

February 1, 2016

Foreign Corrupt Practices Act Alert

SAP SE Agrees to Pay Almost \$3.9 Million to Resolve SEC Investigation Regarding Payments to Secure Panamanian Contracts

SUMMARY

Today, the Securities and Exchange Commission (“Commission”) announced that SAP SE (“SAP”) has agreed to pay disgorgement of \$3,700,000 and prejudgment interest of \$188,896 to resolve claims that SAP violated the books and records and internal controls provisions of the Foreign Corrupt Practices Act of 1977 (“FCPA”) in connection with software contracts with the Panamanian government. SAP is headquartered in Waldorf, Germany, and has American Depositary Shares listed on the New York Stock Exchange. According to the Commission’s Cease-and-Desist Order (“Order”), an SAP vice president engaged in a scheme to discount the price of SAP software to an SAP business partner in Panama. The discounts generated funds used to finance bribes for senior Panamanian government officials and certain kickbacks for the employee and business partner. SAP sold the software to the local business partner, which purchased the software license and resold it to the agency. Through these arrangements, SAP secured government sales contracts of approximately \$3.7 million.

The employee concealed the scheme from others at SAP, circumvented SAP’s internal controls, and justified the excessive discounts by falsifying SAP’s internal approval forms. The Commission’s Order charged that the discounts were falsely recorded as legitimate discounts on the books of SAP’s Mexican subsidiary, which were subsequently consolidated into SAP’s financial statements. In addition, the Commission asserted that SAP failed to devise and maintain an adequate system of internal accounting controls sufficient to prevent or detect improper payments to government officials. The Commission’s Order cited, among other control deficiencies, the wide latitude provided to SAP employees in seeking and approving discounts to local partners, and the acceptance of discounts without company verification or anti-corruption scrutiny. In August 2015, the SAP vice president settled claims by the Commission

SULLIVAN & CROMWELL LLP

against him and pled guilty to criminal charges by the Department of Justice (“DOJ”) that he had conspired to violate the FCPA.

In entering into the settlement, the Commission took into consideration SAP’s remediation and cooperation with the Commission’s investigation. Those measures included, among others, SAP’s thorough internal investigation; prompt voluntary production to the Commission of documents and other information; identification for the Commission of significant documents and translation of documents from Spanish; conduct of witness interviews; presentations to the Commission on the findings of the investigation; and initiation of a third-party audit of the Panamanian business partner. The Commission also noted approvingly that SAP had terminated the vice president involved in the payments after learning of his conduct and undertook substantial remediation efforts to uncover any other possible misconduct and to improve its FCPA compliance and controls.

The Commission’s Order highlights the potentially significant exposure under the FCPA that can arise from the activities of business partners and other representatives, even when title to goods passes to those business associates. The Order is a useful reminder that controls should focus not only on direct interactions with government officials or government-affiliated entities, but also on all third parties involved in contracting and sales in all geographic regions. This action also highlights how typical business practices, such as discount programs, can be manipulated to facilitate improper payments and the need to implement controls even for those types of seemingly routine activities. At the same time, the significance the Commission ascribed to SAP’s cooperation and remediation efforts both reinforces the potential salutary effects of such conduct in limiting liability and illustrates the nature and extent of the response that the United States authorities have repeatedly emphasized they expect from companies that learn of a suspected FCPA violation.

In addition, the related SEC action and DOJ prosecution of the SAP vice president stands as a reminder of the severe sanctions to which individuals may be subject for participation in arrangements that violate the FCPA.

For more information about S&C’s FCPA practice, please contact Nicolas Bourtin (212 558 3920, bourtinn@sullcrom.com), Theodore Edelman (212-558-3436, edelmant@sullcrom.com) or Laura Kabler Oswell (650-461-5679, oswell@sullcrom.com).

* * *

Copyright © Sullivan & Cromwell LLP 2016

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 800 lawyers on four continents, with four offices in the United States, including its headquarters in New York, three offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Stefanie S. Trilling (+1-212-558-4752; trillings@sullcrom.com) in our New York office.