

Siemens Agrees To Landmark \$800 Million Settlement

International Alert
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On December 15, 2008, in the largest FCPA matter to date, the German engineering giant Siemens Aktiengesellschaft (“Siemens” or “the Company”) settled charges with the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”) for violating the Foreign Corrupt Practices Act (“FCPA”) through a pervasive pattern of widespread bribery that totaled nearly \$1.4 billion in illicit payments. As part of the settlement, Siemens agreed to pay a combined \$800 million fine, a total nearly 20 times higher than the prior record FCPA penalty.

The [DOJ charged Siemens](#) with violating the internal controls and books and records provisions of the FCPA and three of the Company’s subsidiaries in [Argentina](#), [Venezuela](#) and [Bangladesh](#) with conspiracy to violate the FCPA, assessing a total criminal fine of just over \$450 million. As part of the settlement, the Company agreed to retain an independent compliance monitor for a four-year term and implement a robust compliance program.

The [SEC charged Siemens](#), a U.S. issuer since 2001, with violating the antibribery, books and records, and internal controls provisions of the FCPA. Without admitting or denying the allegations, [Siemens agreed](#) to be permanently enjoined from violating the FCPA, to pay a \$350 million disgorgement, and to retain an independent compliance monitor within 60 days of the entry of the Final Judgment.

On the same day, Siemens also settled charges in a related investigation brought by German authorities, agreeing to pay a €395 million (\$569 million) penalty to resolve allegations against all of the Company’s operating units except its Telecommunications group. The investigation of its Telecommunications group was resolved in October 2007, when a Munich court imposed a €201 million (\$287 million) penalty against Siemens stemming from the activities of that unit alone.

The combined total that Siemens will pay under U.S. and German enforcement actions resolved to date now exceeds \$1.6 billion in fines, penalties and disgorgement of profits.

FACTS

The DOJ Criminal Information and SEC Complaint detail systematic efforts by Siemens for nearly a decade to bribe foreign officials in an attempt to obtain or retain business. The pleadings detail elaborate payment mechanisms created by Siemens to conceal the nature of its corrupt payments and highlight how Siemens’s lax internal controls created a culture of pervasive corruption at nearly all levels and in all regions within the Company. This led to over 4,000 identified payments totaling \$1.36 billion, of which the DOJ identified \$805 million as used for corrupt payment to officials and \$554 million for “unknown” purposes. The Company typically made illicit payments through intermediaries using a wide variety of means, including off-books accounts, “slush funds,” “cash desks,” false documentation, and other mechanisms intended to conceal the true nature of payments.

According to the SEC, Siemens paid bribes in connection with a slew of high profile contracts, including “transactions to design and build metro transit lines in Venezuela; metro trains and signaling devices in China; power plants in Israel; high voltage transmission lines in China; mobile telephone networks in Bangladesh; telecommunications 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 communications networks in Vietnam.” Siemens also paid kickbacks to Iraqi ministries in connection with sales of power stations

and equipment to Iraq under the United Nations Oil for Food Program. While the Company's primary settlements with the DOJ and SEC relate to violations in all of these countries, the DOJ also filed separate charges against Siemens subsidiaries in Argentina, Venezuela, and Bangladesh for conspiracy to violate FCPA (books and records provisions for all three and antibribery provisions for the latter two).

Since 1999, Siemens has been gradually increasing its compliance efforts; however, these amounted to little more than a "paper program" that was ineffective at changing the ingrained culture of corruption. In practice, members of Siemens's Managing Board or "Vorstand," although aware of numerous compliance violations, failed to adequately respond to this information or to communicate it to the Company's auditors, at times even purposefully. Siemens's "tone" at the top created an environment in which bribery was not only tolerated, but often rewarded. According to the U.S. Government, corrupt practices thus continued, with employees, who were under tremendous pressure to meet sales goals, being given almost no guidance on how to legally conduct business in countries with endemic corruption.

In late 2006, in the face of a rising tide of investigations abroad into its business activities and the looming threat of criminal and civil prosecutions in Germany, Siemens's current management began to drastically overhaul the Company's internal controls, instigated its massive internal investigation and implemented an "innovative" amnesty program that resulted in hundreds of employees coming forward with information that aided the Company in its settlements with U.S. authorities.

NOTEWORTHY ASPECTS

- *The DOJ's Alternative Method of "Loss" Calculation* : In its [Sentencing Memorandum](#), the DOJ set forth the analysis for determining an advisory fine range pursuant to the 2007 U.S. Sentencing Guidelines. One of the factors used to determine fines under Guidelines is the amount of the total "loss" or "pecuniary harm." The DOJ Sentencing Memorandum stated, however, that calculating "a traditional loss figure in a case of this magnitude, involving literally thousands of contracts over many years, would be overly burdensome, if not impossible." As an alternative the DOJ measured loss using the total value of corrupt payments, equal to \$805.5 million. To that amount, the DOJ added \$38 million, which was a known pecuniary gain that Siemens earned on the corruptly obtained Oil for Food contracts, for a total "loss" of \$843.5 million.
- *Reduced Criminal Fine*: For a "loss" of \$843.5 million, the U.S. Sentencing Guidelines call for a total criminal fine between \$1.35 billion and \$2.70 billion. In recognition of several mitigating factors, the DOJ assessed a fine of \$448.5 million (an additional \$1.5 million was separately assessed against the Siemens subsidiaries) significantly below the range recommended by the Sentencing Guidelines. The DOJ's mitigating factors included:
 - *Siemens "Unprecedented" Investigation*: The DOJ Sentencing Memorandum highlights the breadth of Siemens's internal investigation, describing the scope as "unprecedented [including] virtually all aspects of its worldwide operations." The DOJ Sentencing Memorandum included the following statistics regarding the scope of the internal investigation: 1.5 million hours of billable time by the company's outside investigative counsel and forensic accountants; investigative work by 100 lawyers, 100 support staff, and 130 forensic accountants in 34 countries; 1,750 interviews; 100 million documents collected; \$100 million spent on document collection, review, processing, and storage; and production of over 24,000 documents to the DOJ. The DOJ also lauded Siemens's amnesty program, which provided amnesty from company discipline for all but most senior employees who voluntarily disclosed information about possible violations.
 - *Siemens's Assistance in the Investigation of Others* : The DOJ further commended Siemens for providing "detailed and significant information regarding third parties, including individuals and entities that were used as conduits to conceal corrupt payments made to foreign government officials." The DOJ noted that several of these individuals and entities were located in the United States or used U.S. banks to facilitate payments, which would provide the DOJ with jurisdiction. This suggests that additional FCPA cases are likely to follow.

- *Siemens Remediation Efforts:* The DOJ was equally laudatory of Siemens's remediation efforts, noting that Siemens has replaced nearly all of its top leadership, terminated senior management implicated in the misconduct, reorganized the Company to be more centralized and responsive, and completely overhauled its compliance organization and policies, hiring more than 500 full-time compliance personnel worldwide. Siemens also imposed a moratorium to business consulting agreements during the investigation and is nearly complete with a review of all third party agents with whom it has agreements.
- *Parallel Investigations Abroad:* The DOJ also credited the numerous parallel investigations that Siemens has both resolved and currently still has pending. Germany has now settled two enforcement actions aimed at the Company. In the first instance, a Munich court ordered Siemens's Telecommunications unit to pay €201 million (\$268 million) on corruption-related charges and another \$179 million (\$239 million) because of improperly claimed tax deductions related to the matter. This was followed by a settlement that Siemens entered into with the Munich Public Prosecutor's Office regarding an investigation into Siemens's other business units that required the Company to pay an additional €395 million (\$569 million), including a fine of €250,000 million and disgorgement of €394.75 million. Siemens has also been fined twice this past year by Norwegian authorities for a total of \$2.2 million, and Norway recently filed corruption-related charges in a third matter. Beyond this, the Company currently faces related charges in Greece and Italy, and, according to press accounts, is currently under investigation in a slew of jurisdictions, including Argentina Azerbaijan, China, Hungary, Indonesia, Israel, Liechtenstein, Nigeria, and Taiwan.
- *An Era of Multi-Jurisdictional Enforcement:* The many parallel investigations noted above underscore the substantial cooperation that has begun to occur between foreign governments and enforcement agencies in the investigation and prosecution of cases involving the bribery of foreign officials. For example, Siemens's DOJ Press Release highlights the high level of collaboration between German and U.S. authorities, which included the "sharing information and evidence" on the basis of the mutual legal assistance provisions of the OECD anti-bribery convention. More generally, the DOJ Sentencing Memorandum notes that Siemens's 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." It follows that this cooperation may begin to involve discussion of and agreements as to which jurisdiction may appropriately prosecute the parties involved. This would reduce the hazardous risks a company is placed in when facing prosecutions in multiple jurisdiction while also increasing the effectiveness of antibribery laws writ large.
- *The Absence of Criminal Antibribery Charges:* In settling with the DOJ, Siemens avoided any criminal charge of violating the antibribery provisions of the FCPA, which, if admitted to, could have precluded the Company from bidding on public-sector projects in the United States pursuant to the Federal Acquisition Regulations. Based on the facts of the settlement, the lead agency for U.S. federal government contracts, the Defense Logistics Agency, issued a formal determination today that Siemens remains a responsible contractor for U.S. government business.
- *Longest Monitorship to Date:* Per the terms of the SEC and DOJ settlements, Siemens agreed to retain an independent compliance monitor for four years - the longest monitorship of any settlement to date. Of note is the fact that under the terms of the settlement, Siemens, a German company, is required to either retain a monitor who is a U.S. lawyer with demonstrated FCPA experience or to hire a U.S. lawyer with such expertise to serve as independent counsel to its monitor.

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