

SAP resolves FCPA case for \$220 million

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SAP agreed to pay \$220 million to resolve a long-standing foreign bribery investigation with the Department of Justice and the Securities and Exchange Commission involving improper payments in South Africa, Indonesia, and several other countries. Although the resolutions were fairly standard, there are a number of noteworthy aspects and takeaways.

Overview of resolutions

On January 10, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) announced parallel resolutions with SAP, a German software company, to resolve investigations into violations of the Foreign Corrupt Practices Act (FCPA). According to the resolutions, from 2013 to 2018, SAP made improper payments to officials at state-owned entities in South Africa and Indonesia to secure and retain software and professional services contracts with those entities. The bribes were made directly or through third-party intermediaries, and took the form of cash, political contributions, luxury goods and shopping trips for government officials and their family members, netting SAP approximately \$100 million in profits. In addition, the SEC resolution covered conduct in Malawi, Tanzania, Ghana, and Kenya related to bid-rigging and corrupt payments to government officials between 2014 and 2018, and in Azerbaijan related to improper gifts provided to government officials in connection with deals with the state-owned oil company from 2021 to 2022.

To resolve the matter, SAP entered into an administrative order with the SEC requiring SAP to pay approximately \$85 million in disgorgement and \$13 million in prejudgment interest, but received an offset of approximately \$60 million for payments “made or to be made” to South African authorities in connection with a parallel enforcement action there. SAP entered into a three-year Deferred Prosecution Agreement (DPA) with the DOJ, in which SAP agreed to pay a criminal penalty of \$118.8 million and a criminal forfeiture of approximately \$100 million. DOJ agreed to credit up to \$55 million of the criminal penalty to fines owed to South African regulators as well as the forfeiture amount to any disgorgement or forfeiture paid to the SEC and South African authorities, which likely will result in no forfeiture amount paid to DOJ. In addition, SAP received an approximately \$110,000 credit under the Criminal Division’s Pilot Program Regarding Compensation Incentives and Clawbacks because SAP withheld bonuses from employees who were engaged in the misconduct. No monitor was imposed, and instead SAP will self-report regarding its compliance program during the term of the resolution.

Key takeaways

There are several noteworthy aspects and takeaways from the resolutions:

- **Clawback Pilot Program continues to be interpreted broadly but continues to have limited upside:** DOJ once again gave credit to a company under its Clawback Pilot Program for something other than clawing back compensation. As in several other resolutions, DOJ gave credit for and reduced the amount of the criminal penalty by the amount of future bonuses that were withheld from accountable employees, even though the pilot program only expressly covers clawing back compensation that was already awarded. This is a positive development and shows that DOJ is broadly applying the benefits of the program where companies are doing what they can to effectively remediate. Of note, the benefit of the clawback credit was minimal—\$110,000 in a resolution that included total fines of more than \$200 million. This again highlights the limited upside in a company’s risk-benefit analysis that may be

more heavily weighted on the risk side as we described in [our prior client update on the topic](#).

- **“Extraordinary cooperation” credit starts to take shape:** DOJ provided significant cooperation and remediation credit—a 40% discount off the penalty—which, together with other recent resolutions, is starting to fill in the details of what DOJ expects companies to do in order to achieve “extraordinary” cooperation credit. The DOJ noted SAP’s immediate cooperation, production of relevant documents while navigating foreign privacy laws, voluntarily making employees available and facilitating interviews while navigating safety concerns, “de-conflicting” with DOJ’s investigation, promptly organizing voluminous information including complex financial information and documents in a foreign language and translating foreign language documents, and imaging phones of relevant custodians.
- **Prior misconduct matters, but DOJ demonstrates reasonableness in assessing the impact:** Even though DOJ awarded 40% cooperation credit, rather than providing this discount off the low end of the otherwise applicable Sentencing Guidelines range (which is standard for FCPA cases in which the company cooperated), DOJ instead gave the discount “off the tenth percentile above the low end of the otherwise applicable guidelines fine range.” Aside from needing a math degree to understand this calculation, the reason for it is SAP’s prior resolutions. Historically, when a company resolved an FCPA case and had a prior DOJ FCPA resolution, DOJ used the middle of the fine range as the starting point. Here, SAP did not have a prior DOJ FCPA resolution, but did have “a non-prosecution agreement from 2021 with the department’s National Security Division, as well as administrative agreements with the Departments of Commerce and the Treasury relating to export law violations, and a resolution in 2016 with the SEC concerning alleged [i.e., neither admit nor deny] FCPA violations in Panama.” DOJ therefore calibrated the prior misconduct and resolutions to start much closer to the low end of the fine range than if there were a prior DOJ FCPA resolution.
- **Incorporating data analytics into a compliance program can earn companies credit, but not as much as other core compliance hallmarks:** In its resolution, DOJ made a point of noting SAP’s increased use of data analytics as part of its compliance program as a factor in determining SAP’s remediation credit, but as it has done in previous resolutions, DOJ listed this factor after a number of other remedial measures that warranted credit (specifically, the ninth out of 10 factors). Although we do not want to suggest reading too much into the placement of remedial factors in a DOJ resolution, it does seem consistent with the Fraud Section’s general encouragement of companies to increase the use of data analytics while at the same time recognizing that there are more important components of an effective compliance program. Thus, companies should continue to look for opportunities to deploy data analytics as part of their compliance program where appropriate, but should not over-torque and should continue to focus on the core principles of an effective compliance program.
- **Continued growth of international cooperation and coordination:** This marks the second corporate FCPA resolution that was coordinated with South African authorities, continuing the longstanding trend in cooperation and coordination with foreign authorities. We expect this trend to continue, particularly with the establishment of the International Corporate Anti-Bribery Initiative that was announced in December, and that will assign three prosecutors to enhancing and growing international relationships in this space.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Greg D. Andres

+1 212 450 4724
greg.andres@davispolk.com

Sidney Bashago

+1 212 450 4826
sidney.bashago@davispolk.com

Martine M. Beamon

+1 212 450 4262
martine.beamon@davispolk.com

Robert A. Cohen

+1 202 962 7047
robert.cohen@davispolk.com

Daniel S. Kahn

+1 202 962 7140
daniel.kahn@davispolk.com

Tatiana R. Martins

+1 212 450 4085
tatiana.martins@davispolk.com

Fiona R. Moran

+1 202 962 7137
fiona.moran@davispolk.com

Paul J. Nathanson

+1 202 962 7055
+1 212 450 3133
paul.nathanson@davispolk.com

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