

# Alerts & Publications

## Siemens to Pay US\$1.6 Billion in Global Bribery Investigation

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On December 15, 2008, the much-anticipated settlement in the Siemens global bribery investigation was announced. Siemens agreed to pay \$450 million and \$350 million to the Department of Justice and the Securities and Exchange Commission, respectively, for a total of \$800 million to U.S. authorities. Siemens' fines in a related settlement with the Office of the Prosecutor General in Munich, Germany, stand at €596 million, bringing the total cost to date of resolving the corruption-related charges to approximately \$1.6 billion.

The federal investigation and Siemens' internal investigation of its business practices began in November 2006, when raids by German prosecutors prompted Siemens to self-report potential violations of the FCPA. Siemens estimates that over 300 lawyers, accountants, and support staff expended 1.5 million billable hours on the internal investigation in the last two years. Ultimately, these efforts pointed to evidence of corruption by Siemens spanning several decades in many operating groups and regions.

### Summary of Facts

According to the criminal information and the SEC complaint, from at least the mid-1990s to 2007, Siemens utilized a variety of schemes to make thousands of illicit payments in dozens of countries. The principal payment mechanisms included entering into purported business consulting agreements with no legitimate purpose, maintaining slush fund bank accounts, depositing special checks in off-book accounts, using cash desks to obtain large amounts of cash to pay bribes, and disguising payments through an elaborate system of intercompany accounts. From 2001 to 2007, Siemens made approximately \$1.4 billion in corrupt payments to government officials, earning at least \$1.1 billion in profits on these and other transactions.

Though the SEC and DOJ give the distinct impression that the instances of Siemens' bribery are too numerous to catalogue exhaustively, the information and complaint each point to specific examples of wrongdoing. The information describes Siemens' involvement in an Oil for Food kickback scheme. As in other Oil for Food kickback cases, Siemens is alleged to have inflated the price of some U.N. approved contracts by up to 10% in order to funnel cash payments to Iraqi government officials through third-party intermediaries.

The SEC complaint contains 13 additional examples of alleged bribery by Siemens. Subsidiaries in Venezuela, China, Israel, Bangladesh, Nigeria, Argentina, Vietnam, Russia, and Mexico are alleged to have paid bribes in exchange for business advantages in a host of transit, utility, mobile communications, and other projects. The allegations pertaining to payments by Siemens Argentina in connection with a national identity card project, by Siemens Venezuela in connection with two major metropolitan mass transit projects, and Siemens Bangladesh in connection with bidding for a

mobile telephone project are repeated in the criminal sentencing memorandum, as this conduct is the basis for the subsidiaries' guilty pleas. While all three of these subsidiaries pled to conspiring to violate the books and records provisions of the FCPA, only Siemens Venezuela and Siemens Bangladesh pled to conspiring to violate the anti-bribery provisions of the FCPA. Siemens Argentina is alleged to have made at least \$18,782,965 in illicit payments; Siemens Bangladesh is alleged to have paid \$5,319,839.83, and Siemens Venezuela is alleged to have paid a total of \$16.7 million.

A critical component of both the complaint and information are allegations that go to Siemens' knowledge. Germany became party to the OECD Antibribery Convention in 1999. Despite recognition by Siemens' executives at the time that the convention imposed new obligations on the company and could lead to criminal liability if not followed, illicit payments continued. Siemens' listing on the NYSE in 2001 likewise did not deter corrupt payments. In fact, between 2001 and 2006, Siemens' leadership repeatedly refused to address corruption issues in any meaningful fashion, implementing a weak compliance program and ignoring numerous red flags. In 2003, for example, an accountant identified and flagged for review substantial cash payments in Nigeria by senior-level Siemens employees. An in-house compliance attorney investigated and wrote a report indicating that the employees admitted it was not an isolated event and warning of numerous possible violations of law. Siemens' officers, including the then-CFO, elected to pursue no disciplinary action or further investigative work. The report was not forwarded to the Audit Committee. Tone at the top began to change only in 2005 when Siemens learned it was the target of multiple corruption investigations.

### **Plea Agreement -- DOJ**

As noted above, three Siemens subsidiaries pled guilty to one count each of conspiring to violate the books and records provisions of the FCPA. Two subsidiaries pled guilty to one count each of conspiring to violate the anti-bribery provisions of the FCPA. 18 U.S.C. § 371. The parent company, Siemens AG, admitted only to violating the FCPA's internal controls provisions and books and records provisions, thereby preserving arguments that the company should not be barred from government contract work. 15 U.S.C. §§ 78m(b)(2)(B), 78m(b)(5), 78ff(a).

Under the plea agreement, Siemens agreed to fines of \$450 million, continued cooperation, implementation and testing of a rigorous compliance program, and four years of monitoring by an independent compliance consultant.

This is the first time that the FCPA's internal controls provision has been charged criminally. Given the nature of the allegations about top management's lackadaisical attitudes towards the control environment, it is difficult to imagine the charge ever being filed, if not in this case.

### **Settlement -- SEC**

The SEC complaint states three claims: one for bribery of foreign government officials in violation of Section 30A of the Exchange Act; one for failure to maintain accurate books and records in violation of Section 13(b)(2)(A) of the Exchange Act; and one for failure to devise and maintain an adequate system of internal accounting controls, also in violation of Section 13(b)(2)(A) of the Exchange Act. While Siemens did not admit or deny the allegations in the SEC complaint, it did consent to disgorgement of \$350 million and entry of final judgment permanently enjoining it from future violations. Breaking with SEC precedent, the settlement does not require payment of pre-judgment interest on the disgorgement amount.

## Key Issues

Although the \$800 million figure is staggering and dwarfs the previous record for an FCPA settlement with the DOJ and SEC (\$44 million last year in the case of Baker Hughes), many had expected Siemens to have to pay more. Justice Department guidelines would have allowed for up to \$2.7 billion in criminal fines. Ultimately this case was a compromise -- the government can trumpet the high fines but the company can legitimately claim to have dodged a bullet both in not being forced to plead guilty to a bribery charge and in paying less than a third of the potential criminal fine. The sentencing memorandum explains that the Department of Justice believed a downward departure in sentencing was warranted in light of Siemens substantial assistance, cooperation, and remediation efforts, including extensive disclosures to the Government and a broad amnesty and leniency program for Siemens employees with information relevant to the investigation. The sentencing memorandum even goes so far as to say that the "remediation efforts of Siemens have been extraordinary and have set a high standard for multi-national companies to follow." It is unclear whether the DOJ is lauding the proportionality of Siemens' response or suggesting that objectively extensive efforts should become the norm or both.

The SEC settlement was also less than it might have been. The profits Siemens is alleged to have made as a result of the improper payments are nearly triple the disgorgement amount, and the total settlement amount would have been significantly higher had Siemens had to pay pre-judgment interest. The settlement thus does little to clarify the SEC's disgorgement policies. It does, however, equip companies with arguments that full disgorgement is not required in all cases. The settlement also strongly suggests that the SEC has ceded ground to the DOJ with respect to penalties. If the company pays a criminal fine it is almost inevitable that the SEC will stand down and not seek a financial penalty.

The close coordination between U.S. and German authorities in this case is part of a trend towards increasing international cooperation in corruption cases. A year ago, in December 2007, the DOJ, in connection with its investigation of Akzo Nobel's involvement with an Oil for Food kickback scheme, agreed to defer the imposition of a criminal fine in order to allow Akzo Nobel to reach resolution with the Dutch National Public Prosecutor's Office for Financial, Economic and Environmental Offences. The Siemens settlement builds on this precedent. Multi-national companies with corruption issues are well advised to begin coordinating their U.S. and international defense strategies early so that such global resolutions are possible.

The Siemens case serves as a reminder that anticorruption compliance programs are only as good as the resources behind them. Even the best written policies will fail without adequately trained front-line personnel, appropriate tone at the top, and a culture of willingness to halt problematic conduct.

Finally, it bears noting that the Siemens saga is not yet over. On January 9, 2009, the DOJ filed a forfeiture action in the District of Columbia against accounts worth nearly \$3 million that are alleged to be the proceeds of the Siemens Bangladesh bribery conspiracy. More forfeiture actions could be filed as prosecutors work through jurisdictional issues and logistical challenges for the implicated individuals and transactions. U.S. prosecutors have also said that their criminal investigations of individual Siemens executives are ongoing. These additional actions illustrate the lengths to which U.S. law enforcement will go to unwind international bribery schemes.