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Collateral Litigation

Lessons from Glencore's $29.6 Million Restitution Order

By Lori Tripoli, *Anti-Corruption Report*

The very real risk of an FCPA case saddling a violating company with large restitution payments is one of the lessons that can be drawn from the news that a federal district court in late February ordered Glencore International to pay millions of dollars in restitution. The multinational commodity trading and mining company pleaded guilty in 2022 to conspiring to violate the FCPA. Its plea deal included a statement of facts, which the company agreed not to contest in any sentencing proceeding. The Mandatory Victims Restitution Act (MVRA) specify that a sentencing court shall order defendants convicted of certain crimes to make restitution to victims of the offense. The U.S. District Court for the Southern District of New York issued an Order requiring that $29.6 million in restitution be paid by Glencore, a decision that highlights a couple of concerns to be borne in mind, according to Jonathan Sack, a partner at Morvillo Abramowitz Grand Iason & Anello. He characterized these as "the risk of a substantial restitution obligation in an FCPA case, and the importance of anticipating, and planning for, that risk when seeking to resolve an FCPA investigation."

While this particular restitution order is small in relation to Glencore's total bribery resolution – less than 3% of the total – it is not negligible, said David Simon, a partner who heads the International Government Enforcement Defense & Investigations Team at the law firm Foley & Lardner. "$30 million is real money, and certainly worthy of consideration," he said. He also noted that the court's restitution order highlights what he termed "the importance of thinking through all of the potential collateral consequences of an FCPA resolution early and often."

See "Glencore Pleads Guilty and Agrees to Pay $1.1 Billion to Multiple Authorities, But Can It Change?" (Jun. 22, 2022).

Glencore's FCPA Back Story

Restitution had been sought by Ian Hagen and Lauretheé Hagen, the founders of Crusader Health, a medical services company active in the Democratic Republic of the Congo (DRC) and other African nations. They requested about $50 million in restitution arising from what the district court described as Switzerland-based Glencore's "admitted scheme to bribe a public official" in the DRC, in

exchange for dismissal of a 2010 lawsuit brought by Crusader Health against an indirect subsidiary of Glencore. The subsidiary had terminated its contract with Crusader Health, which effectively ended active operations in late 2012. Crusader Health had once provided medical services to more than 40,000 people in the DRC.

In 2022, Glencore pleaded guilty to conspiring to violate the FCPA from 2007 to 2018 by paying more than $100 million in bribes to foreign officials to gain unfair advantage or to retain business in the DRC and elsewhere. Having admitted as much as it did, its maneuvering space was limited in the 2023 restitution proceeding, said John Davis, a member at Miller & Chevalier specializing in FCPA and international anti-corruption matters. “Glencore’s arguments were hobbled in part by its own admissions in the FCPA plea,” he said.

Sack made a similar argument, pointing out that Glencore’s own plea agreement contained a statement of facts that mentioned a higher value than the amount it later tried to claim the suit was worth. “Glencore admitted that, by paying the bribe, it avoided paying a $16 million settlement to the company that brought the lawsuit and later sought restitution,” Sack said. “At sentencing, Glencore took a different position, arguing that the value of the lawsuit was only $10.8 million, not $16 million.” Thus, he said, the court concluded that Glencore’s argument “might have merit, but it does not.”

In fact, Sack noted, the restitution order went beyond the $16 million admitted in the statement of facts. The district court instead ordered almost $30 million to be paid in restitution.

A Well-Prepared Claimant

The size and scope of the restitution award highlights the risk involved when a well-prepared claimant comes forward, Sack said. “The court awarded claimants approximately $13.6 million restitution for the loss and closure of their business in the DRC – beyond the $16 million in lost settlement value,” he explained.

With the help of a valuation expert, claimants argued that the failure to receive the $16 million in settlement proceeds had caused the failure of their business, Sack observed. “Glencore’s conduct was both the ‘but for’ and proximate cause of the business failure,” he said, summarizing part of the decision by the Southern District of New York court. “The court accepted the expert’s opinion that the failure had resulted in $13.6 million in additional damages.” The court rejected Glencore’s argument under 18 U.S.C. § 3663A(c)(3) “that a determination of loss was too complex to justify a restitution award,” Sack said.

Glencore did argue that other claimed amounts were speculative, or did not show sufficient proximate cause to Glencore’s illegal conduct for which it pleaded guilty, said Davis. “But the court ruled against them, in part, based on the claimants’ evidence and expert testimony,” he noted.

There are various helpful takeaways for other defense counsel representing companies in similar positions. “While the evidence here did not favor Glencore, its legal and factual arguments as to causation, concreteness of measurable harm, and related issues are the types of arguments that de-

fendants should consider in other cases, where the evidence may differ from this case," Davis said. "Defendants should also argue, as Glencore did here successfully, against the granting of certain types of monies that are not covered by restitution, such as attorneys' fees related to the contract claim."

A defendant should consider arguments against claimants' double recovery of damages, as Glencore did in this case, partially successfully, Davis said. "Such arguments should consider other U.S. claims as well as international claims that could cover the same activities," he said.

In the anti-corruption arena, there has been a recent trend in which foreign victims of corruption have turned, sometimes successfully, to non-U.S. jurisdictions to gain damages or other recompense from alleged corrupt activities, Davis observed. "There have also been negotiated settlements between claimants and companies based on different legal theories in past FCPA and related cases. If present in relation to a specific restitution claim, these could have an impact in defending a potential claim of recovery," Davis said. He explained that such claims might be under the MVRA and the Crime Victims' Rights Act (CVRA).

Generally, key questions regarding restitution in MVRA cases will almost always relate to causation and damages, because the underlying facts will be established via plea agreement, Simon said. "In Glencore, at least with respect to part of the restitution, causation was clear," he noted. "The company pled guilty to paying a bribe to have a lawsuit valued at $16 million dismissed."

In other cases, causation is often muddier, particularly where the restitution-seeker is a competitor claiming to have lost a government contract or business as a result of a bribery scheme, said Simon. "Those MVRA claims will be more difficult to prove," he said.

Guilty Pleas Have Consequences

Glencore's result can serve as a reminder to pay attention to fact statements. The district court had appeared somewhat sympathetic to Glencore's argument concerning the true value of the lawsuit, and the loss suffered by the victims, said Eric Nitz, a partner at MoloLamken. But, he said, this was not reflected in the eventual decision of the court. "It ultimately concluded that the defendant was bound by the statement of facts to which it pled guilty, which included a far larger value for the lawsuit," said Nitz.

The claimants seeking restitution were able to demonstrate specifically how Glencore's actions, which it admitted in the guilty plea in its DOJ-related FCPA case, directly and concretely damaged Crusader Health's DRC business, thus meeting the relevant legal standards, Davis said.

Thanks to Glencore's admissions related to the DOJ's FCPA disposition, and the underlying evidence – including an invoice shown to have covered for a bribe to get Crusader's 2010 lawsuit dismissed – Crusader Health was able to present sufficient evidence to the court, linking Crusader's own economic damages directly to Glencore's admission of criminal behavior related to its personnel's threatening or illegal activities, Davis noted. Those economic damages were stated as including the termination of the DRC contracts.

Crusader Health was thus able to meet the MVRA standard for having been directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, Davis said.

See "Checklist of Collateral Consequences From FCPA Enforcement Actions" (Feb. 1, 2023)

Limited Judicial Leeway

In general, U.S. sentencing guidelines and the MVRA require restitution awards in cases where there are identifiable victims who suffered a injury or loss because of an offense for which restitution is authorized, noted Warren Allen II, a member at D.C. law firm WTAII. "There is some leeway to forgo awarding restitution in certain cases where the number of victims or complexity of the analysis would make an award 'impracticable' or impose a burden on the sentencing process that outweighs the need to provide restitution," Allen said. "Outside of these circumstances, courts have limited authority to decline to order restitution, though they do have relatively more power to determine an appropriate amount and payment conditions."

Generally, in criminal FCPA cases, much of the harm from bribery is broadly diffused, and identifying specific victims who suffered a physical injury or pecuniary loss that directly and proximately resulted from the offense may be difficult in most instances, explained Allen.

Because much of the conduct and evidence in FCPA cases is outside of the U.S., that is a further factor that can complicate analysis and trigger the exception in many cases, Allen said.

Of course, claimants sometimes have their own issues, such as participation in, or potential knowledge of, illegal activities that could implicate themselves, such that they decide not to bring a claim at all, observed Davis.

Crusader Health's case was helped by some specific factors, Davis said. "First, the Glencore FCPA disposition was through a guilty plea, under which Glencore admitted to the commission of a crime," he noted. "Most corporate FCPA matters are resolved through frameworks under which companies are not required to make definitive statements as to their guilt. SEC matters are routinely resolved via orders under which companies neither affirm nor deny the alleged facts."

Corporate DPAs and NPAs – still the most commonly used form of FCPA corporate settlements – also do not definitively state that crimes were committed or admitted by the company, said Davis. "Guilty pleas, or convictions at trial, are a necessary element for MVRA/CVRA claims to advance, but such pleas or convictions are still rare in the FCPA area – certainly for corporate entities," he said.

Other FCPA Restitution Cases

The result in the Glencore matter illustrates important points presented by other recent restitution decisions in FCPA cases, said Sack. He noted a similarity to *United States v. OZ Africa Management GP, LLC*, No. 16-CR-515 (E.D.N.Y. Aug. 29, 2019), where admissions in a statement of facts significant-

ly impacted the outcome, and complex valuation issues did not stand in the way of a substantial restitution award.

"A group of shareholders of a Canadian mining company sought restitution as victims of a bribery scheme involving a subsidiary of Och-Ziff Capital Management Group LLC," he said, noting the details of that earlier situation. "In that case, the claimant held an interest in a mine in the DRC and the rights to develop the mine, but a former employee secured and auctioned off the rights without notice."

That earlier case saw the claimant fight for the return of the rights in a local court. "The defendant admitted in a statement of facts that its partner in the DRC bribed officials to obtain favorable court rulings so that claimant would lose its interest in the mines," Sack said. "The court awarded claimant restitution of $135 million, finding that defendant's misconduct – the theft of the shareholders' mining rights and related bribery – directly and proximately caused the loss. Likewise, in *Glencore*, claimants were able to make a plausible causation argument in support of their claim for restitution."

On the other hand, Sack noted ways in which *Glencore* is different from certain other cases, such as *United States v. Luque-Flores*, No. 17-CR-537 (E.D.N.Y. May 14, 2021). In that case, the court denied restitution to Ecuador's state-owned oil company – whose high-level employees pleaded guilty to or were convicted of FCPA violations – because of complicity and lack of a clear causal link between the misconduct and alleged injuries. "Defendants should carefully weigh the facts in their case to determine the risk of a finding that the misconduct at issue caused injuries to third parties," Sack advised.

Simon voiced similar concerns. "Company management and their counsel will be well served to consider carefully all the potential legal and commercial consequences of the ultimate resolution in assessing whether to voluntarily self-disclose a potential FCPA violation, in determining what financial reserves are required, and in communicating expectations to the Board and other stakeholders," he said.

See "Restitution in FCPA Cases: Who Is a Victim of Foreign Corruption?" (Sep. 29, 2021), "In Latest Chapter of the Och-Ziff FCPA Saga, Court Rules That It Pay Restitution to Victims of Bribery" (Jan. 8, 2020) and "A Guide to Recent Prosecutions Related to the PetroEcuador Scandal" (Sep. 18, 2019).

DOJ's Emphasis on Victim Rights

DOJ statements about the rights of victims increase the likelihood of restitution being awarded to victims in FCPA cases, said Sack. "Earlier this year, DOJ revised the Principles of Federal Prosecution of Business Organizations to instruct federal prosecutors to consider what steps a corporation has taken to identify potential victims and to mitigate any harm that they have suffered due to the misconduct at issue," he noted. "The government's focus on victims during an investigation will gener-

ally increase the likelihood of companies having to pay restitution to victims, either before, or in connection with, a resolution of criminal charges."

The recent Boeing case, *United States v. Boeing* in the U.S. District Court for the Northern District of Texas, may further encourage DOJ to focus on victims during a criminal investigation, Sack suggested. In that case, victims challenged Boeing's DPA claiming that their rights were not adequately considered before the government entered into a DPA, he said.

Sack also noted that, in an order on February 9, 2023, a federal district judge in Texas agreed with the victims, but ultimately held that the court lacked the authority to order a substantive review and disapproval or modification.

On March 31, 2023, the DOJ's updated Guidelines for Victim and Witness Assistance became effective. The revised guidelines expand the "scope of support for those significantly harmed by crime," the DOJ announced. "We continue to fulfil our obligations to victims and witnesses through an approach that is victim-centered and trauma-informed," according to a quote attributed to Attorney General Merrick Garland in a press release.

Earlier guidelines stated that CVRA rights attach when criminal proceedings are initiated, but the revised version instructs DOJ personnel to give victims procedural rights as early in the criminal justice process as is feasible and appropriate, Sack said.

Ultimately, there could be an uptick in restitution claims. "As the DOJ talks more about victims' rights, and as victims learn about large restitution awards in cases like this one, greater numbers of victims are likely to come forward and request restitution from DOJ or seek restitution directly from the court," Nitz said.

See "Restitution in FCPA Cases: Who Is a Victim of Foreign Corruption?" (Sep. 29, 2021) and "In Latest Chapter of the Och-Ziff FCPA Saga, Court Rules That It Pay Restitution to Victims of Bribery" (Jan. 8, 2020).

Resisting Restitution

While it makes sense that companies might try to resist, or at least limit, payment of restitution, doing so bears its own collateral consequences, Allen cautioned. "Companies must also consider how the approach they take will affect their brands and reputations when they seek to limit relief intended to make their victims whole, particularly when they find themselves unable to challenge the agreed-upon statements of facts in the associated resolution materials," Allen said.

Particularly where a defendant has pleaded guilty, arguments concerning restitution require a delicate balance, to avoid the appearance that a defendant is perceived as shirking responsibility, said Nitz. "That might cause the government to argue the plea agreement has been breached and should be voided," he explained. "Fighting restitution vigorously might also make the defendant appear non-sympathetic to the court, leading to a larger sentence."

Allen laid out several different lines of argument that might be available to a defendant convicted of violating the FCPA, letting it challenge a subsequent restitution claim by an identified victim. First, it can argue that the offense did not cause the claimant's injury. Second, it can dispute the extent of the damages. A third option is to argue that the claimant has already been made whole. A fourth possibility would see the defendant insisting that the number of victims, or complexity of the analysis, would make an award impracticable. Finally, Allen pointed out the possibility of a fifth argument. Namely, claiming that analysis would impose a burden on the sentencing process that outweighs the need to provide restitution.

"Most corporate FCPA cases are resolved through settlement, so the agreed-upon statement of facts would control which, if any, of these arguments might be available," Allen said.

Sack said the Glencore case might persuade some companies to anticipate restitution requests early on. Companies can prepare, during an investigation, for the possibility of such claims and take them into consideration when presenting arguments to the DOJ, negotiating a resolution of the investigation, and agreeing on a statement of facts, Sack suggested. "If company counsel examines who the potential victims might be, and what sort of claims they might have, the company can incorporate these considerations into the resolution reached with the government, and thereby reduce the risk of an unexpected outcome," he said.

In the end, deterring restitution claims is one of many reasons that companies will want to continue to argue against a case disposition that results in a criminal plea, Davis said.

See "Calculating Restitution: What Corporate Defendants Can Learn From Credit Suisse Securities' Settlement Negotiations" (Sep. 14, 2022).