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5 Takeaways From Former SAP Exec's FCPA Case

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On Aug. 12, 2015, Vincente Garcia (former head of Latin American sales for SAP International Inc.) pled guilty in federal court in San Francisco to violations of the Foreign Corrupt Practices Act.[1] In addition to pleading guilty to a criminal information filed by the U.S. Department of Justice, Garcia also settled civil FCPA charges brought by the U.S. Securities and Exchange Commission in a rare simultaneous FCPA enforcement action against an individual.[2] SAP International was a wholly owned U.S. subsidiary of global technology services company SAP SE, which is based in Germany.

Summary

In mid-July, the DOJ quietly filed a one-count criminal information against Garcia in the Northern District of California, charging him with conspiracy to violate the FCPA's anti-bribery provisions, 15 U.S.C. § 78dd-2, as Garcia is a U.S. citizen and thus a "domestic concern."[3] On Aug. 12, Garcia pled guilty.[4] According to the charges, Garcia participated in a scheme to bribe Panamanian officials to secure government technology contracts for SAP from 2009 to 2013.

In late 2009, SAP sought a multimillion-dollar contract to provide a technology upgrade package to a Panamanian state agency. Garcia admitted that he conspired with others, including an adviser, two consultants and one of SAP's channel partners, to pay bribes to two Panamanian officials and the agent of a third government official (with the understanding that at least a portion of the money would be transmitted to the third official) to secure the contract. The bribes were paid through sham contracts and false invoices to disguise the true nature of the payments. SAP's Panamanian channel partner was ultimately awarded the contract for $14.5 million, which included $2.1 million in SAP software licenses, and soon thereafter was awarded additional contracts that included SAP products. Garcia admitted that he believed paying the bribes was necessary to secure both the initial contract and additional Panamanian government contracts. Sentencing before U.S. District Judge Charles Breyer is scheduled for Dec. 16, 2015.[5]

Garcia also settled an SEC enforcement action that charged him with orchestrating a bribery scheme.[6] Unlike the DOJ's charges, the SEC charged Garcia with not only violating the anti-bribery provisions of the FCPA, but also the accounting provisions — that is, knowingly falsifying SAP's books and records and knowingly circumventing SAP's internal controls. According to the SEC, in order to fund the bribes, Garcia sold SAP software to a partner in Panama at discounts of 82 percent. "The excessive discounts enabled the partner to create a slush fund from its excessive earnings on the other end of the sales and tap that money to pay the bribes to Panamanian government officials so SAP could sell the software."[7] Garcia also received kickbacks from the slush fund. The SEC settled with Garcia through an administrative action. Garcia agreed to disgorge $85,965 (the total amount of kickbacks he received), plus prejudgment interest in the amount of $6,430. He also agreed to "cooperate fully with the Commission in any and all investigations."

Analysis

There are a number of interesting takeaways from this case.

First, the DOJ and SEC continue to hold individuals accountable for FCPA violations this year. In 2015, every corporate case DOJ has brought has involved individual guilty pleas (i.e., Louis Berger and IAP Worldwide Services Inc.). Indeed, individual FCPA cases outnumber corporate cases at the DOJ so far this year. For its part, the SEC has brought civil actions against individuals related to two of its five corporate matters in 2015 (i.e., FLIR Systems Inc. and PBSJ Corp.).

Second, the Garcia matter underscores the DOJ's and SEC's continuing focus on the technology sector and Northern California in general, with a number of matters being brought in the Bay Area over the past few years involving brand-name companies. This most recent case reflects the ongoing partnership between the Fraud Section in Washington, D.C., and the U.S. Attorney's Office in San Francisco. And there are a number of other publicly known matters with significant technology companies that are yet to be resolved. This should be a wake-up call to the boardrooms and C-suites of Bay Area companies (if prior actions have not already been) that the DOJ and SEC are not just focused on the extractive industry or defense contractors. The message is clear: Companies are not immune from FCPA enforcement just because they sell computer hardware or software, or other technology solutions.

Third, regardless of the industry, third parties continue to be the hobgoblin of compliance programs and the most likely facilitator of FCPA violations. Indeed, in the past five years, enforcement actions by the DOJ and SEC have identified the use of third parties (e.g., consultants, agents, channel partners, distributors) in about 90 percent of their cases. The Garcia case is no exception. Put simply, one of the best things general counsel or chief compliance officers can do to mitigate FCPA risk in their respective companies is to ensure that there is a robust third-party due diligence, onboarding and monitoring process as part of their company's compliance program. Even current programs should be benchmarked to ensure they are best in class.

Fourth, the law enforcement agencies involved in this matter are also interesting. The FBI has long been the Fraud Section's partner in pursuing FCPA cases, but so too has the Internal Revenue Service — Criminal Investigation. Many people do not realize the role played by IRS-CI in FCPA cases, but IRS-CI agents have played major roles in many of the most prominent FCPA cases in the past few years. Interestingly, the FBI, which also issued a press release, investigated the matter out of its Miami Division (Garcia is from Miami, even though the case was brought in San Francisco).[8]

Finally, the district court judge to whom the Garcia matter was assigned is Judge Breyer. Judge Breyer's name may ring a bell. He was the judge who, in April, dismissed fraud and bribery charges against three foreign nationals brought by the U.S. Attorney's Office in San Francisco, saying that "under the government's theory, there is no limit to the United States's ability to police foreign individuals, in foreign governments or in foreign organizations, on matters completely unrelated to the United States's investment." Having accepted Garcia's guilty plea to an FCPA violation, it appears Judge Breyer did not have the same concerns in this matter. It probably did not hurt that just three days after filing the criminal information against Garcia last month, the U.S. Attorney's Office voluntarily dismissed their Ninth Circuit appeal of Judge Breyer's prior dismissal order.[9]

One of the open questions from the Garcia matter is: What happens next?

- More individual charges? In pleading guilty, Garcia admitted to conspiring with a number of other individuals. Given the DOJ's focus on personal accountability for FCPA violations, it is entirely possible that the DOJ has, or will, charge additional individuals in this matter. While the criminal information indicates that one of the consultants died in 2013, it makes clear that with regard to the unindicted co-conspirators, their "identity is known to the United States [i.e., the DOJ]." And although Garcia's plea agreement is not electronically available on PACER, the SEC's administrative order does reflect that Garcia has agreed to cooperate in any ongoing investigations. It will be interesting to see if there are future developments in this case against individuals beyond Garcia.

- No charges against the employer? There were no charges brought thus far against SAP. Although the DOJ has sometimes brought charges against individuals before resolving cases against companies (e.g., Alcatel-Lucent USA Inc., Alstom SA), the DOJ has also brought charges against individuals and foregone charges against the employer (e.g., Morgan Stanley, PetroTiger Ltd.). Here, the SEC made a point of highlighting the fact that Garcia knowingly circumvented SAP's internal controls and undertook a series of actions designed to "avoid detection of his corrupt activities." That echoes similar types of statements by the DOJ and SEC, made at the time of the charges against Garth Peterson, in announcing the matter was being declined against his employer, though no such announcement was made here.[10] It may be that there was a silent declination or that a broader investigation continues. Either way, this will be a case to follow closely in the coming months.

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[1] Dep't of Justice, "Former Executive Pleads Guilty to Conspiring to Bribe Panamanian Officials" (Aug. 12, 2015), available at http://www.justice.gov/opa/pr/former-executive-pleads-guilty-conspiring-bribe-panamanian-officials.

[2] U.S. Sec. & Exch. Comm'n, "SEC Charges Former Software Executive With FCPA Violations" (Aug. 12, 2015), available at http://www.sec.gov/news/pressrelease/2015-165.html.

[3] Information, United States v. Garcia, 15-cr-366-CRB (N.D. Cal. July 13, 2015) (hereinafter Garcia), ECF 1.

[4] Plea Agreement, Garcia, ECF 10.

[5] Supra note 1.

[6] U.S. Sec. & Exch. Comm’n, In the Matter of Vincent E. Garcia, SEC Release No. 75684, Admin. Proceeding No. 3-16750 (August 12, 20015), available athttp://www.sec.gov/litigation/admin/2015/34-75684.pdf.

[7] Supra note 2.

[8] Miami Division, Federal Bureau of Investigation, “Former Executive Pleads Guilty to Conspiring to Bribe Panamanian Officials” (August 12, 2005), available athttps://www.fbi.gov/miami/press-releases/2015/former-executive-pleads-guilty-to-conspiring-to-bribe-panamanian-officials.

[9] United States’ Motion to Dismiss Appeal, United States v. Sidorenko, et al., No. 15-10190 (9th Cir. July 16, 2015), ECF. No. 2.

[10] See Dep’t of Justice, Press Release (April 25, 2012) (underscoring that defendant “actively sought to evade the company’s internal controls”); U.S. Sec. & Exch. Comm’n, Press Release (April 25, 2012) (highlighting effort to hold individuals accountable, “particularly employees who intentionally circumvent their company’s internal controls”), available at https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702.