Securities Regulation Daily Wrap Up, ENFORCEMENT—Software company SAP fined $220M for FCPA violations, (Jan 11, 2024)

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SAP settled civil and criminal charges of paying bribes to officials throughout Africa, in Indonesia, and in Azerbaijan.

The German software firm SAP agreed to pay over $220 million to resolve DOJ and SEC investigations into violations of the Foreign Corrupt Practices Act. From 2014 to 2022, SAP used third-party intermediaries and consultants to pay bribes to government officials to obtain business, then listed the bribes as business expenses. The SEC's disgorgement amount will be offset by up to $59 million paid to the South African government (*In the Matter of SAP SE*, Release No. 34-99308, January 10, 2024).

Widespread bribery. The SEC's order explains that SAP knew that the use of third parties could increase the risk of improper payments to secure business and that its internal policies and procedures required employees to conduct due diligence to mitigate this risk. Nevertheless, SAP's wholly owned subsidiaries in Africa, Indonesia, and Azerbaijan violated these internal policies, transferring funds through intermediaries who did not perform any actual work for SAP.

WhatsApp messages between account executives and the intermediaries showed requests for "baggage" and "envelopes," understood to refer to bribes. One consultant messaged an SAP Indonesia account executive, "Seventy million, in fifty thousand bills…Bring empty envelope." Bribes helped SAP South Africa to secure contracts valued in the tens of millions of dollars. SAP Africa repeatedly violated its internal processes and procedures and ignored repeated red flags indicating that intermediaries were funneling money to officials. And an SAP Azerbaijan employee provided improper gifts to officials at the state oil company, then backdated the resulting contract, apparently to claim a commission on the deal before a pending promotion.

Penalties. The SEC imposed $85 million in disgorgement and $13 million in prejudgment interest for a total payment of over $98 million. Up to $59 million of this may be offset against any payments made to the government of South Africa or a South African state-owned entity. The remaining $39 million is due within 30 days of the SEC's order.

Under the deferred prosecution agreement with the DOJ, SAP agreed to pay a criminal penalty of $119 million and administrative forfeiture of $104 million. The Department will credit up to $55.1 million of the criminal penalty against amounts SAP pays to South Africa to resolve their investigation, and will credit up to the full forfeiture amount against disgorgement paid to the SEC or South African authorities.

The criminal penalty reflects a small reduction of about $110,000 for compensation that SAP withheld from qualifying employees. In light of SAP's cooperation in the criminal investigation and its timely remedial measures, the criminal penalty reflects a 40 percent reduction off the tenth percentile above the low end of the guidelines fine range.

Charles E. Cain, Chief of the SEC Division of Enforcement's FCPA Unit, said the SEC's order "serves as a stark reminder of the need for global companies to be attuned to both the risks of their business and the need to maintain adequate entity-level controls over all their subsidiaries." The FBI's Donald Always said that the case "is another example of the power of relationships and Persistence… The sustained diligence by the prosecution team and continuous collaboration with South African law enforcement, regulators, and prosecutors identified corrupt activity in multiple countries." U.S. Postal Inspectors also worked with the Justice Department to trace the trail of payments from South Africa to Indonesia, said Postal Inspector in Charge of Criminal Investigations Eric Shen.

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