

CLIENT ALERT

German Software Giant SAP Settles FCPA Investigation

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On January 10, 2024, the U.S. Department of Justice (the “Department” or “DOJ”) and the Securities and Exchange Commission (“SEC”) announced settlements with SAP SE (“SAP”), resolving investigations into the bribery of government officials in Azerbaijan, Ghana, Indonesia, Kenya, Malawi, South Africa, and Tanzania. SAP entered into a three-year deferred prosecution agreement (“DPA”) with the DOJ in which the company acknowledged conspiring to violate the Foreign Corrupt Practices Act (“FCPA”) anti-bribery and books and records provisions.¹ Concurrently, SAP settled with the SEC, which charged the company with violating the FCPA anti-bribery, books and records, and internal controls provisions.²

The Charged Conduct

SAP is a global software company headquartered in Germany whose American Depositary Shares are listed on the New York Stock Exchange. The company is a leader in enterprise resource planning (“ERP”) software. As stated in the DPA’s Statement of Facts, between approximately 2013 and 2017, SAP and subsidiaries SAP Africa Ltd. (“SAP Africa”) and SAP South Africa Ltd. (“SAP South Africa”) used third-party intermediaries to funnel payments to South African officials in order to obtain or retain business with various municipalities and government departments and agencies. These included the cities of Johannesburg and Tshwane, the Department of Water and Sanitation in South Africa, and Eskom Holdings Limited, a state-owned energy company that generates and transmits electricity in South Africa. The improper payments were falsely recorded in SAP’s books and records as “commissions,” even though no legitimate work was performed in exchange for

¹ Deferred Prosecution Agreement, *United States v. SAP SE*, No. 1:23-cr-00202 (E.D. Va. Jan. 10, 2024).

² *In the Matter of SAP SE*, Exchange Act Release No. 99308 (Jan. 10, 2024) (cease-and-desist order).

German Software Giant SAP Settles FCPA Investigation

the payments. In addition, SAP Africa and SAP South Africa executives falsely certified to the operating effectiveness of internal controls over financial reporting, which included the falsely booked commissions. The false accounting entries and certifications were incorporated into SAP's 20-F filings.

Similarly, according to the DPA, between approximately 2015 and 2018, SAP and its subsidiary PT. SAP Indonesia ("SAP Indonesia") conspired to bribe officials at the Indonesian Ministry of Maritime Affairs and Fisheries and an Indonesian state-owned Telecommunications and Information Accessibility Agency, in order to obtain and retain lucrative contracts with those entities. The DPA states that multiple Indonesian government officials and their family members received things of value, and describes in particular a trip to the United States, during which SAP paid for gifts for a government official and a family member, including "a luxury watch," handbags, and "novelties." The DOJ calculated that both bribery schemes resulted in approximately \$103,396,765 in profits to SAP.

The SEC charged an even broader range of conduct. In addition to the misconduct in South Africa and Indonesia, the SEC Order also details bid-rigging and corrupt payments made by intermediaries on behalf of SAP to obtain and retain business in Ghana, Kenya, Malawi, and Tanzania. As described in the SEC Order, SAP Africa paid bribes to intermediaries to improperly influence government tenders to favor SAP. And an employee of SAP AZ LLC ("SAP Azerbaijan") provided gifts to government officials in connection with trying to secure business with a state-owned Azerbaijani company. According to the SEC Order, several officials received gifts totaling about \$3,000, which exceeded SAP's gift limit of \$30.

The SEC further found that the various improper payments were inaccurately recorded as commissions or other expenses in SAP's books and records and that SAP lacked "internal accounting controls sufficient to detect or prevent such payments," including failing to conduct adequate due diligence for third parties and not having in place payment approval controls to ensure services were actually rendered before issuing payments. The SEC also faulted SAP for having "insufficient formal monitoring" to "ensure" employees at the various subsidiaries were adhering to relevant policies.

Significant Cooperation Credit Given Despite No Voluntary Disclosure

SAP did not voluntarily disclose the misconduct to the Department or the SEC, and had prior relevant criminal and civil resolutions, namely resolutions in 2021 with the DOJ's National Security Division, the Department of Commerce, and the Department of the Treasury relating to potential violations of export laws, and a 2016 resolution with the SEC related to FCPA violations in Panama. Nevertheless, the DOJ agreed to resolve the new matter through a DPA and to provide a substantial discount off the low end of the sentencing guidelines in light of SAP's significant remediation and cooperation with the DOJ's investigation.

With respect to remediation, SAP conducted a root cause analysis and a comprehensive risk assessment focusing on controls around payment processes and other high risk areas, eliminated the use of the third-party sales commission model, significantly expanded SAP's Offices of Ethics and Compliance, enhanced policies and processes relating to the reporting

German Software Giant SAP Settles FCPA Investigation

of concerns, auditing, and internal investigations, increased the use of data analytics, and promptly disciplined all employees involved in the misconduct.

With respect to cooperation, SAP cooperated from the outset, kept the DOJ up-to-date on factual findings, navigated data privacy laws to allow for expeditious production from multiple foreign countries, facilitated interviews while addressing “witness security concerns,” “deconflict[ed]” its investigation from the DOJ’s, provided translations of “voluminous foreign language documents,” organized and analyzed “complex financial information,” and “imag[ed] the phones of relevant custodians” at the beginning of SAP’s investigation, preserving “relevant and highly probative business communications sent on mobile messaging applications.”

Given all this, the DPA imposed a criminal penalty of \$118,800,000, which represents a 40% discount off “the 10th percentile” of the applicable U.S. Sentencing Guidelines fine range. SAP then received a \$109,141 credit under the Department’s Compensation Incentives and Clawbacks Pilot Program, as SAP withheld bonuses totaling to that amount from employees engaged in the wrongdoing or who had supervisory authority over such employees. The size of this credit illustrates that the direct effect of clawbacks reducing penalties is often small, although seeking clawbacks also factors into the Department’s determination of the discount off the lower range of the U.S. Sentencing Guidelines.

The DPA also ordered the forfeiture of \$103,396,765 as proceeds traceable to the misconduct. SAP will receive a credit against this forfeiture amount for the disgorgement paid to the SEC. The SEC imposed disgorgement of \$85,046,035 and prejudgment interest of \$13,405,149, but did not impose a civil penalty in light of the criminal penalty.

SAP also avoided an independent compliance monitor as a result of its cooperation and remediation. Instead, for the term of the DPA, the company is required to review, test, and update its compliance program and to produce at least three written reports to the Department describing that work.

Coordination With Non-U.S. Enforcement Authorities

The resolutions with the DOJ and the SEC were coordinated with enforcement authorities in South Africa, where SAP was also under investigation. In anticipation of a settlement with South African authorities, the DOJ agreed to credit any penalties paid to South African enforcement authorities against its criminal penalty up to \$55,100,000. Similarly, the SEC agreed to credit up to \$59,455,779 against the disgorgement it imposed for any amounts paid to South African authorities. The SAP matter is reflective of the continuing increase in anti-corruption enforcement by non-U.S. governments, and emphasizes the importance of coordinating any investigation and negotiation not only with U.S. enforcement authorities but also relevant foreign counterparts.

German Software Giant SAP Settles FCPA Investigation

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