



Securities Law Alert

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The FCPA: Two New Record Settlements Serve As A Reminder To Carefully Monitor Practices

The renewed emphasis on enforcement of the Foreign Corrupt Practices Act (FCPA or the Act) by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) recently resulted in two record-breaking settlements — a warning that should be heeded by all companies doing business abroad (whether directly or through subsidiaries or joint ventures). Siemens AG and three of its subsidiaries agreed to pay the largest amount ever (\$1.6 billion) to authorities in the U.S. and abroad in a settlement with DOJ, the Munich Public Prosecutor's Office, and the SEC. Shortly thereafter, former Halliburton Company subsidiary Kellogg Brown & Root LLC (KBR) agreed to pay \$560 million in settlements to DOJ making the largest combined FCPA settlement paid by U.S. companies. In announcing the settlement with Siemens, spokespersons for the DOJ and the FBI emphasized that the Act is a key area of emphasis and warned that they will continue to work with enforcement authorities around the globe to root out violations.

The FCPA

Enforcement authorities have used two primary components of the FCPA, 15 U.S.C. §§ 78dd-1, et seq., to ensnare an increasing number of companies: the anti-bribery provisions and the books and records and internal control provisions. Although the anti-bribery provisions may be better known, the books and records and internal control provisions have a much more extensive reach and were used in the cases against Siemens and KBR.

DOJ and the SEC have been bringing FCPA cases at a record-setting pace. For example, during 2007 and 2008, DOJ brought 38 FCPA cases and the SEC filed 33 cases. From 2006 to 2008, DOJ and the SEC brought more FCPA cases than they did during the entire period from the passage of the Act in 1977 through 2005.

This increase in the number of cases has been coupled with an aggressive interpretation of the statutes and soaring penalties. In 2007, for example, DOJ and the SEC set records for what up to then were the largest FCPA settlements to date. In 2008, DOJ and the SEC surpassed their just-set records with even bigger penalties. Both agencies continue to focus on FCPA enforcement and bringing cases against corporate directors, officers, and agents. Indeed, DOJ recently confirmed that approximately 100 companies are under investigation for alleged FCPA violations. The current focus and an open inventory of FCPA

investigations suggests that companies should expect DOJ and the SEC to continue to focus in this area through this year and into the future.

The Siemens Settlement

Siemens AG resolved FCPA charges with DOJ, the Munich Public Prosecutor's Office, and the SEC with multiple guilty pleas and the payment of \$1.6 billion in fines, penalties and disgorgement of profits, including \$800 million to U.S. authorities. *U.S. v. Siemens Aktiengesellschaft*, Case No. 08-367 (D.D.C. Filed Dec. 15, 2008); see also *SEC v. Siemens Aktiengesellschaft*, Case No. 1:08-cv-02167 (D.D.C. Filed Dec. 15, 2008).

The charges were based on violations in the Middle East, Latin America and Asia. From 2000 to 2002, four Siemens subsidiaries — Siemens Turkey, Siemens France, Osram Middle East and Gas Turbine — were awarded 42 contracts valued at more than \$80 million with the Ministries of Electricity and Oil of Iraq under the United Nations Oil for Food Program (OFP). These contracts were secured by paying over \$1.7 million in kickbacks to the Iraqi government. The company netted over \$38 million in profits. As with other OFP cases, the contract price was inflated before the submission of the contract to the U.N. for approval. The payments were improperly recorded on the books and records of the company.

The settlement revealed that Siemens' subsidiaries in Latin America also violated the FCPA. Beginning in September 1998 and continuing through 2007, Siemens S.A. Argentina made over \$31 million in corrupt payments to various Argentine officials. These payments were improperly recorded in the books and records as "consulting fees," "legal fees," and other types of legitimate payments. These payments were made to obtain favorable business treatment in connection with a \$1 billion national identity card project. Siemens S.A. Venezuela also made corrupt payments beginning in October 2001. The subsidiary made over \$18 million in corrupt payments to various Venezuelan officials to obtain favorable treatment in connection with two major metropolitan mass transit projects, and the improper payments were not properly recorded on the company's books and records.

Finally, Siemens Bangladesh Limited admitted that from May 2001 to August 2006, it made corrupt payments of over \$5.3 million to obtain favorable treatment during the bidding process on a mobile telephone project.

Under the terms of the plea agreement with DOJ: (1) Siemens AG pled guilty to one count of failure to maintain internal controls and one count of books and records violations; (2) Siemens S.A. Argentina pled guilty to one count of conspiracy to violate the books and records provisions of the FCPA; (3) Siemens Bangladesh Limited pled guilty to a one-count information charging conspiracy to violate the anti-bribery and books and records provisions; and (4) Siemens S.A. Venezuela pled guilty to a one-count information charging conspiracy to violate the anti-bribery and books and records provisions. Under the agreements, Siemens AG and its three subsidiaries agreed to pay fines totaling \$450 million, the largest criminal FCPA fine since the Act was passed in 1977. The company also agreed to retain an independent monitor for four years.

In addition, the company also settled charges with the Munich Public Prosecutor's Office and the SEC. With the former, Siemens AG agreed to pay about \$569 million, which includes a fine and disgorgement. To settle with the SEC, the company consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery and books and records provision. In addition, the company agreed to disgorge \$350 million in profits, which does not include those profits disgorged in the payment under the Munich settlement.

The settlements were based on the cooperation of Siemens. The extensive cooperation of the company, praised by DOJ, included conducting a full investigation of the matter, making the results of that investigation available to DOJ, taking appropriate personnel action regarding those involved, instituting remedial actions and accepting responsibility for its actions.

The Halliburton-KBR Settlement

With the ink hardly dry on the Siemens record-setting deal, DOJ and the SEC combined to set another record — the largest combined FCPA settlement paid by U.S. companies. This time the settlement involved former Halliburton subsidiary KBR. *U.S. v. Kellogg Brown & Root LLC*, 4:09-cr-00071 (S.D. Tex. Filed Feb. 6, 2009); *SEC v. Halliburton Company*, Case No. 4:09-CV-399 (S.D. Tex. Filed Feb. 11, 2009).

The company admitted to paying bribes to Nigerian government officials in connection with the award of four contracts, valued at over \$6 billion, between 1995 and 2004. KBR also admitted that before the award of the contracts, its

former CEO Albert Stanley and others met with three successive former holders of a top-level office of the Nigerian government to ask for the designation of a representative with whom the joint venture could negotiate bribes for government officials. Following the designation and negotiations, about \$132 million in bribes were paid to one agent, a consulting company incorporated in Gibraltar, and another \$50 million was paid to a second agent based in Japan. The fees were paid to bribe Nigerian government officials.

In the KBR criminal case, the company pled guilty to conspiring with its joint venture partners and others to violate the FCPA. KBR agreed to pay a fine of \$402 million and to retain a monitor for three years. Mr. Stanley previously pled guilty to FCPA charges.

The SEC filed a settled civil injunctive action against Halliburton and KBR, alleging violations of the anti-bribery and books and records provisions of the FCPA. The complaint is based on the same scheme as the criminal case. To settle the action, Halliburton and KBR agreed to: (1) a permanent injunction from future violations of the anti-bribery and books and records provisions of the FCPA; (2) a \$177 million disgorgement of the ill-gotten profits derived from the scheme; (3) the implementation of an independent monitor for KBR for a period of three years to review its FCPA compliance program, and (4) the implementation of an independent consultant for Halliburton to review its policies and procedures as they relate to compliance with the FCPA.

Heeding the Warning Signs

The warning signs for companies doing business abroad are present for all companies to see. The sheer increase in the number of FCPA cases over the last two years demonstrates the importance placed on these issues by the enforcement authorities. The two record-setting settlements, along with recent cases against Fiat S.p.A and ITT Corporation, reflect the continued scrutiny being given to FCPA matters.

Companies doing business abroad (including those acting through subsidiaries or joint ventures) should consider the following steps to reduce the risk of liability:

- **Effective compliance procedures consistently applied.** Any company that does not have compliance procedures and programs in place should immediately establish procedures that address the anti-bribery provisions of the FCPA and the accounting procedures that need to be in place for the books and records and internal control provisions. Companies with such procedures already in place should review them periodically. Once a set of procedures are in place, it is critical that they be consistently updated and enforced.
- **Periodic education of employees.** Employee education should be a priority. This is particularly true in view of everyday occurrences, such as employee turnover, promotions, and changes in position. Periodic and repeated emphasis on FCPA compliance is critical to ensure that employees understand that compliance is a management priority.
- **Careful assessment of “country risk”.** It is prudent to carefully assess each country in which the company does business. The environment and history in some countries may create a difficult venue for compliance. This “country risk” should be analyzed with an eye toward instituting additional procedures and protections where necessary.
- **Thorough due diligence when hiring agents and completing mergers.** Many cases involving the anti-bribery provisions involve payments made through agents or involve mergers or the acquisition of a subsidiary. This requires companies to conduct due diligence when retaining agents to act in foreign countries and to ensure that those arrangements are periodically reviewed. Similarly, a key part of any merger due diligence should involve a complete FCPA review.