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Siemens Settling Multi-National Anti-Bribery Probe for \$1.6 Billion

On December 15, 2008, German corporation Siemens Aktiengesellschaft (“Siemens AG”), along with three of its subsidiaries, pleaded guilty to charges that the company violated U.S. and non-U.S. anti-bribery laws, and in particular the U.S. Foreign Corrupt Practices Act¹ (“FCPA”). As part of its settlement, the company agreed to fines and disgorgement of profits totaling \$800 million to U.S. authorities and \$856 million to German authorities.² This represents the largest FCPA settlement in history, and dwarfs the previous record of \$44 million set by the 2007 Baker Hughes prosecution.³

The U.S. Department of Justice charged Siemens AG, which is listed on the New York Stock Exchange, with violations of the FCPA’s books and records and internal controls provisions.⁴ This provision requires U.S. issuers to implement adequate internal controls and keep fair and accurate books and records. The Department also charged Siemens AG’s subsidiary in Argentina with conspiracy to commit a books and records and internal controls violation, and subsidiaries in Venezuela and Bangladesh with conspiracy to violate the FCPA anti-bribery and books and records and internal controls provisions. In addition, the company was charged with providing kickback payments to the Iraqi government in connection with the United Nations’ Oil for Food Program.

In its charging documents, the government alleged that Siemens engaged in long-standing and systematic schemes to bribe foreign government officials, both directly and through “business consultants,” in exchange for lucrative government contracts. The company then knowingly falsified its books and records in order to disguise these payments. In its internal investigation, the company identified over \$800 million in bribery payments over a six-year period.⁵

Among the sanctions resulting from this negotiated plea, Siemens has agreed to pay criminal fines, disgorge certain profits, and retain

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a corporate compliance monitor for a period of four years. Specifically, Siemens' criminal settlement calls for payment of \$450 million in criminal fines.⁶ Although this amount is certainly historic in the FCPA context, it is considerably lower than the range of fines—\$1.35 billion to \$2.7 billion—prescribed by the advisory U.S. Sentencing Guidelines under the facts of Siemens' case as well as the specific offenses charged. It also bears noting that the Justice Department's criminal fine calculations in this case were based on the total amount of corrupt payments made since the company became an issuer, rather than the pecuniary gain (typically the profit) that accrued to Siemens as a result of the bribes. In explaining this atypical approach, the Justice Department noted, "The controls failures and books and records falsifications in this case spanned many thousands of projects over a long time period, and to calculate loss or gain on a project-by-project basis would take an unreasonable amount of time and resources."⁷

In justifying its departure from the criminal fine range prescribed under the Sentencing Guidelines, the Justice Department emphasized "Siemens' assistance in the investigation of other individuals and organizations," "its substantial compliance and remediation efforts," and "its extraordinary rehabilitation," among other factors.⁸ These factors may also have contributed to the Justice Department's decision to predicate its fine calculations on the total amount of bribes, rather than using a profit figure, as would have been more standard and likely would have resulted in a much higher criminal fine range under the Sentencing Guidelines.

In addition to criminal fines, Siemens settled civil charges with the Securities and Exchange Commission for \$350 million, which reflects a disgorgement of certain profits earned as a result of the company's improper conduct.⁹ Furthermore, Siemens agreed to pay over \$800 million to German authorities, bringing the total fines and disgorgement of profits to over \$1.6 billion.

Although these amounts are staggering by any measure, they might have been much higher were it not for the "exceptional" steps taken by Siemens to investigate its own improper conduct and reform its compliance culture.¹⁰ U.S. authorities have admonished the company for its earlier compliance failures, including repeated failures to follow-up and investigate meaningfully in response to corruption issues. But the authorities have also lauded the company for its more recent, aggressive fact-finding, willingness to disclose wrongdoing, and adoption of state-of-the-art remediation measures. These investigative and remedial activities were crucial in curbing the amount of the settlement. Moreover, Siemens' fulsome cooperation likely impacted negotiations between the government and the company concerning the structure of the plea, which appears favorable to Siemens on the critical issue of debarment from future U.S. government contracts.¹¹

The following investigative and remedial activities by the company are highlighted in the Justice Department's Sentencing Memorandum:

- Although Siemens did not self-disclose its FCPA violations to U.S. authorities—German prosecutors raided the company's offices in Germany in late 2006—the company was credited by U.S.



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authorities for quickly retaining outside counsel to conduct a completely independent investigation without restriction as to duration or scope. Over a two-year period, Siemens coordinated the work of external lawyers and forensic accountants in a worldwide investigation involving 34 countries, over 1,750 interviews and 800 informational meetings, and over 1.5 million hours of billable time by outside firms. In total, Siemens reportedly paid over \$850 million in fees and expenses to outside lawyers and accountants.¹²

- The company took sweeping measures to preserve and collect documents, spending over \$100 million on the preservation, collection, and storage of more than 100 million records. Ultimately, the company produced to the government over 100,000 pages of documents and bank records, many of which the company translated into English as a courtesy. The company's attorneys also kept the government abreast of their findings through frequent presentations.
- The company helped to facilitate coordination between U.S. prosecutors and their foreign counterparts—an increasing priority for the Justice Department—by providing timely disclosures to foreign government prosecutors, as well as to investigators from the World Bank and the Inter-American Development Bank. These efforts “have 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.”¹³
- The company implemented internal amnesty and leniency programs whereby certain categories of employees who voluntarily reported credible FCPA violations could avoid termination and prosecution by the company (although the government itself was not bound by this requirement). More than 100 employees evidently provided information pursuant to these programs.
- Siemens replaced most of its top leadership (including its Chairman of the Supervisory Board, CEO, General Counsel, Head of Internal Audit, Chief Compliance Officer, and other senior managers), centralized its compliance operations, and created a number of new positions with focused compliance and legal responsibilities. The company also revamped its anti-corruption program by adopting a number of state-of-the-art compliance tools to ensure proper controls and transparency. One such tool is a computer program that prompts employees to input certain information when proposing third-party agents; that information is then routed to various levels of company management for approval.

In settling charges with Siemens, the government rewarded the company for its comprehensive and innovative cooperation and remediation. The question going forward will be how much Siemens has raised the bar for corporations seeking credit with government prosecutors in FCPA cases. Although it has characterized Siemens' cooperation as “extraordinary” and the company's remedial actions as “uncommonly sweeping,”¹⁴ the government also noted that Siemens has “set a high standard for multi-national companies to follow.”¹⁵



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¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (amended 1988 and 1998).

² Press Release, United States Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008).

³ Press Release, United States Department of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007).

⁴ Information, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.C. Cir. Dec. 12, 2008).

⁵ Siemens became subject to the FCPA's books and records and internal controls provisions beginning in 2001, when the company was first listed on the New York Stock Exchange. By charging Siemens under these provisions, the universe of improper payments at issue in this settlement appears to be limited to those dating back to 2001. Department of Justice Sentencing Memorandum at 5, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.C. Cir. Dec. 12, 2008).

⁶ The settlement calls for fines of \$448,500,000 from Siemens AG, and \$500,000 each from Siemens subsidiaries in Argentina, Venezuela, and Bangladesh.

⁷ Department's Sentencing Memorandum, *supra* note 5, at 13.

⁸ *Id.* at 14.

⁹ Siemens Aktiengesellschaft, Litigation Release No. 20829, Accounting and Auditing Enforcement Release No. 2911, No. 08 CV 02167 (D.D.C. Dec. 15, 2008).

¹⁰ Press Release, United States Department of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008).

¹¹ However, there does appear to be some risk of debarment to Siemens, as the Justice Department expressly referred to this risk in listing potential collateral consequences to the company. Department's Sentencing Memorandum, *supra* note 5, at 11.

¹² David Crawford & Mike Esterl, *Siemens Pays Record Fine in Probe, \$800 Million Settlement Will End U.S. Bribery Case for German Conglomerate*, WALL ST. J., Dec. 16, 2008, at B2.

¹³ Department's Sentencing Memorandum, *supra* note 5, at 18.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 24.

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