White Collar Update: Odebrecht and Braskem to Pay Record FCPA Penalty of at Least $3.5 Billion in Petrobras Fallout

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On Wednesday, December 21, 2016, Brazilian construction conglomerate Odebrecht S.A. and its affiliate Braskem S.A. pled guilty in the United States District Court for the Eastern District of New York to conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") for a scheme to bribe government officials, primarily in Brazil. In addition to its plea to the Department of Justice ("DOJ") charges, Braskem settled a civil action with the Securities and Exchange Commission ("SEC") – which is an outcome typical of joint DOJ/SEC FCPA resolutions. Odebrecht and Braskem agreed to pay at least $3.5 billion to authorities in the United States, Brazil, and Switzerland – the largest-ever FCPA penalty, including the second-largest FCPA disgorgement, to date. The resolutions are noteworthy not only for their record size, but also because they reaffirm the U.S. authorities' commitments to cooperating with foreign authorities and providing significant credit in exchange for robust cooperation efforts. Of note, this is the second resolution in recent months involving a Brazilian entity that resulted from cooperation between U.S. and Brazilian authorities.

Factual Background

According to DOJ, since as early as 2001, Odebrecht engaged in a "massive and unparalleled bribery and bid-rigging scheme," paying over $700 million in bribes to government officials and political parties in twelve countries. These bribes included approximately $98 million in corrupt payments in Venezuela, more than $92 million in corrupt payments in the Dominican Republic, and more than $59 million in corrupt payments in Panama. Nearly half of the corrupt payments were made to officials in Brazil, including executives and employees of Petróleo Brasileiro S.A. ("Petrobras"), Brazil's state-controlled oil company. From at least 2006 through 2014, Braskem, a petrochemical company controlled by Odebrecht, also used Odebrecht's off-book system to pay bribes to Brazilian politicians. Corrupt payments and profits from the schemes totaled approximately $3.8 billion. Odebrecht created a specialized division used to conceal the company's bribery through off-book communications and payment systems, ultimately funneling the bribes through offshore entities.

This matter is reportedly part of a larger international probe into corruption at Petrobras and the latest episode in a dramatic and difficult year for Brazil. The corruption probes have implicated numerous companies, executives, and politicians and have had serious economic and political consequences – most notably the impeachment of former Brazilian President Dilma Rouseff in August.

Odebrecht and Braskem Agree to Record FCPA Penalties and a Guilty Plea

Odebrecht and Braskem variously entered into resolutions with the DOJ and SEC, the Ministério Público Federal in Brazil ("MPF"), and the Office of the Attorney General in Switzerland. The companies pled guilty to one count of conspiracy to violate the FCPA in the U.S. District Court for the Eastern District of New York, entered into a leniency agreement with Brazilian authorities, and are subject to a summary penalty order in Switzerland for violation of corporate criminal law. Braskem also settled a civil case brought by the SEC in the U.S. District Court for the District of Columbia.

Odebrecht agreed to pay between $2.6 and $4.5 billion, while Braskem agreed to pay $632 million in penalties as well as $325 million in disgorgement. Although Odebrecht and authorities agreed that $4.5 billion is the appropriate criminal penalty, the final amount is subject to an "inability to pay" analysis due to Odebrecht's representation that it could only pay $2.6 billion.

According to court documents, neither company voluntarily disclosed the conduct underlying the investigation, and thus neither received a reduction for self-disclosure. Odebrecht did receive a 25% reduction off the bottom of the U.S. Sentencing Guidelines range for its full cooperation with the investigation; Braskem received a 15% reduction for "partial" cooperation. DOJ credited each company with significant remediation efforts, but still required both companies to retain independent compliance monitors for three years.

Observations

- **Record penalties for egregious conduct:** The penalties amount to the largest FCPA fine and the second-largest disgorgement amount to date, with Braskem's $325 million disgorgement falling just behind Siemens AG's 2008 disgorgement of $350 million. These numbers are less surprising in light of DOJ's characterization of the bribery as a decade-long "massive and unparalleled" scheme involving billions of dollars across twelve countries and effected by a secret division with a shadow budget. DOJ also cited evidence that Odebrecht employees took steps to destroy evidence of corruption after the investigation was made public. Brazil will receive the majority of the penalties; the United States will receive 10% of Odebrecht's penalty and 15% of Braskem's penalty.
- **U.S.-Brazil cooperation:** The Odebrecht and Braskem resolutions are the second time in recent months that U.S. and Brazilian authorities have joined forces to investigate a Brazilian company for bribery violations, and the third time this year the U.S. authorities have resolved Brazilian corruption charges, a dramatic increase compared to the past five years. In March 2016, medical equipment distributor **Olympus Corporation** and a Latin American subsidiary resolved DOJ FCPA charges for conduct in Brazil and elsewhere, and in October 2016, officials at DOJ, the SEC, and the MPF announced an FCPA resolution with Brazilian aircraft manufacturer Embraer S.A. Perhaps foreshadowing the Odebrecht and Braskem resolutions, the MPF noted in the Embraer matter that cooperation between the U.S. and Brazilian agencies was "not limited" to that matter. U.S. Assistant Attorney General Leslie Caldwell has similarly **said** that "[c]ollaboration and coordination among multiple regulators in cross-border matters is the future of major white collar criminal enforcement." The Embraer press release, deferred prosecution agreement, and criminal information are available **here**. These recent resolutions follow Brazil's enactment of its own anti-corruption statute, the Clean Companies Act of 2014, in addition to several other pieces of legislation aimed at combating corruption and organized crime. These efforts, coupled with the country's poor score on the Corruption Perception Index and continuing corruption allegations, suggest that additional corruption-related enforcement actions in Brazil are likely in the year to come. Finally, the U.S.-Brazil cooperation seen in recent months is exemplary of an ever-growing trend of foreign cooperation among U.S. and regulators in various foreign countries, including in places such as Israel, as evidenced by this week's additional resolution in the **Teva Pharmaceuticals** matter.
- **Cooperation credit:** Despite the allegedly massive scope of the bribery scheme, Odebrecht received a significant 25% fine reduction for its cooperation efforts. Though the investigation predated the DOJ Fraud Section's **FCPA Pilot Program**, that reduction matches the maximum available to companies that cooperate but fail to voluntarily disclose misconduct, which was the case for Odebrecht. Moreover, Odebrecht's plea agreement detailing its cooperation efforts potentially provides a guide to effective FCPA cooperation, including: providing voluminous documents from multiple jurisdictions, including translations; providing non-privileged facts about individuals and other companies; facilitating cooperation and disclosures by current and former employees; engaging in extensive remedial measures, including terminating or disciplining over 75 employees; instituting

training and heightened supervision requirements; adopting heightened policies, procedures, and controls; and increasing compliance resources, among others.

- **Imposition of a monitor:** The inclusion of a corporate monitor requirement in both the Odebrecht and Braskem resolutions rounds out a year in which DOJ has required monitors in several high-profile corporate FCPA resolutions, such as Embraer, VimpelCom and Och-Ziff Capital Management.
- **Inability to pay analysis:** Odebrecht is one of a small number of companies to have its FCPA penalty reduced because it is "unable" to pay. Like those companies, which include Alcoa and Innospec, Odebrecht's penalty could be reduced by nearly 50% from $4.5 to $2.6 billion. The plea agreement empowers DOJ and the Brazilian authorities to conduct an independent analysis of Odebrecht's finances before making a final determination of the criminal penalty.
- **Leveraging of New York U.S. Attorney's Offices:** The Odebrecht and Braskem resolutions represent two of several significant FCPA cases the Fraud Section has brought jointly with the U.S. Attorney's Office for the Eastern or Southern District of New York. Other notable 2016 corporate FCPA resolutions have included JP Morgan and Och-Ziff in the Eastern District and VimpelCom in the Southern District. This increased cooperation reflects the Fraud Section's continued efforts to leverage experienced white collar resources in these offices.

The Odebrecht and Braskem DOJ press release, plea agreements, and criminal information are available here. The Braskem SEC press release and complaint is available here.

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