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Telecom Executive Sentenced to 4 Years in Prison for Violations of the Foreign Corrupt Practices Act

Three Other Former Executives of Now-Defunct Company to be Sentenced by End of the Year

By D. Anthony Rodriguez

Last Wednesday, a United States District Court judge in the Southern District of Florida sentenced the former CEO of Latin Node, a now-defunct Florida-based telecommunication company, to 46 months in prison for paying bribes to Honduran government officials. Three other former executives will be sentenced later this year, bringing to a close the extensive -- and expensive -- fall-out from events that carry many lessons regarding the FCPA.

BRIBES TO FOREIGN OFFICIALS TO RETAIN A BUSINESS ADVANTAGE

Payments to Employees of State-Owned Telecommunications Company

The former CEO, like his three other colleagues (the then-CFO, vice president of business development, and the chief commercial officer), pled guilty to arranging bribes to the general manager, an attorney, and a Honduran government representative to the board of directors of Empresa Hondurena de Telecomunicaciones (Hondutel), the Honduran state-owned telecommunications company. The bribes totaled more than \$500,000 over a nearly 18 month period, and were laundered through Latin Node subsidiaries in Guatemala and through Honduran accounts that the government officials controlled. Nine months before the bribes began, Latin Node had been named the sole winner of an interconnection agreement with Hondutel, allowing Latin Node to provide long distance service between the two countries. The bribes were paid to retain the interconnection agreement and to continue to do business with Hondutel. In its plea agreement, Latin Node admitted to having paid bribes to Honduran officials and also to Yemeni officials.

THE ACQUISITION OF LATIN NODE

The Importance of Diligence and Contractual Protections

Halfway through the period during which Latin Node was paying bribes to the Honduran officials, eLandia signed a share purchase agreement with Latin Node's owner for approximately \$20 million. Two months after the closing (and six months after signing the share purchase agreement) eLandia filed a Form 10-Q in which it stated that control deficiencies in Latin Node's financial reporting departments "may exist." One month later, eLandia disclosed that, in the course of integrating Latin Node, it had identified questionable payments and had begun an investigation. Within three months, the investigation had reached the preliminary findings stage; soon thereafter, eLandia self-reported the situation to the Department of Justice and to the Securities and Exchange Commission.

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The last bribe was paid before the closing, but after the execution of the share purchase agreement. It appears eLandia conducted some diligence, but how much is unclear. The Department of Justice, in responding to the former CEO's request for a lighter sentence than called for by the advisory sentencing Guidelines, stated that the CEO had directed steps (the execution of sham "consulting contracts" that did not name the government officials, and the laundering of payments through a Guatemalan shell company) to conceal the bribes from eLandia during the due diligence process. The DOJ also stated that the former CEO had obstructed eLandia's subsequent internal investigation, such as by directing employees to delete emails and other files that were related to the bribes. However, the timing and content of eLandia's post-closing disclosures suggests that it had not conducted rigorous pre-closing diligence.

This case and others before it demonstrate the serious risks that come with failing to conduct diligence pre-closing, or to conduct rigorous diligence of a business that has mission-critical agreements with a government-owned entity in a developing country. This case likewise highlights the importance of negotiating provisions to cover a later-discovered FCPA problem, such as representations and warranties regarding compliance with anti-corruption requirements, the adequacy of internal controls and the accuracy of accounting records, and the "holdback" of consideration to secure indemnification obligations.

MILLIONS OF DOLLARS DOWN THE DRAIN

FCPA Problems Make an Acquisition Worthless

eLandia paid approximately \$20 million to acquire Latin Node for, it turns out, the opportunity to pay that amount and more in investigation costs, the payment of a \$2 million fine by Latin Node (which was a shell by that time), the costs of terminating employees and operations, and other fallout. eLandia sued Latin Node's previous owner for fraud, and ultimately reached a settlement that included the return of 375,000 eLandia shares that had been placed in escrow to secure performance of the seller's indemnification obligations. A lawsuit, however, is an attempt to mitigate already-incurred losses, and costs money to bring. Whether an "ounce of prevention" could have kept eLandia from making the deal to acquire Latin Node, or to price it differently, no doubt is a question that eLandia executives have since asked themselves more than once.

PRISON SENTENCES

The FCPA Has Teeth

In his plea, the former CEO negotiated a maximum sentence of five years, less than half the sentence called for by the advisory Sentencing Guidelines. The former CEO requested that the judge impose a sentence of less than five years, citing his Restless Leg Syndrome, possible early stages of Parkinson's, the increased mortality among prisoners who enter the system at age 55 or older, and the degree to which Latin Node had been "coerced" into paying bribes in order to keep its interconnection agreement with Hondutel. In response, the DOJ cited numerous cases in which defendants in their 50s had been sentenced to much longer sentences; the lack of a showing that Restless Leg Syndrome warranted a downward departure from the Guidelines; the lack of any diagnosis of Parkinson's, or a showing that the Bureau of Prisons could not care for a Parkinson's patient; and the former CEO's role as "the ringleader" of the scheme. The DOJ also noted that the U.S. Sentencing Commission, in a policy statement regarding downward departures from the Sentencing Guidelines for coercion and duress, stated that "personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure." The DOJ also argued that the coercion argument was directly contrary to the FCPA's express prohibition of the making of corrupt payments to obtain *or retain* business. Finally, the

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DOJ cited the fact that a Latin Node employee had warned the CEO and another defendant about “dirty business” with Hondutel, and ultimately resigned after learning of the bribe payments. The DOJ contrasted that employee’s choice to incur personal financial hardship by quitting his job to the former CEO’s choices to keep making the bribes.

The judge’s sentencing decision is stated in a short form, and imposes a 46 month prison term. The three other former Latin Node executives will be sentenced later this year. Their plea agreements, which reflect those defendants’ cooperation with the Government, call for maximum sentences of five years in prison.

BE CAREFUL OUT THERE

The sad tale of Latin Node illustrates the importance of FCPA-related diligence when acquiring businesses with international operations, particularly if the target interacts with state-owned companies in developing countries.

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