOJ and SEC*," The FCPA Report, Vol. 2, No. 12 (Jun. 12, 2013).

Fail to Cooperate and Face the Consequences

The settlement "makes clear that attempting to stonewall the government in an FCPA matter is not likely to be a successful strategy," Kang said. "In this case, when Alstom refused to cooperate early on, the government acted independently to investigate and develop cases against several Alstom executives," he explained. "When Alstom finally agreed to cooperate with the government after four executives had been charged, the government clearly viewed that cooperation as too little, too late," he said. "The Alstom case thus serves as a warning to companies regarding potential FCPA violations: refuse to cooperate with government investigations at your own peril." See "*Top FCPA Enforcers Tout Voluntary Disclosure and Warn About International Cooperation; The Defense Bar Responds*," The FCPA Report, Vol. 3, No. 24 (Dec. 3, 2014).

DOJ officials and their SEC counterparts regularly sing the praises of companies that self-report and cooperate with the government. In settling with Alstom, those officials highlight the flipside, that companies who choose not to report and refuse to cooperate will be punished.

At a DOJ press conference announcing the settlement, Attorney General Leslie Caldwell explained that "Alstom did not voluntarily disclose the misconduct to law enforcement authorities, and Alstom refused to cooperate in a meaningful way during the first several years of the investigation." She added, "indeed, it was only after the department publicly charged several Alstom executives – three years after the investigation began – that the company finally cooperated."

According to the Plea Agreement, during the early phases of the investigation, the company provided responses to the Department's subpoenas but provided no additional cooperation. That "initial failure to cooperate impeded the Department's investigation of individuals involved in the bribery scheme."

Caldwell emphasized the government's position on disclosure, cooperation, and remediation: "We encourage companies to maintain robust compliance programs, to voluntarily disclose and eradicate misconduct when it is detected, and to cooperate in the government's investigation. But," she warned, "we will not wait for companies to act responsibly. With cooperation or without it, 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."

While many companies that cooperate receive a fine at the low end of the Federal Sentencing Guidelines range, or even receive a discount off the bottom of that range, Alstom received a fine in the middle of the range. According to the guidelines calculation outlined in the Plea Agreement, Alstom should have been assessed a fine between $532 million and $1 billion.

Kang pointed to the April 2013 Ralph Lauren settlement as a demonstration of the government's policy. "In contrast to Alstom, Ralph Lauren began an internal investigation and made an initial disclosure of its findings to the government just two weeks after the company became aware of potential violations. Ralph Lauren also promptly produced documents to the government and fully cooperated with the government's subsequent investigation," he said. "As a result of these cooperation efforts, Ralph Lauren was able to resolve the case via Non-Prosecution Agreements with the SEC and DOJ."

"The contrasting results for Alstom and Ralph Lauren – even when taking into account other differences in the cases such as the extent of the misconduct – demonstrate that U.S. regulators are rewarding companies that cooperate and self-report, and punishing those that do not," Kang said. "In addition, even if the government comes to the company first, a company's cooperation may still help to mitigate the eventual punishment. Although the decisions to cooperate and self-report are highly fact-intensive and involve the risk of parallel prosecutions, it is clear that companies that uncover potential FCPA violations should consider these options if they wish to obtain any significant benefit from the government."

Remediation May Improve the Resolution

In addition to self-reporting and cooperating, the government routinely calls for companies that discover FCPA issues to remediate the problem and shore up their internal compliance programs. Companies that successfully do so may be subject to lesser financial penalties or may avoid other consequences, such as retaining a corporate monitor.

Although the Department of Justice was clearly unhappy with Alstom's cooperation, the Plea Agreement did note that the company had made "substantial efforts" to improve its compliance program and "remediate prior inadequacies." Those efforts included complying with the compliance recommendations of the company's existing World Bank resolution, which also arose out of bribery allegations

Why No Monitor?

In a departure from its habit in other large cases involving non-U.S. corporations, such as Siemens or Total,

the government did not require Alstom to immediately retain a monitor. (As discussed in this issue of The FCPA Report, the Avon FCPA settlement, also formally announced in December 2014, did include a monitor.)

Instead, the Alstom Plea Agreement required that Alstom periodically self-report to the Justice Department about its ongoing remediation and compliance-program implementation. The terms of Alstom's resolution with the World Bank, however, did include a monitor and the Plea Agreement also required that Alstom comply with its ongoing World Bank monitorship. Should the World Bank Integrity Compliance Office fail to certify that Alstom satisfied the requirements of its monitorship, Alstom will be required to retain an independent compliance monitor who will report to the Justice Department.

The lack of a compliance monitor may be a reward for Alstom's remediation efforts, but it may merely reflect Alstom's unique situation. "It's not entirely clear why a monitor was not imposed," Kang told The FCPA Report. "It could be that self-reporting was a concession that the government made as part of the plea negotiations," he said. "The World Bank's involvement could have been a factor in the Justice Department's refusal to insist on the imposition of an independent monitor. If so, this demonstrates once again the interconnectedness of anti-corruption enforcement across multiple agencies in multiple countries and jurisdictions."

International Cooperation Increases Anti-Corruption Risk

Alstom's troubles demonstrate the increasingly international nature of anti-bribery enforcement. Companies operating multi-nationally must anticipate that, if an anti-corruption issue arises, any country they have contact with will assist in investigating the conduct and that the company may face prosecutions in multiple countries.

At the press conference announcing the settlement, Deputy Attorney General James Cole described the investigation and prosecution of Alstom as "exceedingly complex" and said "they have required the utmost skill and tenacity on the part of a wide consortium of law enforcement officials throughout the country and across the globe." The U.S. received assistance from Switzerland, the U.K., Singapore, Italy, Saudi Arabia, Taiwan, Cyprus and Germany while investigating the company, he said, emphasizing that "the remarkable cross-border collaboration that these agencies made possible has led directly to [the] historic resolution."

As a result of the worldwide investigation, Alstom's troubles do not begin or end at the U.S. border. The company is also facing charges in the U.K. and several of its executives have been indicted in the U.S. The company is also reportedly under investigation by authorities in France, Italy, and Brazil, Kang said.

"Having to contend with parallel international prosecutions based on the same or similar set of facts is not unique to Alstom," Kang explained. "Numerous settlements, most notably with Siemens and Total S.A., demonstrate that multi-national corporations must now grapple with the possibility of 'copycat' anti-corruption prosecutions in multiple countries. Greater international cooperation and information-sharing among prosecutors have further contributed to the rising globalization of anti-corruption enforcement, and increased the ability for regulators to uncover misconduct independently," he said. Therefore, "before deciding whether to self-report potential violations to U.S. authorities, companies should analyze the likelihood of parallel international prosecutions being initiated and consider what the potential costs and penalties associated with such prosecutions would be," Kang advised. See "*Top DOJ and SEC Officials Discuss FCPA Enforcement Priorities and Mechanics,*" The FCPA Report, Vol. 3, No. 7 (Apr. 2, 2014) (discussing "legal double jeopardy").

No SEC Involvement, Questionable Jurisdiction?

The Alstom settlement did not involve accompanying SEC charges. Alstom, a French company that trades on the Paris Stock Exchange, is not subject to the jurisdiction of the SEC because, since 2004, it has not traded on U.S. exchanges. The criminal books and

records and internal controls provisions charges to which Alstom pleaded guilty were also based on Alstom's status as an issuer. On his website, The FCPA Professor, Mike Koehler argued that the Alstom "pleaded guilty to substantive legal provisions in 2014 that last applied to the company in 2004." Koehler described such charges as part of a "free-for-all, anything goes" approach to FCPA enforcement.

On his blog, FCPA attorney Tom Fox disagreed with that depiction of the approach, noting that this was a negotiated settlement. Alstom's lawyers were surely aware of the law regarding issuers, he said, and made a calculated decision. "First and foremost is that clearly Alstom did engage in conduct which substantially violated the FCPA. It would further appear that the conduct reached right up into the corporate home offices in France. By agreeing to the books and records and internal control violations, Alstom may have avoided any direct admission of guilt under French law, which we now know from the Total FCPA enforcement action is significant for a French company, because what is illegal bribery and corruption under U.S. law is not necessarily illegal under French law."

M&A Liability Remains a Threat

The Alstom settlement gives General Electric, which has agreed to purchase Alstom's core assets, some clarity in its acquisition when it comes to FCPA liability. According to the Justice Department, the penalty assessed will be paid by Alstom, not GE. "That was something we insisted on," said Assistant Attorney General Caldwell. "That's something that I think was very important." See "*How to Perform Effective FCPA Due Diligence in Private Equity Transactions and Strategic Mergers and Acquisitions*," The FCPA Report, Vol. 2, No. 5 (Mar. 6, 2013).

"The settlement helps draws a line in the sand as to what problems are 'owned' by the Alstom entities and in that regard, the scope of GE's liability has been narrowed," Kang said. "However, successor companies that are in a position similar to GE are by no means immune from potential anti-corruption liability. They can still be liable for future misconduct by the acquired entities," he explained. "Indeed, the criminal resolution against Alstom is a significant red flag that will require GE to be even more vigilant when it comes to anti-corruption diligence related to the acquired Alstom units. That diligence includes, but is not limited to, ensuring proper integration into the successor company's anti-corruption policies and procedures, training for third parties and employees associated with the acquired entities, continually assessing the areas of greatest corruption risk at the acquired entities, and conducting periodic audits and reviews of the books and records of the acquired entities."

Third-Party Dangers Fell Another Giant

As with many FCPA cases, many of Alstom's problems arose from its use of third parties. For example, in Indonesia, Alstom retained consultants to assist it in obtaining contracts for power projects, the Plea Agreement said. The consultants were retained primarily to pay bribes to Indonesian officials who could influence the award of the contracts. Several Alstom executives were aware of these activities. Similarly, in the Bahamas, Alstom retained at least one consultant who was a close friend of a government official for the purpose of paying bribes to that official.

In its press release discussing the settlement, Alstom emphasized that the conduct discussed in the settlement "mainly arose" from the use of external, success fee based consultants. The company no longer uses such consultants, it said.

Due Diligence Failures

Alstom's internal controls failed to prevent third parties from bribing foreign officials on its behalf. In addition to insufficient controls related to things such as third-party due diligence, it failed to follow the policies it did have.

According to the Alstom Plea Agreement, the company hired consultants despite the fact that they raised red flags under the company's own policies. In some

situations, company employees selected consultants who had no expertise or experience in the industry in which Alstom was trying to execute a project. For example, in Taiwan, the company retained a consultant that was listed as a "wholesaler of cigarettes, wines, and pianos" and that listed no expertise in the transport sector to assist with a transport-related project. The company also used consultants that were not even located in the country where a project was performed, and ignored other blatant issues including consultants asking to be paid in questionable ways, such as foreign bank accounts and multiple consultants being retained for the same services, the Plea Agreement said.

During the due diligence process, Alstom employees concealed facts about the purpose for hiring the consultants and company executives knew or failed to take action that would have revealed that those consultants were being secured for illicit purposes. For example, the Plea Agreement alleged that, in 2000, Alstom acquired a worldwide power business that was involved in contracts in Saudi Arabia. Prior to Alstom's acquisition, the power company began bidding on Saudi Arabian power projects, the Shoaiba Projects. Much of the work around the Shoaiba was done by consultants. After the acquisition, Alstom failed to perform effective due diligence and retained and sometimes renewed the consultancy agreements.

The consultants paid bribes on Alstom's behalf and Alstom failed to implement internal controls and disguised, in its books and records, tens of millions of dollars in payments and things of value provided to Saudi officials by Alstom consultants, the Plea Agreement said. Internally, Alstom referred to the consultants using code names such as "Mr. Geneva," "Quiet Man" or "Old Friend." See "*Qui Facit per Alium, Facit per Se: Best Practices for Third-Party Due Diligence*," The FCPA Report, Vol. 3, No.21 (Oct. 22, 2014).

Consultancy Agreements

Alstom employees also failed to follow company procedures relating to consultancy agreements, the Plea Agreement said. Alstom's agreements provided for payments to be made to consultants based on project milestones or when Alstom was paid by its customer. In some cases, Alstom employees would change the payment terms of the agreements, in violation of company policy. Executives were aware of these changes and were, at times, copied on emails discussing the true purpose for such changes.

For example, in connection with a project in Egypt, Alstom retained a consultant. Deviating from its normal policy of paying consultants on a pro-rata basis, the company changed the consultant's agreement "so that he received a large payment up front, which provided cash to bribe Egyptian officials," the Plea Agreement said.

Perhaps to avoid FCPA liability, Alstom also had a policy to avoid consultancy agreements that would subject it to the jurisdiction of the United States, the Plea Agreement said. Accordingly, Alstom generally used non-U.S. consultants and intentionally avoided making payments to U.S. bank accounts or in U.S. dollars. Alstom executives and employees went so far as encouraging consultants to open offshore bank accounts to receive payments, the Plea Agreement said. See our series on third-party contracts, "*A Guide to Anti-Corruption Representations in Third-Party Contracts: Nine Clauses to Include (Part One of Two)*," The FCPA Report, Vol. 3, No. 13 (Jun. 25, 2014); "*Clauses for High-Risk Situations and Enforcement Strategies (Part Two of Two)*," Vol. 3, No. 14 (Jul. 9, 2014).

Failure to Control Payments to Consultants

Alstom did not maintain adequate control over the payments to its consultants, the Plea Agreement stated. The company made payments to consultants without adequate documentation of the services the consultant's supposedly performed. At times, consultants asked Alstom to assist with creating false documentation necessary for payment approvals. In at least one case, a consultant blatantly stated that his services included making corrupt payments, asking an Alstom employee for assistance with his invoice to avoid including unlawful payments, the Plea Agreement said.

Charitable Contributions

Alstom also used charitable contributions to influence foreign officials, the Plea Agreement alleged. In Saudi Arabia, the company and its subsidiaries gave $2.2 million to a U.S.-based Islamic education foundation that was associated with a high-level official who had the ability to influence the award of the Shoaiba Projects. The payments were included in Alstom's books and records as expenses related to the projects rather than as an independent charitable contribution, the Plea Agreement said. See "*Ten Strategies for Avoiding FCPA Violations When Making Charitable Donations*," The FCPA Report, Vol. 1, No. 3 (Jul. 11, 2012).

Providing Jobs to Friends and Family of Government Officials

The Alstom Plea Agreement indicated that the company may have provided jobs to friends and family of foreign officials at the behest of those foreign officials. In an email discussing the Saudi projects, an Alstom U.S. employee acknowledged that Saudi laws required that projects such as the Shoaiba projects employ staffs containing at least 10% Saudi citizens. The Alstom employee described that as the "hammer used by our client to hire Saudis many of whom are strongly recommended by our client, i.e., friends and family," the Plea Agreement said. See "*Friendly Relations? When Nepotism May Violate the FCPA,*" The FCPA Report, Vol. 1, No. 10 (Oct. 17, 2012).

Travel and Entertainment Troubles

In addition to providing government officials with money, Alstom also provided them with improper gifts, travel and entertainment. For example, in Egypt the company paid for entertainment and travel for a high-level official with decision-making authority over a project Alstom was involved with and provided gifts during that travel, the Plea Agreement said. Alstom emails describe providing the official with a "special weekend in NYC with shopping, sightseeing, dining and tickets to a Broadway Musical." See "*Gifts, Travel, Entertainment and Anti-Corruption Compliance: Sources of Authority, Best Practices and Benchmarking*," The FCPA Report, Vol. 2, No. 22 (Nov. 6, 2013).

Creative Language Results in Books & Records Charges

Alstom actively worked to conceal and disguise improper payments to foreign officials, the Alstom Plea Agreement said. The company took several steps to alter its records including recording payments to consultants that it knew were not performing legitimate services as "commissions" or "consultancy fees"; creating consultancy agreements that prohibited unlawful payments while knowing the consultants would be providing such payments; and encouraging consultants to create and submit false invoices describing purported legitimate services rendered.

As noted above, the indictment did not charge Alstom with violations of the anti-bribery provisions of the FCPA and instead focused on the company's books and records and internal controls.