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Foreign Corrupt Practices Act (FCPA) Alert

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Siemens Pays Record $800 Million to Settle Foreign Corrupt Practices Act Charges

On December 15, 2008, Siemens AG ("Siemens"), Europe's largest engineering company, pleaded guilty to violations of the U.S. Foreign Corrupt Practices Act ("FCPA") and agreed to pay a record $800 million fine to settle charges that it spent almost $1.4 billion to bribe foreign government officials around the globe.[1] Siemens also agreed to pay an additional $856 million to settle related charges in Germany, bringing the combined total fine in both countries to a staggering $1.6 billion. The $800 million paid to U.S. government agencies is more than 18 times greater than the previous largest aggregation of penalties paid to resolve an FCPA matter.

The size of this settlement should serve as a reminder to companies doing business abroad about the importance of a rigorous and effective FCPA compliance program. In addition to preventing and detecting FCPA violations, comprehensive and appropriate compliance policies, procedures and training help protect against the likelihood that an enforcement agency will initiate an investigation, and may result in lesser sanctions should FCPA violations be uncovered. As the Siemens settlement makes clear, the costs associated with not implementing an effective internal compliance program can be extremely high.

The Siemens settlement also provides an example of how cooperation with the government can impact resolution of FCPA charges. In its publicly filed sentencing memorandum, the government noted Siemens' "extraordinary cooperation" and "uncommonly sweeping remedial action." Apparently due at least in part to this cooperation, Siemens has reported that the Defense Logistics Agency issued a formal determination that Siemens remains a responsible contractor for the business of the U.S. government notwithstanding the broad scope of conduct uncovered. Moreover, in spite of the enormity of the fines at issue, Siemens was potentially subject to much higher fines under the applicable sentencing guidelines. Also cited by the government was Siemens' implementation of a robust compliance program that provides an indication of what the government apparently views as a model for companies hoping to avoid a similar fate.

Siemens' Alleged Violations of the FCPA

According to documents filed in federal court, Siemens engaged in a widespread and systematic practice of paying bribes to foreign government officials to obtain business, falsified corporate records to hide the payments and failed to implement effective internal controls that might have prevented such payments. According to U.S. enforcement authorities, this misconduct involved employees at all levels of the company, including senior management.

1 In addition to Siemens, three of its foreign subsidiaries also pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA. As part of their respective plea agreements, each subsidiary agreed to pay a $500,000 fine, which is included in the $800 million figure.

Court documents detail alleged bribes to government officials in 10 countries, including corrupt payments related to transit systems in Venezuela, high voltage transmission lines in China, power plants in Israel, telecommunications projects in Bangladesh and Nigeria, national identity cards in Argentina, traffic control systems in Russia, medical equipment in Vietnam and refineries in Mexico. Prosecutors also allege that Siemens paid kickbacks to Iraqi ministries in connection with sales of power stations and equipment in Iraq under the United Nations Oil for Food Program.

According to U.S. authorities, Siemens employed a variety of methods to conceal these bribes, including the use of off-books accounts, sham consulting contracts and inter-company accounts to make corrupt payments. Prosecutors also allege that Siemens generated false invoices to justify corrupt payments, maintained "cash desks" where employees could withdraw large sums of cash for bribes with little documentation and used removable Post-It notes with affixed signatures to conceal the identity of the signors and obscure the audit trail.

Although Siemens executives did not directly participate in any of these activities, court documents allege that they helped create a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company. Specifically, prosecutors allege that senior management failed to adopt meaningful compliance measures, refused to commit adequate resources to enforce existing compliance programs and ignored repeated "red flags" indicating that bribery was widespread within the company. Among other things, prosecutors cite the fact that Siemens did not issue mandatory companywide controls regarding the use of third-party business consultants, failed to establish effective internal controls over off-books accounts and cash disbursements, did not adequately discipline employees engaged in bribery and other misconduct on behalf of the company and failed to implement mandatory FCPA compliance training. According to U.S. authorities, these failures "demonstrated a tone at the top of Siemens that was inconsistent with an effective FCPA compliance program."

Siemens' Settlement

Under its settlement agreement with the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), Siemens agreed to plead guilty to criminal violations of the FCPA's internal controls and books and records provisions. As part of the settlement, Siemens agreed to pay a criminal fine of $450 million to the DOJ and $350 million in civil damages to the SEC. Siemens also agreed to implement rigorous compliance enhancements and retain an independent compliance monitor for four years.

The combined $800 million settlement is the largest monetary sanction ever imposed under the FCPA. The previous record penalty was $44 million, levied last year against a subsidiary of Houston-based oil services company Baker Hughes Inc.

Although the penalties levied against Siemens are high, the public filings indicate that they reflect a significant credit for Siemens' "extraordinary cooperation" and "uncommonly sweeping remedial action." Court documents reveal that Siemens faced a criminal fine as high as $2.7 billion under the Federal Sentencing Guidelines, as compared to the $450 million agreed fine, but prosecutors argued for the lower amount, in part because Siemens provided "extraordinary" cooperation in connection with the investigation of its past corporate conduct and made an "extensive commitment" to overhaul its compliance program.

Siemens' "Extraordinary" Cooperation

According to court documents, Siemens disclosed the existence of potential FCPA violations to the DOJ and SEC and initiated a sweeping internal investigation shortly after German authorities raided several Siemens offices and the homes of several Siemens employees in November 2006. At the outset of the investigation, Siemens hired an independent investigator, instituted a worldwide data preservation policy and undertook a massive effort to collect documents and interview relevant employees and third parties around the world. As described in DOJ's sentencing memorandum, this effort involved more than 1.5 million hours of billable attorney time, an

independent investigation involving more than 100 outside attorneys and an additional more than 100 legal staff, more than 130 forensic accountants and support staff and the collection of over 100 million documents at a cost of more than $100 million dollars. Siemens also designed and implemented a companywide amnesty program to facilitate the investigation that, according to court documents, yielded "impressive results." Siemens then provided government investigators with periodic reports on the status of the investigation and information obtained from interviews, corporate records and financial records, including significant information regarding individuals who were used as conduits to conceal corrupt payments made to foreign government officials.

Siemens' Remedial Actions

According to prosecutors, Siemens also made an "extensive commitment to restructure and remediate its operations to make it a worldwide leader in transparent and responsible corporate practices." Among other things, Siemens replaced nearly all of its top leadership, terminated members of senior management implicated in the misconduct and reorganized the company to be more centralized from both a business and compliance perspective. Siemens also imposed a moratorium on entering into new business consulting agreements or making payments under existing business consulting agreements until it could conduct a complete review of any such agreements and the third parties involved. According to court documents, this has resulted in a significant reduction in the number of business consultants used by Siemens.

Siemens also overhauled and greatly expanded its compliance organization. According to prosecutors, control and accountability are now vested in a Chief Compliance Officer who reports directly to the General Counsel and the Chief Executive Officer. The Audit Department is now headed by a newly appointed Chief Audit Officer who reports directly to the Audit Committee. Siemens also enacted a series of new anti-corruption policies, including a new anti-corruption handbook, sophisticated web-based tools for due diligence and compliance matters, a new computer-based system for review and approval of agreements with business consultants, a confidential communications channel for employees to report irregular business practices and a corporate disciplinary committee to impose appropriate disciplinary measures for substantiated misconduct. In addition, Siemens increased corporate-level control over company funds and centralized and reduced the number of company bank accounts and outgoing payments to third parties. Finally, Siemens organized a working group devoted to fully implementing the new compliance initiatives.

The Take-Away

The Siemens settlement should serve as a reminder to companies doing business abroad about the importance of a rigorous and effective FCPA compliance program. Companies doing business in foreign countries, particularly companies that do business in countries with a history of corruption, would be well advised to reevaluate their internal compliance programs in light of this settlement. Among other things, the Siemens settlement shows the need for companies to:

- Implement effective anti-corruption policies, controls and training for employees, agents and representatives involved in overseas transactions, including setting the tone of compliance starting at the highest levels of management;
- Perform due diligence on foreign business partners, agents, representatives and transactions before going forward with a transaction;
- Be prepared to walk away from a prospective transaction when there is evidence of corruption or a party involved in the transaction is either unwilling or unable to adhere to your company's FCPA policies; and
- Ensure that management understands the importance of an effective compliance program, takes an active role in communicating and enforcing your company's anti-corruption policies and follows up on any "red flags."

K&L Gates' FCPA Experience

With 1,700 lawyers on three continents, K&L Gates has the breadth and depth of experience necessary to handle the variety of complex legal/business issues that arise under the FCPA. Our lawyers frequently deal with FCPA issues associated with international business transactions, conduct internal corporate investigations into possible FCPA violations, help organizations develop effective FCPA compliance programs, conduct FCPA compliance training programs domestically and abroad, and represent clients in FCPA enforcement proceedings.