

# FCPA Update

A Global Anti-Corruption Newsletter



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## Cooperation Mitigates Recidivism: ABB Settles with DOJ and the SEC

On December 2, 2022, ABB Ltd. (“ABB”), a Swiss multinational electrification, automation, motion, and robotics technologies firm, resolved its third FCPA case since 2004. ABB entered into a DPA with DOJ and a settlement with the SEC, agreeing to penalties of approximately \$400 million to resolve investigations into alleged FCPA violations.<sup>1</sup> In addition, ABB subsidiaries in Switzerland and South Africa pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provisions.<sup>2</sup> These U.S. resolutions are part of a coordinated global settlement with

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1. Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 1:22-cr-00220-MSN (E.D. Va. Dec. 2, 2022) <https://www.justice.gov/opa/press-release/file/1556131/download>; Order, *In re ABB Ltd.*, Securities & Exchange Act Rel. No. 96444 (Dec. 3, 2022) (“ABB Order”) <https://www.sec.gov/litigation/admin/2022/34-96444.pdf>.
2. Plea Agreement, *United States v. ABB South Africa (PTY) Ltd.*, No. 1:22-cr-00222-MSN (E.D. Va. Dec. 2, 2022) <https://www.justice.gov/opa/press-release/file/1556091/download>; Plea Agreement, *United States v. ABB Management Services Ltd.*, No. 1:22-cr-00221-MSN (E.D. Va. Dec. 2, 2022) <https://www.justice.gov/opa/press-release/file/1556136/download>.

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authorities in Switzerland and South Africa, with another resolution forthcoming in Germany. Notably, this is the first coordinated resolution for U.S. officials with South African authorities.

The ABB resolution provides insight into several aspects of recent DOJ pronouncements regarding voluntary disclosure, cooperation, remediation, the imposition of compliance monitorships, and recidivism.<sup>3</sup> But notably, while DOJ continues to tout individual accountability as its top priority, the ABB resolution does not yet appear to involve individuals.

**The Bribery Scheme**

DOJ charged ABB with two counts of conspiracy to violate the FCPA and two counts of violating the FCPA. The SEC similarly found that ABB violated the anti-bribery, books and records, and internal controls provisions of the FCPA. The scheme primarily occurred in South Africa (though individuals in other jurisdictions were involved), extended over a four-year period, and involved ABB obtaining a contract worth approximately \$160 million from the state-owned South African power utility, Eskom. The bribes were funneled to a high-ranking official at Eskom through two subcontractors.

In 2013, ABB learned of plans to cancel and rebid certain engineering contracts in connection with a project involving construction of a major coal plant in South Africa (approved by the government in 2007). ABB then began its efforts to win those contracts in March 2014, later forming an internal group of its Italian, German, and South African subsidiaries with oversight by its Swiss management subsidiary (collectively, the “consortium”). The SEC order describes two of the ABB employees involved in these efforts as a “senior business executive at ABB headquarters” and “a senior sales and marketing executive at ABB headquarters.”<sup>4</sup> In April 2014, a high-ranking Eskom official introduced consortium employees to a subcontractor, and the ABB consortium decided to work with the subcontractor despite indications that the subcontractor had political ties.

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3. Similar aspects are reinforced by DOJ’s most recent declination made pursuant to its Corporate Enforcement Policy (the second so-called declination with disgorgement in 2022 after a lull in the use of that resolution form). Declination Letter from the U.S. Dep’t of Justice, Criminal Division, Fraud Section to Peter Spivack, Re: Safran S.A., Declination (Dec. 21, 2022), <https://www.justice.gov/criminal-fraud/file/1559236/download>. Despite evidence of FCPA violations committed by a German entity prior to acquisition by French aerospace company Safran related to obtaining train lavatory contracts with the Chinese government, DOJ resolved the matter via a declination with disgorgement of \$17.9 million due to the company’s timely and voluntary self-disclosure (after post-acquisition due diligence), proactive cooperation, and full remediation (including terminating responsible employees). DOJ will defer to German authorities’ imposition of penalties owed in connection with the bribery scheme.
  4. ABB Order at 3.

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In December 2014, the ABB consortium received confidential information about the award process from the same Eskom official. A few months later, ABB secured a contract with Eskom, worth approximately \$160 million, and began making payments to the subcontractor with the understanding that ten percent of the payments would be passed on to the Eskom official. When the relationship between the Eskom official and the subcontractor later soured, the official then required that ABB work with another subcontractor in order to facilitate the passing of payments to the official.

In order to justify bringing on a new subcontractor, the ABB consortium in conjunction with the Eskom official fabricated “variation orders” to increase payments under the contract and allow for the addition of a new subcontractor. The ABB consortium agreed to work with the new subcontractor selected by the Eskom official despite the fact that the subcontractor failed to meet ABB’s minimum qualifications, which was flagged by an American compliance employee at ABB and required a waiver for ABB’s internal approvals. The ABB consortium agreed to multiple “variation orders” worth more than \$57 million with the understanding that a portion of each order would be paid to the Eskom official. ABB did not accurately represent these payments in its books and records.

“Timely self-disclosure (or even evidence of a genuine *intent* to timely self-disclose) is one of the strongest steps a company can take to help stave off parent guilty pleas and monitorships, even for recidivist companies for whom DOJ has stated multiple DPAs are disfavored.”

**ABB’s FCPA Settlement**

In announcing this resolution, DOJ highlighted ABB’s recidivism, but also its efforts in reaching a resolution, noting that “[t]his resolution demonstrates the Criminal Division’s thoughtful approach to appropriately balance” the company’s intent to promptly self-disclose, its timely and full cooperation, and extensive remediation against ABB’s historical misconduct.<sup>5</sup> Importantly, although ABB qualifies as an FCPA recidivist, its previous FCPA resolutions (from 2004 and 2010) fall outside

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5. See U.S. Dep’t Justice Press Rel. No. 22-1296, “ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case,” (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>.

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the ten-year window for consideration of prior criminal resolutions discussed in the 2022 Monaco Memo, suggesting that DOJ may have given reduced weight to these previous instances of misconduct.<sup>6</sup>

ABB agreed to pay a total criminal fine of \$315 million to DOJ, a civil fine of \$75 million to the SEC, and disgorgement and prejudgment interest of more than of \$72.5 million to the SEC, which was deemed satisfied by the company's prior payment to South African authorities in December 2020. DOJ agreed to credit up to half of its total fine amount for penalties paid in South Africa (\$157.5 million) and also agreed to credit amounts paid to the SEC (\$63 million) and authorities in Switzerland (\$11 million) and Germany (up to \$11 million for any penalties paid within a year). The total combined U.S. penalties and disgorgement before crediting for foreign penalties is approximately \$462.5 million, of which approximately \$147.5 million will actually be paid to U.S. authorities after credits.

ABB received a full 25% discount for its "extraordinary" cooperation with DOJ. Among the factors that contributed to ABB receiving significant cooperation credit were ABB's prompt provision of information obtained through its internal investigation, ABB's production of documents and translations, and ABB voluntarily making foreign-based employees available for interviews in the United States. However, primarily on account of ABB's recidivism, the 25% discount was applied off the mid-point between the middle and high ends of the Sentencing Guidelines fine range, while the true maximum cooperation credit would be 25% off the bottom end of the Sentencing Guidelines fine range. In describing ABB's recidivism, the DPA referenced the two prior FCPA settlements, one prior bid-rigging settlement, and the resolution of two administrative actions with competition authorities in Europe and Brazil.<sup>7</sup>

ABB did not receive credit for voluntary disclosure, as the media reported the South African bribery scheme ahead of ABB's disclosure meeting with the U.S. authorities. However, DOJ highlighted that it considered the circumstances of ABB's "prompt disclosure" in determining the form of the settlement: ABB scheduled a meeting to disclose the issue without any knowledge of the forthcoming media reports, but the news broke before the meeting took place.

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6. See Memo from the Deputy Attorney General (Lisa O. Monaco), "Further Revisions to Corporate Criminal Enforcement Policies Follow Discussions with Corporate Crime Advisory Group" at 5 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

7. ABB DPA at 5–6.

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The DPA also highlighted ABB's "extensive remedial measures," which included hiring experienced compliance personnel, conducting a root-cause analysis, investing significantly in compliance testing, and continuing its monitoring and assessment. (It is worth noting that ABB successfully completed an FCPA monitorship in 2010.<sup>8</sup>) Because of the company's extensive remediation, DOJ determined that an independent monitor was unnecessary. However, for the duration of the three-year term of the agreement, DOJ has required "enhanced" corporate compliance reporting, which in addition to the regular annual compliance reports during the DPA term also includes quarterly meetings to update DOJ on the company's remediation, implementation, and testing of its compliance program and internal controls.

As is standard in FCPA settlements, the plea agreement requires that ABB disclose to DOJ any evidence or allegation of conduct that "may constitute" a violation of the anti-bribery provisions of the FCPA, whether or not the misconduct occurred outside the jurisdiction of the FCPA (for the duration of the three-year DPA). Consistent with recent pronouncements from DOJ, the plea agreement also requires ABB's CEO and CIO (chief integrity officer, similar to the chief compliance officer role) to certify to the effectiveness of the company's compliance program at the end of the three-year DPA period. This is yet another instance of DOJ imposing this relatively new requirement in FCPA settlements.

**ABB Sheds Light on DOJ's Evolving Approach to Recidivism**

Relatedly, recent signs from DOJ suggest that the simple fact of a prior criminal or civil settlement is not the end of the conversation when it comes to the outcomes that companies can expect when cooperating with the government. Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri recently clarified that "a history of misconduct will not mean a guilty plea for a company that self-discloses, cooperates, and remediates unless other aggravating factors – aside from recidivism – are present."<sup>9</sup> Those aggravating factors include "involvement by executive management in the misconduct, significant profit to the company from the wrongdoing, or pervasive or egregious misconduct." Interestingly, here, several of the employees involved worked at the parent.

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8. ABB's 2010 DPA included requirements relating to policy updates across several high-risk areas (e.g., gifts and hospitality, donations and sponsorships, political contributions), hiring of sufficiently senior and experienced compliance personnel, heightened requirements for managing relationships with third parties, maintaining accessible reporting lines for employees to report violations, improved risk assessment, and various structural improvements.
  9. Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

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### Takeaways

The latest ABB resolution provides some useful takeaways for companies facing FCPA scrutiny:

- Timely self-disclosure (or even evidence of a genuine *intent* to timely self-disclose) is one of the strongest steps a company can take to help stave off parent guilty pleas and monitorships, even for recidivist companies for whom DOJ has stated multiple DPAs are disfavored.
- Self-disclosure and full cooperation can to a certain extent overcome recidivism – at least recidivism based on dated conduct – though recidivists can expect to pay fines based on higher points in the guideline range.
- The most important factor in determining whether a monitorship will be imposed is whether there is sufficient evidence of extensive remediation and an agile and risk-based compliance program being implemented and well-tested prior to resolution.
- It remains to be seen whether the United States or other authorities will hold any individuals accountable (although Germany in particular is worth watching, since that resolution has not yet been announced and the key individuals, according to the DPA, are German nationals.)

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