



Former Société Générale Trader Convicted of Stealing Proprietary Source Code; Stage Set for Goldman Sachs Source Code Prosecution

Insights

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Much attention has been paid to the criminal prosecution of Samarath Agrawal, former trader at Société Générale, for allegedly misappropriating the source code that fueled the high-frequency trading algorithms used by Société Générale. On Friday, November 19, 2010, a jury in Manhattan convicted Agrawal of stealing the French bank's proprietary code. The United States alleged that Agrawal secretly printed out copies of the computer code last year, and planned to use it to run similar high-frequency trading programs at one of Société Générale's competitors. After two weeks of testimony and evidence concerning these allegations, the federal jury, comprised of four women and seven men, found Agrawal guilty of theft of trade secrets and transportation of stolen property. The sentencing phase of the trial is set for February 2011, and Agrawal could face between four to six years in prison.

Perhaps central to Agrawal's conviction was his unexpected admission, on direct examination, that he shared aspects of the source code with a one of the bank's competitors, including specific aspects of how the source code stages the execution of the trades. The admission by Agrawal probably will be the subject of discussion by analysts and practitioners for some time. In trade secret misappropriation cases, the burden is on the plaintiff or the state to prove the misappropriation, albeit by different burdens of proof. While criminal defendants are not required to take the stand in their own defense, an open strategic question in civil cases is whether to admit, stipulate to or contest the transfer, copying, downloading, e-mailing or other taking of the trade secret or confidential information. This call depends in part on the quality and quantum of evidence regarding the alleged misappropriation, the remaining factors a plaintiff must prove in order to carry its burden, as well as the defenses available to a civil defendant in a given case. While employee defection and trade secrets cases tend to be highly fact-specific and not susceptible to easy comparison, it is possible that Agrawal's admission to the taking was insurmountable in the eyes of the jury.

The Agrawal conviction is the first of two criminal prosecutions undertaken by the United States Government for employee theft of source code underlying high-frequency trading platforms. After Thanksgiving, the trial is scheduled to begin in the case of Sergey Aleynikov, a former Goldman Sachs Group Inc. computer programmer who is accused of stealing high-frequency trading computer code.

Brent Cossrow is a member of Fisher Phillips' Employee Defection & Trade Secrets Practice Group. Mr. Cossrow's practice focuses on e-discovery and other electronically stored information issues in the employee defection and trade secret context. As always, please feel free to share your thoughts and questions in the comment space below.

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