Client Advisory

KELLEY DRYE

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Siemens Pays Record Fine for Violations of the Foreign Corrupt Practices Act

Siemens AG and its subsidiaries in Latin America (collectively, "Siemens") recently paid $1.6 billion in fines, penalties, and disgorgement in profits, including $800 million to U.S. authorities, to resolve charges that Siemens violated the Foreign Corrupt Practices Act ("FCPA"). The fine paid to the U.S. authorities is the largest fine under the FCPA paid to date.

FCPA REQUIREMENTS

The FCPA prohibits offering or giving anything of value to a foreign governmental official for the purposes of obtaining or retaining business, securing an improper advantage, or influencing the governmental official. It also requires companies whose securities are publicly traded in the United States to keep books and records in reasonable detail which accurately and fairly reflect the companies' transactions. Furthermore, public companies must devise and maintain a system of internal accounting controls which provide reasonable assurances that the financial statements will be prepared in accordance with generally accepted accounting principles and all assets will be accounted for.

SIEMENS' PLEA AGREEMENTS

The fines and penalties paid by Siemens were made in connection with plea agreements that Siemens entered into with the Department of Justice, the Munich Public Prosecutor's Office, and the Securities and Exchange Commission, in which it admitted to a failure to maintain adequate internal controls and improper bookkeeping. The charges under the FCPA were based on violations that occurred in Latin America and the Middle East. From 2000 to 2002, four Siemens subsidiaries paid over $1.7 million in bribes to the Iraq government to obtain over forty contracts with the Ministries of Electricity and Oil, and improperly recorded the payments on the books and records of the company. From 1998 to 2007, subsidiaries in Latin America disguised over $31 million in corrupt payments to the Argentine government as consulting and legal fees in order to obtain favorable treatment in connection with a $1 billion project. Beginning in October 2001, a Venezuelan subsidiary made over $18 million in corrupt payments to Venezuelan officials to obtain mass transit projects, and improperly recorded these payments. Finally, a subsidiary in Bangladesh made a corrupt payment of $5.3 million to obtain favorable treatment in connection with a mobile telephone project.

Under the plea agreements, in addition to paying the fines, Siemens agreed to retain an independent FCPA compliance monitor for four years. Siemens was not, however, required to admit to any bribery allegations, allowing it to continue bidding on U.S. public sector projects. The Department of Justice indicated that it could have sought fines as high as $2.7 billion had Siemens not cooperated in the investigation and agreed to strengthen its compliance procedures. The Department of Justice and the FBI emphasized that they will continue to work with enforcement authorities around the world to root out violations of the FCPA.

DETERING FCPA VIOLATIONS

In light of the FCPA actions against Siemens, companies doing business internationally should adopt policies intended to deter, and establish practices designed to detect and prevent, payments in violation of the FCPA. A company should place the responsibility

for the design and implementation of a compliance program in the hands of senior management which would not be involved in or compensated from the primary business activities to be regulated, the legal department, or a separate corporate compliance department. When developing a compliance program, a company should consider not only the FCPA, but also the bribery or corruption laws of the countries in which the company does business. The program should identify the employees who interact with foreign officials, and maintain periodic continuing training for such employees about the requirements of the FCPA and the company's policy against corrupt payments. Additionally, the company should ensure that such employees do not have a history of violating the law. Furthermore, a company should implement procedures to monitor the accuracy of its books and records are accurate and regularly conduct reviews as to the correct reporting of transactions.

Many of the foregoing activities can and should be part of a company's ethics, disclosure and internal control policies and procedures under The Sarbanes-Oxley Act of 2002 ("SOX"), if applicable. A company should also foster the reporting of FCPA violations and give its employees the option to report anonymously if they wish, keeping in mind that the company must extend the right to anonymous reporting to third parties if the company is subject to the SOX. Finally, a company should document all compliance efforts carefully, including documenting all educational materials, compliance reviews and internal investigations.

Directors of a company should bear in mind that, under *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996), and other cases, they have a duty to attempt in good faith to assure that an adequate corporate information and reporting system exists. Additionally, the Federal Organizational Sentencing Guidelines impose several additional duties on companies and their governing bodies, including boards of directors. Among other things, directors must be knowledgeable about the content and operation of their compliance programs, receive periodic updates on the programs' implementation and effectiveness, and receive adequate training corresponding with their role in the compliance program. Additionally, companies must consistently implement and modify the compliance program to ensure that it is effective in preventing FCPA violations and other criminal conduct. Compliance with the duties set forth in Caremark and the Organizational Sentencing Guidelines can help deter FCPA violations as well as reduce the charges and penalties imposed if FCPA violations do occur.

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