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Outside Counsel Lessons for Business in an Era Of Global Anti-Corruption Efforts

Expert Analysis

On Dec. 15, 2008, Siemens AG and three of its foreign subsidiaries reached agreements with U.S. and German authorities concluding long-running investigations of the company's business practices. The investigations date to a November 2006 raid by the Munich prosecutor on Siemens' offices in response to allegations that the company had made corrupt payments. Siemens then undertook an internal investigation and disclosed potential violations to U.S. officials.

The ensuing internal and governmental investigations were unprecedented in size and scope and are notable for the level of cooperation the company provided to the authorities. These investigations uncovered business practices through which, according to the Securities and Exchange Commission, thousands of payments, totaling approximately \$1.4 billion, were used to bribe government officials in return for business to Siemens in at least 10 countries.

The agreements reached in December called for Siemens to pay a total of \$1.6 billion to conclude all the proceedings, including €96 million to Germany, \$450 million to the Department of Justice, and \$350 million to the SEC. The payments to the DOJ and the SEC for violations of the Foreign Corrupt Practices Act (FCPA), are approximately 10 times greater than the next-largest FCPA fines to date.

In addition to monetary penalties, Siemens will engage an eminent individual as a compliance monitor for the next four years to evaluate and report on the company's progress in implementing and operating its new compliance programs. The DOJ believes that Siemens has shown a commitment to compliance that, in the words of the DOJ sentencing memorandum, will make it a "worldwide leader in transparent and responsible corporate practices going forward."

Although the Siemens plea agreement and fine are unique in their magnitude, the action is but one of an increasing number of FCPA cases successfully prosecuted by the DOJ and SEC. Indeed, from 2005 through 2008, the DOJ resolved 42 FCPA cases, an increase of more than 200 percent from the 17 resolved or charged from 2001 through 2004.

The DOJ made clear in announcing the Siemens



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agreement that this trend of increased enforcement will continue and that "[o]ther nations are joining us in this effort."

The agreements resolve the legal liabilities for Siemens and allow it to move forward with certainty. These agreements do not, however, provide resolution for individuals or other organizations implicated by the investigations. Indeed, the DOJ has specifically cited Siemens' assistance in the investigation of other individuals and organizations as one of the reasons for reducing Siemens' penalties. The impact on others

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of this investigation and Siemens' cooperation with investigators from both Germany and the United States will likely be seen in the months and years to come.

The resolution of the Siemens matter comes as the global economy struggles to right itself, with greater regulatory scrutiny of business practices a certainty.

Three key points can be taken from the resolution of the Siemens investigation.

I. Corruption enforcement is increasing in frequency and in its international character.

Both the DOJ and SEC have increased the resources that they are allocating to FCPA investigations,¹ and FCPA prosecutions have increased markedly over the past several years.

Moreover, the United States is no longer alone in these efforts. As Linda Thomsen, the director of the

SEC's Division of Enforcement, said in announcing the Siemens action: "The worldwide community will vigorously and tenaciously pursue those who bribe government officials.... If a company bribes government officials anywhere on the globe, law enforcement will work around the globe to hold that company accountable." She added that the Siemens case "marks the first time that United States and foreign prosecutors have coordinated their enforcement efforts to address violations of anti-bribery laws. I expect it will not be the last."

Similarly, as FBI Assistant Director Joseph Persichini Jr. noted, the agency has both begun to devote more resources to FCPA investigations and to partner with foreign government and law enforcement agencies to conduct global investigations into industry-specific practices.²

The remediation undertaken by Siemens, like the investigation itself, is unprecedented for the level of international cooperation it will involve. The individual appointed as compliance monitor is likely the first non-U.S. national to be appointed to such a position in the context of FCPA violations. Monitoring Siemens compliance will require cooperation between German and U.S. monitoring teams and communications with both German and U.S. governmental agencies.

The current dislocation of the world economy has implications for global anti-corruption efforts. Regulators perceive an economic downturn as fertile ground for illegal activity, including corporate corruption, as companies and individuals seek every competitive advantage. They also are concerned that companies that are cutting back across the board may downsize or otherwise limit their compliance programs. (Regulators have warned companies against doing so.)

At the same time, as regulators themselves are spread more thinly as they seek to address the myriad issues presented by the financial markets and to learn to do more with less, they may look to the Siemens model of a massive internal investigation as the best means available to leverage their limited resources.

II. Cooperation matters but penalties may be huge nonetheless.

For several years, representatives of both DOJ and the SEC have emphasized the importance of self-reporting and cooperation with government investigations. However, they have not provided much clarity regarding the extent to which cooperation has benefited a particular defendant.

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The government appears to have intended to use the Siemens matter to articulate the credit that is available to cooperative companies. If that is the case, the articulation is cryptic, as the thought processes that lead to each aspect of the penalty (monetary and otherwise) remains opaque.

Moreover, to the extent that the government sought to send a message, that message appears to be that cooperation helps, but that penalties may remain stunningly large.

The DOJ cited Siemens' assistance in the investigation of other individuals and organizations, payment of fines in the United States and abroad, substantial compliance and remediation efforts, and its extraordinary rehabilitation as reasons for reducing Siemens' penalties. Among other things, the DOJ noted that Siemens had:

- Provided detailed information obtained from interviews of Siemens employees and reviews of financial records;
- Organized and explained the information provided during briefing sessions supported by specific documentation (including translations of documents written in languages other than English);
- Provided forensic analysis of bank and other financial records;
- Took aggressive steps to preserve evidence, both in electronic and hard copy form, and made documents held in non-U.S. jurisdictions available to investigators; and
- Established an "amnesty program" for employees below the level of senior management. The government acknowledged that the program, which did not provide immunity from government prosecution but which did protect the jobs of employees who came forward, helped surface important information.

In sum, Siemens relieved the government of a substantial portion of the burden of performing a detailed, wide-ranging, time-consuming and expensive investigation. As noted in the DOJ sentencing memorandum: "It was only through the extensive, worldwide investigative efforts of the internal investigators that these complex criminal activities were uncovered."

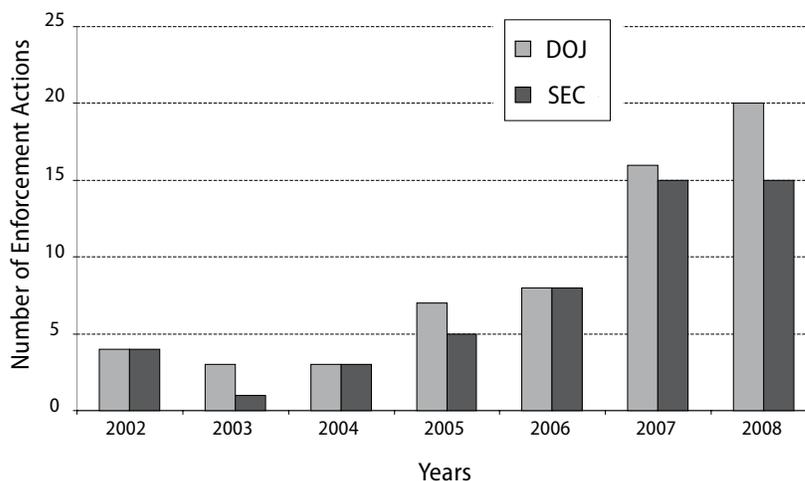
Benefits to Siemens that can be attributed, at least in part, to the company's cooperation with the DOJ, SEC, and German officials include:

- A reduction in U.S. fines to \$800 million from a possible fine ranging from \$1.35 billion to \$2.7 billion;
- The DOJ bringing charges only for violations of the accounting and books and records provisions of the FCPA and not for criminal violations of its bribery provisions;
- The preservation of claims to attorney-client privilege for information and documents shared with the SEC, DOJ, and in the future with the compliance monitor; and
- The Defense Logistics Agency issuing a formal determination that means that Siemens continues to be eligible to receive contracts for U.S. government business.

III. It is important to have strong compliance programs and practices.

The government stressed the distinction between Siemens' current and previously existing management and culture. Siemens expanded its compliance organization (which previously had been understaffed) and incorporated sophisticated technology and confidential communications channels for detecting or reporting corrupt behavior.

DOJ and SEC FCPA Enforcement Actions, 2002-2008



SOURCE: SEC and DOJ Public Information

However, the DOJ and SEC filings against Siemens note that the company's previous corporate culture had embraced corrupt practices even after Germany had signed the Organization for Economic Cooperation and Development in 1999 and after Siemens had begun to be traded on the NYSE in 2001.

Indeed, the DOJ described Siemens' 2001-04 compliance efforts as a largely ineffective "paper program." Similarly, both the SEC and DOJ note numerous investigations from 2003-06 that should have alerted Siemens to possible FCPA violations.

Despite this, Siemens did not implement a mandatory FCPA training program until 2007. The SEC, however, took notice of the fact that only \$27.5 million of the alleged \$1.4 billion in corrupt payments occurred after November 2006 when Siemens' current management began efforts to probe allegations and to institute a strong compliance program. The apparent incremental success of these efforts was likely considered in the determination of the cooperation credit that Siemens received.

Red Flags

The DOJ and SEC filings indicate that a compliance program attuned to red flags would have caught many of Siemens' problems. The DOJ has identified several red flags that corporations must be watchful for in negotiating relationships with joint venture partners, consultants and any other third party through which exposure for an FCPA violation could occur.

Unfortunately, as in other cases, these red flags are general and obvious and the specifics of any particular indicator and its relationship to Siemens' alleged improprieties is clear only in hindsight. These include:

- Unusual payment patterns or financial arrangements;
- A history of corruption in a country;
- A refusal by a foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful

offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA;

- Unusually high commissions;
- Lack of transparency in expenses and accounting records;
- Apparent lack of qualifications or resources on the part of joint venture partner or representative to perform the services offered;
- Whether a joint venture partner or representative has been recommended by an official of the potential governmental customer.

Siemens' alleged corrupt payments included nearly \$200 million each funneled through consultants, intermediaries and slush funds. In addition, confidential payments, internal commissions, and other methods of transferring money played a role in Siemens' practices. Each of these forms of payments would have raised red flags that would be noted by a well-designed compliance program.

In advising clients on the design and structure of their FCPA compliance programs, we stress the need to tailor their procedures to their particular businesses. Although there may be common themes, the red flags that may be generated, for example, by a pharmaceutical company will differ from those that maybe generated for a financial services firm, and procedures to detect and respond to such flags must be designed accordingly.

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1. <outbind://295/#_ftnref1> See, e.g., Andrew Osterland, U.S. Targeting Execs in Bribe Probes, Financial Week, March 3, 2008 available at <http://www.financialweek.com/apps/pbcs.dll/article?AID=/20080303/REG/931152399>.

2. <outbind://295/#_ftnref2> "The FBI is currently joining forces with our overseas partners through our legal attache offices worldwide in over 200 different countries in our 70 legal attache offices."