Alarming lessons from Siemens

The US is aggressively pursuing corruption, everywhere

In a long anticipated settlement that was first announced on December 15 2008, German industrial company Siemens and three of its subsidiaries, in Argentina, Bangladesh and Venezuela, agreed to pay a combined total of $800 million to the US Department of Justice and Securities and Exchange Commission (SEC) to settle far-reaching violations of the Foreign Corrupt Practices Act (FCPA) that came to light following a November 2006 dawn raid on various Siemens employees and offices by German law enforcement authorities.

In a cooperative stance that is the first of its kind between the US and Germany, on the same day as the US settlements were announced Siemens revealed that it had agreed to pay an additional €395 million ($528 million) in penalties in Germany to resolve similar allegations. Previously, Siemens had paid €201 million in Germany in partial settlement for similar charges.

The settlement with the Justice Department in which Siemens agreed to pay $450 million of the combined $800 million settlement was the first time that the Justice Department criminally prosecuted an issuer for internal controls and books and records violations.

In its settlement with the SEC, Siemens agreed to be enjoined from future violations of the FCPA's anti-bribery, books and records and internal controls provisions and to pay $350 million in disgorgement and prejudgment interests.

Siemens's cooperation

Siemens conducted an unprecedented $1 billion internal investigation, which included:

- analysis of 38 million financial transactions;
- 1.6 million hours of billable time by counsel and the company's forensic auditors totaling over $850 million;
- 1,750 interviews and 800 informational meetings concerning Siemens operations in 34 countries;
- $5.2 million in translation costs; and
- $150 million on creating an extensive anti-corruption kit.

Siemens also adopted extensive remedial measures. Most prominently, it replaced its entire top leadership, including the chairman of the supervisory board, its chief executive officer, its general counsel, the head of internal audit and the chief compliance officer.

Additionally, Siemens took several steps to remedy deficiencies in its corporate structure. Among other things, it created a new position on the managing board with specific responsibility for legal and compliance matters, reorganised its audit department, and enacted a series of new anti-corruption policies.

Lessons from the settlement

Not surprisingly, the government viewed these steps and others taken by Siemens as "extraordinary" and "set[ting] a standard going forward for the type of multinational cooperation that can greatly enhance worldwide law enforcement efforts involving corruption of foreign officials."

The first lesson for companies is that, contrary to what the Justice Department and the SEC appear to be suggesting in their settlement papers, not every company needs to conduct as sweeping an internal investigation as Siemens to satisfy the government that a "thorough" investigation was conducted. It is nevertheless crucial for any company conducting an FCPA investigation to fully scope the investigation at the outset. Get buy-in from all interested parties, in particular the government and the company's external auditors.

Second, the Justice Department highlighted the importance of prompt voluntary disclosure under the US sentencing guidelines. The prosecutors stated that, while the negotiated sentence under the plea agreement properly accounted for Siemens's extraordinary internal investigation and cooperation, Siemens would not have gotten the full benefit of its cooperation by relying solely on a sentencing guidelines regime that provides lesser credit for cooperation when a defendant has not made a voluntary disclosure. Companies faced with the decision whether to self-report a potential FCPA problem to the Justice Department and the SEC should consider this point in reaching a decision on disclosure.

Third, both the Justice Department's and the SEC's press releases and charging documents emphasised the extensive international cooperation, particularly between US and German officials, that underlay both the investigation and the coordinated settlement. The SEC release also singled out UK and Hong Kong enforcement authorities as having rendered important assistance. Companies facing multi-jurisdictional FCPA investigations must understand the lay of the land in the various jurisdictions in which they may be called to account. Where possible, these issues should be fully vetted before a call is made to the Justice Department and the SEC.

Fourth, one of the more concerning aspects of the settlement is the government's broad view of the FCPA's jurisdictional reach. The SEC appears to predicate jurisdiction over transactions that were routed through US correspondent banks and payments made into US bank accounts. For the Justice Department, among other things, payments made in dollars via a New York bank appear to be enough to confer jurisdiction.

Indeed, in the charges against Siemens-Bangladesh, the Justice Department alleged that at least one payment was to be made to purported consultants from a US bank account. What these charges foreshadow is that virtually any transaction anywhere in the world, no matter how tangentially (if at all) it touches the US, can give rise to allegations of FCPA violations. It is doubtful that Congress intended for the FCPA's jurisdictional reach to be this broad.

Fifth, Siemens also marked the first time that a non-US person was appointed as a corporate monitor. The four-year monitor, a former German finance minister, will however be aided by a US law firm. Importantly, and as a nod to Siemens' extensive cooperation and remedial efforts, the scope of the monitor's work was more narrowly defined than usual.

Sixth, perhaps the most important lesson is that the government is continuing its aggressive plan to root out corruption worldwide. The ability to get other countries to enforce their local anti-corruption laws appears to have gained momentum with Siemens. Apparently, Siemens is under investigation in Switzerland, Italy, Greece, China, Hungary, Israel, Russia, Norway, Indonesia, and Nigeria for potential violations of local anti-corruption laws. Although the US portion appears to be over for now, the Siemens show continues in a country near you.

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