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Siemens Agrees to Largest Settlement in History of FCPA

On December 15, the U.S. Department of Justice announced that the German conglomerate Siemens AG, along with its subsidiaries in Argentina, Bangladesh, and Venezuela, agreed to plead guilty to conspiring to commit violations of the U.S. Foreign Corrupt Practices Act (FCPA). The criminal fines imposed, totaling more than \$450 million, are by far the largest in the history of the FCPA, and are supplemented by more than \$350 million in ill-gotten profits that Siemens agreed to disgorge as part of a settlement in a parallel SEC suit.

On the same day, the company announced that it had entered into a second settlement with the German authorities, agreeing to pay penalties of €395 million in addition to the €201 million in penalties that it previously paid in an earlier settlement. Thus, to date Siemens has paid more than \$1.6 billion in total penalties.

Apart from establishing a new record for FCPA penalties, the Siemens matter breaks new ground in a number of ways. For the first time, the Department of Justice (DOJ) charged a company with a *criminal* violation of the FCPA's internal controls provision. This is the culmination of a number of FCPA enforcement actions over the past five years in which the DOJ has repeatedly expressed its view that the absence of an effective FCPA compliance program is a violation of this provision. In the past, however, it had left formal charges of such violations to civil enforcement actions by the Securities and Exchange Commission (SEC). Significantly as well, by agreeing to plead guilty to a violation of the FCPA's "books and records" provisions rather than an anti-bribery violation, Siemens will avoid debarment from potentially lucrative future U.S. Government contracts.

In addition, the Siemens matter helps identify the U.S. Government's current thinking on FCPA jurisdictional facts. The criminal bribery charges against each of the

Siemens subsidiaries explicitly alleged the use of U.S. bank accounts or other activities in the United States, while the criminal internal controls charges are predicated on the fact that Siemens was an issuer and, to some extent, on its involvement in paying kickbacks to the Iraqi government in violation of the U.N.'s Oil for Food program. The SEC, on the other hand, which alleged additional violations of the FCPA's anti-bribery provisions, predicated some of those offenses solely on the use of "correspondent accounts" in the United States, *i.e.*, accounts used by foreign banks to clear U.S. dollar transactions. Based on this jurisdictional approach, almost any U.S. dollar transaction by a company listed on a U.S. stock exchange could be subject to the FCPA's anti-bribery provisions.

Further, the coordinated timing of the U.S. and German settlements represents a significant evolution of cooperation on anti-corruption enforcement between these two governments. Similarly, the appointment by the DOJ and SEC of a former German finance minister (supported by a U.S. law firm) as an independent compliance monitor for Siemens displays impressive cross-cultural sensitivity by the U.S. Government.

The disposition of the Siemens case marks the culmination of the two largest investigations of Siemens by government agencies across the globe, although

investigations are ongoing in Bangladesh, Greece, Italy, Liechtenstein, Nigeria, and Switzerland. In addition, Siemens conducted several multi-year internal investigations, and Nokia, Siemens' partner in the telecommunications joint venture Nokia Siemens Networks (NSN), conducted its own investigation into corruption, bribery, and internal controls issues relating to business lines and personnel contributed by Siemens to the NSN joint venture.

Siemens AG Guilty Plea

In pleading guilty, Siemens AG admitted that it lacked sufficient anti-corruption compliance controls and that its senior management failed to take action once it was aware of significant control weaknesses. (The criminal information filed by the DOJ notes that one judicial observer called Siemens' controls a "paper program" for their lack of actual implementation.)

Many of the compliance shortcomings at Siemens, according to the information, stemmed from the maintenance of off-books bank accounts from which Siemens employees withdrew cash to make corrupt payments. Additionally, the company made use of sham consultants, whom it retained without conducting sufficient due diligence or providing proper oversight, as channels for payments to government officials. Over several years, a myriad of reports of these and other questionable or improper business practices were identified to the senior management of Siemens AG, which undertook no rigorous investigation or other action despite its awareness of such significant compliance failures.

Besides failing to maintain an adequate system of anti-corruption compliance controls, the information also states that Siemens AG systematically falsified its corporate books and records to conceal corrupt payments its employees were making on the company's behalf. Siemens employed a wide range of subterfuges to carry out this deception, including sham business consultants, off-books bank accounts, and payment intermediaries.

In all, the information alleges that Siemens made more than \$800 million in corrupt payments between 2001

and 2007. In addition, the information alleges that Siemens paid more than \$1.7 million in kickbacks to the Iraqi government under the Oil For Food program.

Siemens Argentina Guilty Plea

Siemens Argentina admitted violations of the FCPA's "books and records" provisions by falsifying its books, records, and accounts in connection with approximately \$95 million in corrupt payments paid, directly or indirectly, to officials in the Argentine government.

The information alleges that Siemens Argentina conspired to make corrupt payments in connection with its bid for a more than \$1 billion project involving the development of a national identification card. According to the information, Siemens Argentina made payments to a third-party whom it understood would make corrupt payments to high-level Argentine government officials.

According to the information, between 1997 and 2007 Siemens Argentina made or directed payments of more than \$15 million to entities controlled by members of the government of Argentina. During this period, Siemens Argentina also made nearly \$35 million in payments to a consultant that acted as a conduit for further payments to Argentine government officials responsible for the identity card project, and paid almost \$55 million to other third-parties in connection with the project.

Siemens Bangladesh Guilty Plea

The guilty plea by Siemens Bangladesh involved an admission that the company conspired to commit violations of the FCPA by making more than \$5.3 million in corrupt payments between 2001 and 2006 to Bangladeshi government officials and senior employees of the state-owned Bangladesh Telegraph & Telephone Board (BTTB).

The information alleges that Siemens Bangladesh made payments through business consultants that it retained pursuant to "sham agreements" that purportedly involved rendering services in connection with a mobile telephone contract worth approximately

\$40.9 million. In reality, these “business consultants” provided little or no concrete services in exchange for commissions totaling millions of dollars.

Instead, Siemens Bangladesh used the business consultants to channel bribes to the son of the then-Prime Minister of Bangladesh, the Minister of Posts & Telecommunications (MoPT), and the Director of Procurement at BTTB. Siemens Bangladesh also made direct payments to Bangladeshi government officials (or their relatives) with responsibility for awarding the BTTB project. Additionally, Siemens Bangladesh hired relatives of two other BTTB and MoPT officials, although Siemens Bangladesh did not need the relatives’ services for its business.

Siemens Venezuela Guilty Plea

In pleading guilty, Siemens Venezuela admitted that it paid almost \$19 million in bribes to Venezuelan government officials in connection with mass transit systems in the Venezuelan cities of Valencia and Maracaibo. Similarly to the other violations discussed above, the Venezuela conspiracy involved the use of third-parties.

As with the FCPA violations by other Siemens entities, Siemens Venezuela admitted that it paid large sums of money to these sham agents and business consultants, who had no substantive role on the projects, with the understanding that they would pass on some or all of the funds to relevant government officials. Siemens Venezuela’s underlying FCPA violations involved falsification of the company’s books, records, and accounts, as payments were labeled as involving nonexistent studies, sham supply contracts, and off-books or improperly recorded bank accounts, all of which Siemens Venezuela used to conceal corrupt payments to Venezuelan government officials.

SEC Complaint Against Siemens AG

In addition to criminal fines in excess of \$450 million, Siemens agreed to disgorge more than \$350 million in ill-gotten profits in connection with a parallel enforcement action by the U.S. Securities and Exchange Commission.

The SEC complaint sets forth that Siemens made nearly 4,300 separate corrupt payments totaling approximately \$1.4 billion in order to obtain or retain business around the world. As discussed above, Siemens concealed the true nature of these payments to obscure the actual purpose and ultimate recipients.

The payments referenced in the SEC complaint include bribes paid in connection with projects in Argentina, Bangladesh, China, Israel, Mexico, Russia, Venezuela, and Vietnam. The SEC complaint sets forth that Siemens leadership failed to respond to a series of “red flags” that indicated the widespread nature of bribery at the company, including reports from internal compliance attorneys as well as external auditors.

Disposition

As noted above, Siemens and its subsidiaries will pay a total of more than \$450 million in criminal fines, and have agreed to disgorge more than \$350 million in profits that were obtained through corrupt payments.

Although it represents the largest criminal fine in the history of the FCPA, the Sentencing Memorandum submitted by the Department of Justice identifies that Siemens faced potential fines up to \$2.7 billion, based upon the factors set out in the U.S. Sentencing Guidelines. In explaining the significant reduction from the maximum possible fines, the Justice Department cited Siemens’ “substantial assistance, cooperation, and remediation efforts.” This included the sweeping internal investigations mentioned above, as well as significant efforts to preserve evidence in electronic and hard copy form. Additionally, the Justice Department included in its discussion of these efforts mention of Siemens’ extensive cooperation with parallel investigations and judicial proceedings in other countries. To wit, the Sentencing Memorandum noted that Siemens has “set a standard going forward for the type of multi-national cooperation that can greatly enhance worldwide law enforcement efforts involving corruption of foreign officials.”

Siemens also agreed to overhaul and substantially improve its compliance organization. The company

added large numbers of employees and resources to its compliance office and improved anti-corruption policies, procedures, and controls. The company tightened its oversight of third-parties as well, a key step given their use by Siemens in making many of the corrupt payments discussed above. Finally, Siemens agreed to accept a third-party independent compliance monitor for a term of four years to evaluate and report on the company's ongoing compliance with the FCPA.

Significance of the Siemens Plea Agreement

In many ways, the Siemens plea agreement represents another example of several FCPA enforcement trends seen over the previous few years. (For a more in-depth discussion of FCPA enforcement trends and a detailed compendium of all FCPA enforcement actions in the history of the statute, see the "FCPA Digest," published by Shearman & Sterling partners Danforth Newcomb and Philip Urofsky, available at <http://www.shearman.com/fcpadigest>.)

Most notably, the unprecedented size of the Siemens criminal penalty highlights the Justice Department's continued aggressiveness toward FCPA enforcement. This trend has resulted in a new norm involving higher criminal penalties and an insistence by the SEC that as part of any plea agreement, companies consent to disgorge profits that were obtained corruptly. On the other hand, the Siemens sentencing memorandum provides one of the most detailed explanations of the benefits the Department of Justice is willing to confer on a company that voluntarily discloses FCPA violations and cooperates with the U.S. Government's subsequent investigation.

Additionally, the Department's case against Siemens (a German company) and three of its non-U.S. subsidiaries represents another example of a case that entirely targets non-U.S. companies. Although earlier FCPA prosecutions focused more on U.S. companies acting overseas, the Justice Department more recently has taken aim at corrupt payments by non-U.S. companies that fall within the jurisdiction of the FCPA by virtue of being listed on U.S. stock exchanges.

Although the Siemens case does continue certain trends in FCPA enforcement, it also appears to have broken new ground on several fronts. First, Siemens agreed to plead guilty to a *criminal* violation of the FCPA's "books and records" provisions based on the company's failure to maintain adequate compliance controls. The elevation of liability for an insufficient compliance program – from grounds for civil liability enforced by the SEC to a basis for criminal liability enforced by the Justice Department – is the apex of the Justice Department's expansive view of the requirements imposed by the "books and records" provisions of the FCPA.

Additionally, jurisdiction for several claims in the SEC complaint against Siemens appears to be based solely on the use of correspondent bank accounts in the United States to make certain corrupt payments. Dollar-denominated payments worldwide generally "clear" through a correspondent bank account in the United States, even for a dollar-denominated transaction between two non-U.S. entities. As a result, the SEC's position would expand its jurisdiction to include any company worldwide that issues securities in the United States and engages in a dollar-denominated transaction that clears through a U.S. bank. The SEC complaint also includes corrupt payments that occurred after Siemens voluntarily disclosed its violations to the U.S. Government, including more than \$27 million in payments made after November 2006.

The level of international cooperation by the U.S. and German authorities, and the cross-cultural sensitivity of the U.S. Government, also merit mention. The coordinated settlement by Siemens of proceedings in both the United States and Germany displays the degree to which these two governments worked together on this immense multinational investigation. Additionally, the selection of a former German finance minister as an independent compliance monitor for Siemens represents the first time that a non-American has been chosen for such a position. (This monitor will be supported by a U.S. law firm.) The flexibility and cultural sensitivity shown by the U.S. Government in this selection may reduce opposition by non-U.S. companies to this aspect of FCPA

settlements with the U.S. Government, and therefore encourage more non-U.S. companies to voluntarily disclose FCPA violations to the U.S. Government.

Several novel aspects of the U.S. Government's investigation also are worth noting. First, the scope of the internal investigation by Siemens was towering, totaling more than 1.5 million billable hours by outside attorneys and accountants. Moreover, the Justice Department appears to have "deputized" and directed Siemens in its investigation, for it selected the employees on which Siemens and its attorneys carried out "deep dive" analyses. Third, the Justice Department credited Siemens for its assistance in other investigations of individuals and companies, presumably those located in the United States that were used as conduits for corrupt payments. Finally, the Justice Department praised Siemens' "amnesty" program, which is perhaps the first approval of a company's decision not to take disciplinary

action against culpable employees to advance an investigation by encouraging full cooperation by employees who may have played a role in the corruption that is the subject of the investigation.

Conclusion

Although the FCPA enforcement landscape is constantly evolving, the Siemens plea agreement reinforces FCPA enforcement trends previously identified by Shearman & Sterling, including an aggressive enforcement climate and increased criminal and civil fines. Moreover, the sheer size of the criminal and civil penalties should encourage companies subject to the FCPA to ensure that their own anti-corruption compliance programs are sufficiently stringent to prevent and detect any attempts to violate the anti-bribery and books-and-records provisions of the FCPA.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

Danforth Newcomb
New York
+1.212.848.4184
dnewcomb@shearman.com

Philip Urofsky
Washington, DC
+1.202.508.8060
purofsky@shearman.com

Stephen Fishbein
New York
+1.212.848.4424
sfishbein@shearman.com

Tai Park
New York
+1.212.848.5364
tpark@shearman.com

Patrick D. Robbins
San Francisco
+1.415.616.1210
probbins@shearman.com

Josanne Rickard
London
+44.20.7655.5781
jrickard@shearman.com

Robert Treuhold
Paris
+33.15.389.7060
rtreuhold@shearman.com

Richard H. Kreindler
Frankfurt
+49.69.9711.1420
rkreindler@shearman.com

Markus S. Rieder
Munich
+49.89.23888.2119
markus.rieder@shearman.com

John Savage
Singapore
+65.6230.3800 / +1.212.848.8982
jsavage@shearman.com

Andrew Béla Jánszky
São Paulo
+55.11.3702.2202
ajanszky@shearman.com

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