

# ANTITRUST & TRADE PRACTICES

## *Alert*

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

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### **Siemens To Settle Foreign Corrupt Practices Act Charges for \$800 Million: Largest FCPA Settlement Action in History; Highlights DOJ and SEC Determination to Aggressively Enforce FCPA**

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#### **Key Points**

- Siemens AG (“Siemens”) is expected to plead guilty today to violating the Foreign Corrupt Practices Act (“FCPA”). Fines and disgorgement are expected to total approximately \$800 million. Siemens also must submit to oversight by an independent compliance monitor.
- Siemens is expected to admit that it violated the FCPA by failing to keep accurate books and records or establish internal compliance programs to prevent FCPA violations. Though the FCPA also prohibits actual bribery, Siemens will not be required to admit bribery violations.
- This case caps a banner year in enforcement of the FCPA, with record prison sentences and fines for executives and companies in multiple industries. Companies and executives that do business internationally are on notice that the FCPA will be aggressively enforced in 2009.

#### **The Siemens Charges**

Today, one of Europe’s largest and most sophisticated conglomerates is expected to settle FCPA charges with the Department of Justice (“DOJ”) and Securities & Exchange Commission (“SEC”). This enforcement action is the latest indication that the government intends to aggressively apply the once little-used FCPA against businesses that operate internationally. The Siemens action arises from the company’s alleged failure to prevent or adequately account for improper payments made to foreign government officials. The SEC alleges that Siemens paid bribes to secure contracts for medical equipment in China and Southeast Asia, telecommunications networks in Africa, and transit equipment in South America, among others.

According to documents filed by the government, Siemens made over 4,200 improper payments totaling \$1.4 billion. The charging documents allege that Siemens employees mischaracterized bribes and used improper accounts to conceal the illegal payments from auditors. These actions,

along with the chronic underfunding of the company's anti-corruption compliance efforts, led to massive FCPA violations.

The DOJ stated Friday that Siemens could have been required to pay up to \$2.7 billion, and that only exemplary cooperation during the investigation reduced the penalties and disgorgement to \$800 million. In addition to the monetary settlement, Siemens will be required to submit to extensive anti-corruption compliance monitoring by an independent firm.

Though a settlement today is expected to conclude a two-year U.S. investigation of the German conglomerate, the company remains under investigation for related charges in nearly a dozen other foreign countries in which it operates. Siemens' CEO, Klaus Kleinfeld, was forced to resign in the wake of the scandal, and German courts have issued prison sentences to other executives. In addition to the fines themselves, Siemens has spent over €850 million during its own investigation of the charges, including paying more than €200 million to its U.S. attorneys.

### **What is the FCPA and to Whom Does it Apply?**

Though the FCPA has been around for decades, it was rarely enforced until recently, and therefore has garnered relatively little attention from many executives, general counsel and compliance officers. If you or your company is engaged in international business, whether directly or through agents, JVs or subsidiaries, you need to be aware of the FCPA.

The FCPA can be reduced to two general sets of provisions:

(i) *Anti-bribery* – these provisions prohibit directly or indirectly offering anything of value to any foreign official for the purpose of influencing the decision of that official to do anything that assists the offeror in the obtaining or retaining of business. The interpretation of the statutory language is exceptionally broad. For example, a “foreign official” can include physicians and other healthcare workers in countries with government-sponsored healthcare. “Anything of value” can include travel, meals, entertainment and offers of employment to relatives. Local custom is no defense.

(ii) *Books and Records* – these provisions require companies to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. There is no materiality threshold. Additionally, companies must maintain a system of internal compliance controls that “provides reasonable assurances that transactions are executed in accordance” with GAAP.

The approximately \$800 million in fines expected to be paid by Siemens are reported to stem from failure to maintain proper books, records and compliance controls, not from violations of the anti-bribery provisions of the FCPA.

The penalties that can be imposed for FCPA violations are severe, and can include:

(i) *For companies* – felony convictions, fines of up to \$2,000,000 per violation, disgorgement, denial of export licenses, and debarment from doing business with the U.S.

government. As in the Siemens case, companies will often be required to submit to an independent compliance monitor.

(ii) *For individuals and executives* – felony convictions, imprisonment up to 5 years and fines up to \$100,000 per violation, along with disbarment and debarment.

Companies and individuals also face substantial defense costs and the loss of reputation associated with being criminally charged under an anti-bribery statute.

### **Why is the FCPA Relevant Now?**

FCPA prosecutions have spiked dramatically in the last 3 years. Fines and prison sentences are also increasing. The record for fines has been broken each of the last 3 years, culminating in the Siemens settlement. The U.S. government has decided to aggressively enforce the FCPA and significant resources have been devoted to this end. The DOJ FCPA team that previously had the equivalent of only two full-time prosecutors now has as many as a dozen prosecutors dedicated to FCPA enforcement, supported by a special FBI FCPA unit. Government investigators are using wiretaps, undercover agents, and corporate “moles” to uncover anti-corruption violations. As public awareness of the FCPA grows, enforcers are receiving many more reports of alleged FCPA violations from whistleblowers and competitors.

Recently, when enforcers have targeted one company in an industry, they have heavily scrutinized other players in that industry. For example, nearly a dozen investigations have occurred or are ongoing in the medical devices industry.

### **Maintaining an FCPA Compliance Program that Adheres to Current DOJ Guidelines**

The DOJ’s chief FCPA enforcer has remarked that “we have yet to bring a case where we’ve had a company come before us with a meaningful compliance program.” Companies that conduct business internationally should institute an FCPA compliance program that meets current DOJ guidelines. This is acutely important for companies that do business in high risk areas such as China, India, Mexico, Russia, Brazil, Africa, Eastern Europe, and the Middle East.

An effective anti-corruption compliance program can significantly reduce FCPA exposure, both by avoiding or catching potential problems before they develop and by convincing prosecutors that a company is serious about its anti-corruption efforts. Moreover, as demonstrated by the €50 million spent by Siemens on its internal investigation, even simply defending an FCPA allegation can be enormously expensive. When dealing with the FCPA, the proverbial ounce of prevention can be worth several million pounds of cure.

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