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Foreign Corrupt Practices Act Compliance Lessons From the Record-Setting Siemens Enforcement Action

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In December 2008, Siemens AG agreed to pay \$800 million in combined fines and penalties to settle Foreign Corrupt Practices Act charges for engaging in a pattern of bribery the Department of Justice termed “unprecedented in scale and geographic scope.”¹ The combined fines and penalties against Siemens (a German company with global operations and shares listed on the New York Stock Exchange) are by far the largest ever imposed in an FCPA enforcement action. In addition to resolution of the FCPA charges, Siemens has settled related foreign enforcement actions based on the same core facts and total worldwide fines and penalties to date exceed \$1.6 billion.

The Siemens Enforcement Action and Plea

The Siemens action, besides being of interest because of the size and scope of the action and the extent

¹ See DOJ Release 08-1105, “Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 in Combined Criminal Fines.”

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of the corruption in the company, teaches several important FCPA compliance lessons, including: (1) the FCPA’s broad reach; (2) the FCPA risks of utilizing third parties; (3) how FCPA compliance requires a committed “tone at the top”; and (4) how FCPA compliance means more than just having a “paper program.”

Resolution of the FCPA charges against Siemens included both DOJ and Securities and Exchange Commission enforcement actions.

DOJ Resolution. Siemens pleaded guilty to a two-count criminal information charging the company with violations of the FCPA’s books and records and internal control provisions.² Although the criminal information did not include FCPA anti-bribery charges, it described approximately \$1.36 billion in payments Siemens made through various mechanisms for unknown purposes or intended, in whole or in part, as corrupt payments to foreign officials. According to DOJ, for much of Siemens’s operations around the world, “bribery was nothing less than standard operating procedure,” and the criminal information details improper conduct in various Siemens operating groups and subsidiaries around the world.³

International Subsidiaries Charged

In addition to the Siemens criminal information, DOJ also separately charged three Siemens international

² See *United States v. Siemens AG*, No. 1:08-cr-00367 (D.D.C. Dec. 15, 2008).

³ See DOJ Release 08-1112, “Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations.”

subsidiaries with conspiracy to violate the FCPA in connection with government projects in those countries.⁴

Siemens Argentina. Siemens S.A. Argentina was charged with conspiracy to violate the FCPA's books and records and internal control provisions in connection with an Argentine government project. The criminal information detailed how Siemens Argentina used various agents and consulting companies to make improper payments to government officials involved in the project and how certain of the improper activity took place in the United States (such as meetings during which the improper payments were discussed and payments made through U.S. bank accounts), thereby making Siemens Argentina subject to the FCPA's provisions. Payments to the third parties were accomplished through sham invoices and backdated agreements and were improperly characterized on the books and records of Siemens Argentina (which were incorporated into Siemens's books and records for purposes of preparing Siemens's year-end financial statements) as "commissions" or "business consulting fees" even though, in many cases, no legitimate services were actually provided.

Siemens Venezuela. Siemens S.A.-Venezuela was charged with conspiracy to violate the FCPA's anti-bribery and books and records and internal control provisions in connection with mass transit projects in Venezuela. Siemens Venezuela used agents and consulting companies to engage in a conspiracy to obtain or retain the mass transit projects with Venezuelan government entities through the payment of bribes to high-level government officials responsible for awarding the projects. As with the concealment of payments by Siemens Argentina, the payments here to the third parties were also accomplished through sham invoices and backdated agreements and were improperly characterized as "commissions," "business consulting fees," and "shipping and marketing costs." Siemens Venezuela became subject to the FCPA because certain of the improper payments were routed through a U.S.-based consultant or through U.S. bank accounts.

Siemens Bangladesh. Siemens Bangladesh Ltd. was charged with conspiracy to violate the FCPA's anti-bribery and books and records and internal control provisions in connection with a digital cellular mobile telephone network for the Bangladeshi government.⁵ Siemens Bangladesh engaged consultants to pay bribes to Bangladeshi officials in exchange for favorable treatment during the project's bidding process. Siemens Bangladesh became subject to the FCPA because certain of the improper payments were routed through

⁴ See *United States v. Siemens S.A. Argentina*, No. 1:08-cr-00368 (D.D.C. Dec. 12, 2008); *United States v. Siemens Bangladesh Ltd.*, No. 1:08-cr-00369 (D.D.C. Dec. 12, 2008); *United States v. Siemens S.A.-Venezuela*, No. 1:08-cr-00370 (D.D.C. Dec. 12, 2008).

⁵ In a related civil enforcement action, in January 2009, DOJ filed a civil forfeiture action against bank accounts located in Singapore used by consultants hired by Siemens and an accounts belonging to a son of the former prime minister of Bangladesh. See DOJ Release 09-020, "Department of Justice Seeks to Recover Approximately \$3 Million in Illegal Proceeds From Foreign Bribe Payments." According to DOJ's complaint, these accounts were used to bribe Bangladeshi foreign officials in violation of the FCPA.

U.S. bank accounts. In addition, the criminal information charged that Siemens Bangladesh made direct payments to government officials or relatives of those officials in order to secure an improper advantage in connection with the project. Again, payments to the officials were improperly characterized as "commissions" and "business consulting fees."

The Plea Deal

Based on Siemens's conduct and that of its subsidiaries, Siemens entered into plea agreements with DOJ containing the following core terms: (1) an agreement by Siemens (and the referenced subsidiaries) to plead guilty to the charges in the respective criminal informations; (2) a total criminal penalty of \$450 million (a \$448.5 million fine against Siemens and a \$500,000 fine against each of the three subsidiaries); (3) a continuing obligation to cooperate with U.S. and foreign law enforcement agencies, including the investigation of potentially culpable individuals; (4) continued implementation and testing of compliance policies and procedures; and (5) retention of an independent compliance monitor for a four-year period to ensure that Siemens implements an effective system of corporate governance, complies with all applicable laws and regulations, and complies with the terms of the plea agreements.⁶

In agreeing to fines and penalties substantially below the maximum \$2.7 billion available under the advisory U.S. Sentencing Guidelines, DOJ noted that resolution of the matter reflected Siemens's actions in disclosing the conduct at issue to U.S. enforcement agencies after German authorities searched its offices and after Siemens conducted an extensive internal investigation. DOJ specifically noted, among other things, the company's "extraordinary" cooperation in connection with its investigation (and the investigations of foreign law enforcement agencies), the "unprecedented" scope of the company's internal investigation (which included virtually all aspects of its worldwide operations), and the significant remedial measures the company has undertaken.⁷

Parallel Civil Action

In a parallel enforcement action based on the same conduct as that charged by DOJ, the SEC filed a settled civil action against Siemens alleging violations of the FCPA's anti-bribery and books and records and internal control provisions.⁸ The SEC alleged that Siemens violated the FCPA by engaging in a "widespread and systematic practice of paying bribes to foreign government officials to obtain business" and that the misconduct involved employees "at all levels of the Company, including foreign senior management, and reveal[ed] a corporate culture that had long been at odds with the FCPA." The SEC further alleged that Siemens made 4,283 separate payments totaling approximately \$1.4 billion to

⁶ See Letter Agreement, Dec. 15, 2008, from Steven Tyrrell (DOJ, Chief Fraud Section, Criminal Division) to attorney Scott Muller.

⁷ See *United States v. Siemens AG*, No. 1:08-cr-00367, Department's Sentencing Memorandum (D.D.C. Dec. 12, 2008).

⁸ See *SEC v. Siemens AG*, No. 1:08-cv-02167 (D.D.C. Dec. 12, 2008).

bribe foreign government officials and that an additional 1,185 separate payments to third parties (totaling approximately \$391 million) were not properly controlled and were used, at least in part, for improper purposes including commercial bribery and embezzlement.

SEC Complaint More Detailed. The complaint, which was settled the same day it was filed, contained more details than DOJ's criminal informations and identified a number of specific projects where Siemens paid bribes: metro transit projects in Venezuela; metro trains and signaling devices in China; power plants in Israel; high voltage transmission lines in China; mobile telephone networks in Bangladesh; telecommunication projects in Nigeria; national identity cards in Argentina; medical devices in Vietnam, China, and Russia; traffic control systems in Russia; refineries in Mexico; and mobile communication networks in Vietnam.

The complaint alleged that Siemens made, directly or indirectly through intermediaries, improper payments in connection with at least 290 projects or individual sales in these countries. These payments, at least in part, had a U.S. jurisdictional nexus in that certain of the projects were financed by the World Bank or the U.S. Export-Import Bank, or because the payments were funneled through U.S. bank accounts, made through U.S.-based intermediaries, or were discussed in meetings in the United States or in communications (mail, e-mail, and fax) into and out of the United States.

Without admitting or denying the SEC's allegations, Siemens agreed to consent to entry of a final judgment whereby it will pay \$350 million in disgorgement of profits and agreed to engage in certain undertakings regarding its FCPA compliance program, including the engagement of an independent monitor for a four-year period. In resolving the matter, SEC noted Siemens's cooperation in its investigation, its extensive internal investigation, and the remedial actions promptly undertaken by the company.

FCPA Compliance Lessons From the Siemens Matter

The record-setting Siemens enforcement action offers several FCPA compliance lessons. This is not because other companies view bribery as "standard operating procedure" or have "cash desks" where employees can load up suitcases full of cash to make improper payments, as DOJ alleged in the Siemens matter. Rather, it is because of Siemens's systemic inattention to anti-corruption compliance and because of the FCPA "red flags" Siemens ignored.

The FCPA's Broad Reach. Despite several recent FCPA enforcement actions against foreign companies, a misperception persists that the FCPA applies only to U.S. companies. The truth is that the FCPA applies to any company, including foreign companies, with shares listed on U.S. markets ("issuers"), a point emphasized by various U.S. government official statements in connection with the Siemens matter. ("Simply stated, it is a federal crime for U.S. citizens and companies traded on U.S. markets to pay bribes in return for business."⁹).

The Siemens enforcement action also shows that even nonissuer foreign companies can become subject

to the FCPA's provisions if any conduct in furtherance of an improper payment takes place in the United States. This was true with respect to Siemens Argentina, Siemens Venezuela, and Siemens Bangladesh, none of which qualified as an "issuer," but all of which became subject to the FCPA because certain improper conduct had a U.S. nexus. For example, there were meetings in the United States in which improper payments were discussed, or U.S. bank accounts were used to facilitate improper payments. It is also clear that U.S. regulators will not hesitate to bring FCPA books and records charges against an issuer parent corporation based on the conduct of its foreign subsidiary when the foreign subsidiary's books and records are consolidated with the issuer's books and records for purposes of financial reporting.

The FCPA Risks of Utilizing Third Parties. While Siemens's conduct was (to use DOJ's characterization) "egregious" and "systematic" and not merely the result of ineffective oversight of its foreign business partners, the enforcement action highlights the FCPA compliance risks of using foreign third parties to pursue business, and it instructs that reliance on third parties is not a shield against FCPA liability.

Because the FCPA's anti-bribery provisions apply not just to direct payments to foreign officials but also to indirect payments made to "any person, while knowing that all or a portion" of such payments will be "offered, given or promised, directly or indirectly to any foreign official," companies must be cognizant of the FCPA risks of relying on foreign agents, representatives, or distributors (collectively, third parties) to achieve business objectives. Like other elements of the FCPA, the knowledge requirement is broadly interpreted and can be satisfied not only when a company has actual knowledge that a third party is making an improper payment to a foreign official, but also when a company is willfully blind or consciously disregards facts which suggest that an improper payment is being made by a third party to a foreign official on its behalf.

Siemens had numerous FCPA compliance failures in connection with its use of third parties, including: (1) engaging third parties with no expertise in the specific industry (i.e., a clothing company with no expertise in the power generation industry); (2) engaging third parties who simultaneously worked for the government entity targeted for business; (3) engaging third parties without a formal, written agreement, or, if written agreements were executed, (a) executing the agreements only after the company was awarded the business, or (b) using a form agreement with no substance and/or provisions calling for "success fee" payments; and (4) paying the third party unreasonably high fees.

These FCPA "red flags" went undetected in part because Siemens rejected suggestions to create a companywide list of third parties and to form a centralized committee to review third-party relationships. It was not until June 2005 that Siemens implemented mandatory and comprehensive companywide rules governing the use of third parties. Among other things, these rules prohibited the payment of "success fees" and required a compliance officer to sign off on all third-party agreements.

Avoiding Siemens-like FCPA problems based on the use of third parties can best be accomplished through robust and thorough FCPA compliance policies and

⁹ DOJ Release 08-1105, note 1, *supra*.

procedures specific to third parties. These policies and procedures should, at a minimum, include: (1) pre-engagement due diligence; (2) engagement of the third party by written agreement only with certain mandatory contractual provisions (such as third-party representations and warranties that it is not owned or controlled by a foreign government, that no foreign official holds an ownership interest in it, and that it will abide by the company's FCPA compliance policies and procedures); and (3) post-engagement monitoring and supervision of the third party.

Compliance Begins With Committed 'Tone at the Top'

According to the SEC, at Siemens there was a "demonstrated tone at the top . . . that was inconsistent with an effective FCPA compliance program [which] created a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company." The SEC complaint further alleged that "the misconduct [at Siemens] involved employees at all levels of the Company, including former senior management, and reveals a corporate culture that had long been at odds with the FCPA."

DOJ was equally harsh in its judgment of Siemens senior management. Among other things, DOJ's criminal information noted that Siemens's senior management provided little guidance on how to conduct business lawfully in countries where the company had historically paid bribes, and it provided few strong messages regarding business ethics, including no clear statements that the company would rather lose business than obtain it through bribery.

A committed FCPA compliance "tone at the top" is certainly not by itself sufficient to ensure FCPA compliance, and even companies with an exemplary FCPA "tone at the top" may have FCPA problems. Nevertheless, "tone at the top" is a necessary element of an effective FCPA compliance program and it can be shown through, among other things: (1) frequent compliance messages from senior leadership which stress that the company will only seek business in a transparent manner; (2) including compliance metrics in leadership performance reviews; (3) including compliance issues on the agenda of board of directors or audit committee meetings; and (4) fully funding the company's compliance functions.

Must Be More Than 'Paper Program.' The Siemens enforcement action also shows that, while the existence of written FCPA policies and procedures that are well-

communicated throughout the company is a necessary element of an effective FCPA compliance program, it is not alone sufficient. In fact, and as noted by DOJ, during a portion of the relevant period, Siemens did promulgate certain written policies and procedures aimed at preventing corruption.

But these policies and procedures were little more than a "paper program." Specifically, DOJ alleged that Siemens's compliance resources were small and its program understaffed given the company's extensive worldwide presence. DOJ also noted that Siemens' compliance personnel had other full-time responsibilities besides compliance, that personnel received minimal training or direction regarding their compliance responsibilities, and that personnel were inherently conflicted because they were tasked both with defending the company against wrongdoing and preventing compliance breaches. Because of these and other deficiencies, Siemens routinely: (1) ignored "red flags" suggesting that improper payments had been made; (2) failed to adequately investigate or follow up on the "red flags"; and (3) failed to take disciplinary action against known wrongdoers.

The SEC's complaint was also severe in its assessment of Siemens's compliance program and alleged that "the success of Siemens' bribery system was maintained by lax internal controls over corruption related activities and an acceptance of such activities by members of senior management and the compliance, internal audit, legal and finance departments."

The compliance lesson is that an FCPA compliance program must be real, multifaceted, and subject to periodic review and enhancement. Further, FCPA compliance is best achieved if personnel across the corporate spectrum (such as internal audit and finance, legal, sales and marketing, and human resources) are properly trained and able to detect and prevent FCPA issues from occurring.

Conclusion

The FCPA compliance failures at Siemens were widespread and long-running, in no small part because of the company's failure to adopt anti-corruption "best practices." The FCPA compliance lessons in the record-setting Siemens enforcement action should be a wake-up call to all companies conducting business in overseas markets. They demonstrate that companies must be proactive and vigilant when it comes to FCPA compliance and that it is critical to establish a compliance ethic that permeates the company.