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## The SEC cases against Siemens and Johnson & Johnson | doing business in Greece through bribes and corruption | Opinion \*

### I. Introduction

U.S. companies with an international presence must be well versed with the provisions of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq., (hereinafter “FCPA”). The law prohibits U.S. nationals and firms from making “corrupt” payments to foreign officials for the purpose of securing or maintaining business. The legislative history of the FCPA clearly demonstrates that this kind of corruption was rampant and ran the “gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties.”<sup>1</sup>

Congress enacted the FCPA in 1977 to stop the bribery of foreign officials as these business practices were against the integrity of the U.S. business model.<sup>2</sup> The FCPA imposes fines and criminal sanctions while its anti-bribery provisions prohibit: a) direct bribes and b) bribes of a domestic concern and its officials through intermediaries. At the same time, the tax code does not allow deductions for bribes while issued securities must meet the accounting standards set forth at 15 U.S.C. § 78m(b)(2)). Specifically, the FCPA’s anti-

bribery provisions prohibit any issuer of publicly traded securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, “from making use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value would be offered, given, or promised, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person or securing any improper advantage. 15 U.S.C. § 78dd-1(a)(3)”.<sup>3</sup>

Under this umbrella of legislation, U.S. based companies and companies with operations in the U.S. must take company-wide steps to prevent violations of the FCPA whenever executives and/or consultants transact business in foreign markets, under local conditions and diverse cultures. As will become apparent in this newsletter, it is all too often that companies yield to funding activities that violate the FCPA as widespread corruption is the norm for transacting business in many countries. There is frequently a dilemma in that competition often means suitcases of cash being passed around to officials and funding of bank accounts through offshore activities identified as “consulting fees”, all targeted at winning

<sup>1</sup> H.R. Rep. No. 95-640, at 4 (1977). 1075 PLI/Corp, \*119.

<sup>2</sup> S. Rep. No. 95-114 (1977), reprinted in 1977 U.S.C.A.N. 4098, 4101.

<sup>3</sup> <http://www.nytimes.com/packages/pdf/business/21siemens1.pdf>

contracts through bribery. What often secures contracts is the personal relationship with a government official and the financing of such relationship (i.e. "through consulting fees") rather than the quality of products/services and/or the competitive pricing.

## II. The Siemens case

On December 12, 2008, the Securities and Exchange Commission ("SEC") filed a settled enforcement action against Siemens Aktiengesellschaft ("Siemens"), alleging that the Munich based company violated the FCPA's anti-bribery, books and records, and internal controls provisions.<sup>4</sup> On the same day, the Department of Justice ("DOJ") filed an action against Siemens in the Federal Court of the District of Columbia, alleging violations of the FCPA and detailing the manner, methods and conduct of Siemens in securing contracts through bribes and corruption.<sup>5</sup>

As part of the settlement with the SEC, Siemens offered to pay a total of \$1.6 billion in disgorgement and fines, the largest amount a company has ever paid to resolve corruption-related charges. Specifically, Siemens agreed to pay \$350 million in disgorgement to the SEC, \$450 million in criminal fines to the U.S. DOJ and a fine of €395 million (approximately \$572 million) to the Office of the Prosecutor General in Munich, Germany. In October of 2007, Siemens also paid a fine of €201 million (approximately \$291 million) to the Munich Prosecutor.

The SEC and the DOJ complaints describe the web of corruption in graphic detail. Prior to 1999, German law did not prohibit foreign bribes and companies could deduct such payments made in foreign countries as expenditures. Despite foreign laws that prohibited bribery, Siemens had payment mechanisms in place which included cash and off-book accounts that were used to make the necessary payments to win contracts.

The SEC Complaint describes how "Siemens developed a network of payment mechanisms designed to funnel money through third parties in a way that obscured the purpose and ultimate recipient of the funds." There were no internal controls that targeted

corruption related activities and there was a consensus on bribery within the company at all levels of senior management, compliance, internal audit, legal and finance departments.

From 1999 to 2003, the Managing Board of Siemens "was ineffective in implementing controls to address constraints imposed by Germany's 1999 adoption of the Organization for Economic Cooperation and Development ("OECD) anti-bribery convention that outlawed foreign bribery." Siemens was also ineffective in meeting the U.S. regulatory and anti-bribery requirements that Siemens was subject to following its March 12, 2001, listing on the NYSE.

Siemens used business consultants and business consulting agreements to make the improper payments and to funnel such payment to parties and/or government officials. Despite Siemens' public declarations and policies relative to business consultants, there were no rules in place governing such consulting relationships until June of 2005. "There were additional significant red flags of corruption including admissions of bribery or so called 'bonus payments' to government officials in March 2006 by a manager at Siemens Greece of over €37 million, as well as an April 2006 KPMG audit identification of over 250 suspicious payments made through an intermediary on behalf of Information and Communication Mobile, a corporate predecessor of COM, and Siemens S.p.A in Italy."

The SEC complaint alleged that "Siemens made 4,283 separate payments totaling approximately \$1.4 billion to bribe government officials in foreign countries throughout the world. An additional approximately 1,185 separate payments to third parties totaling approximately \$391 million were not properly controlled and were used, at least in part, for illicit purposes, including commercial bribery and embezzlement."

Facing unprecedented fines and criminal sanctions unless it cooperated, Siemens retained Debevoise & Plimpton, a U.S. based law firm to conduct an internal investigation and to share information with the U.S. federal authorities. "As German and American investigators worked together to develop leads, Debevoise and its partners dedicated more than 300 lawyers, forensic analysts and staff members to

<sup>4</sup> <http://www.sec.gov/litigation/complaints/2008/comp20829.pdf>

<sup>5</sup> <http://www.justice.gov/opa/documents/siemens-ag-info.pdf>

untangle thousands of payments across the globe, according to the court records. American investigators and the Debevoise lawyers conducted more than 1,700 interviews in 34 countries. They collected more than 100 million documents, creating special facilities in China and Germany to house records from that single investigation. Debevoise and an outside auditor racked up 1.5 million billable hours, according to court documents. Siemens has said that the internal inquiry and related restructurings have cost it more than \$1 billion.”<sup>6</sup>

The SEC complaint describes in detail how Siemens made \$1.4 billion in payments to foreign government officials. For example, between 2001 and 2007, Siemens TS and Siemens S.A., a regional company in Venezuela, paid an estimated \$16.7 million in bribes to Venezuelan government officials in connection with the construction of metro transit systems in the cities of Valencia and Maracaibo, Venezuela.

“The two projects, Metro Valencia and Metro Maracaibo, generated approximately \$642 million in revenue to Siemens. Siemens used a Cyprus-based business consultant as an intermediary to fund up to \$2.5 million in bribe payments on the Valencia project. Sham agreements were entered into with the business consultant that purported to be for other Siemens projects, but were actually designed to transfer money to Valencia. This payment scheme was authorized by a former CFO of the Turnkey Division within the TS group at Siemens.” See ¶38 of SEC Complaint.

Between 2002 and 2007, Siemens TS paid approximately \$22 million to business consultants who used some portion of those funds to bribe foreign officials in connection with seven projects for the construction of metro trains and signaling devices on behalf of government customers in China. The total value of the projects was over \$1 billion. ¶43 of SEC Complaint.

Between 2002 and 2005, Siemens PG paid approximately \$20 million in bribes to a former Director of the state-owned Israel Electric Company (“IEC”). The bribes were paid in connection with four

contracts to build and service power plants in Israel. The total value of the contracts was approximately \$786 million. Siemens routed the corrupt payments through a business consultant owned and managed by the brother in-law of the CEO of Siemens Israel Limited, a regional subsidiary. ¶44 of the SEC complaint.

Between 2002 and 2003, Siemens PTD paid approximately \$25 million in bribes to government customers in connection with two projects for the installation of high voltage transmission lines in South China. The total value of the projects was approximately \$838 million. ¶46 of the SEC complaint

Between 2004 and 2006, Siemens COM paid approximately \$5.3 million in bribes to government officials in Bangladesh in connection with a contract with the Bangladesh Telegraph & Telephone Board (“BTTB”) to install mobile telephone services. The total value of the contract was approximately \$40.9 million. The payments were made to three business consultants pursuant to sham agreements calling for services associated with the mobile telephone project. ¶ 47 of the SEC complaint.

“Siemens COM made approximately \$12.7 million in suspicious payments in connection with Nigerian projects, with at least \$4.5 million paid as bribes in connection with four telecommunications projects with government customers in Nigeria, including Nigeria Telecommunications Limited and the Ministry of Communications. The total value of the four contracts was approximately \$130 million. The practice of paying bribes by Siemens COM in Nigeria was long-standing and systematic. According to a high ranking official within Siemens Limited Nigeria, a regional company, corrupt payments in 2000 and 2001 commonly reached 15 to 30% of the contracts' value. Bribe payments were typically documented using fictitious business consultant agreements under which no actual services were performed.” ¶49 of the SEC complaint.

Both the SEC and DOJ complaints detail the direct or indirect bribe payments to foreign government officials in at least 290 projects in Venezuela, China, Israel, Bangladesh, Nigeria, Argentina, Vietnam, Russia, and Mexico. In essence, Siemens had in place a well-orchestrated plan to avoid the anti-bribery

<sup>6</sup> [http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=1&\\_r=1&sq=siemens&st=cse&scp=2](http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=1&_r=1&sq=siemens&st=cse&scp=2)

prosecution in the U.S. by transferring the approval of the consulting agreements and the payments of the consultants through Siemens' headquarters in Germany and not through the U.S.

Finally, and this is certainly relevant to Greece, a SIEMENS Greece COM manager admitted to the Corporate Compliance Office and Internal Audit in March of 2006 that he had received substantial funds to make "bonus payments" to managers at the Greek national telephone company, OTE. Neither SIEMENS ZV nor the Corporate Compliance Office undertook a comprehensive investigation aimed at discovering the full extent of corruption in Greece or in the COM business more broadly.

### III. The Johnson & Johnson case

On April 7, 2011, the SEC filed an action against Johnson and Johnson ("J&J") that it violated the FCPA by bribing public doctors in several European countries and paying kickbacks to Iraq to illegally obtain business.<sup>7</sup> The SEC alleges "that since at least 1998, subsidiaries of the New Brunswick, N.J.-based pharmaceutical, consumer product, and medical device company paid bribes to public doctors in Greece who selected J&J surgical implants, public doctors and hospital administrators in Poland who awarded contracts to J&J, and public doctors in Romania to prescribe J&J pharmaceutical products. J&J subsidiaries also paid kickbacks to Iraq to obtain 19 contracts under the United Nations Oil for Food Program."<sup>8</sup>

The DOJ also pursued a criminal complaint as J&J had undertaken "an elaborate scheme to pay about 20 percent of the price of the company's devices to Greek surgeons. Such bribes were so routine in Greece, according to the document, that an accountant for the company's Greek sales agent had trouble understanding why he had to disguise the purpose of the money in his statements to Johnson & Johnson."

As part of the settlement, J&J agreed to pay more than \$48.6 million in disgorgement and prejudgment

interest to settle the SEC's charges and to pay a \$21.4 million fine to the DOJ to settle criminal charges.

### IV. The Daimler case

On March 22, 2010, the SEC filed an action against Daimler AG, formerly known as DaimlerChrysler AG ("Daimler"), and certain of its subsidiaries and affiliates, alleging that it violated the anti-bribery, books and records and internal controls provisions of the FCPA by making illicit payments, directly or indirectly, to foreign government officials in order to secure and maintain business worldwide.<sup>9</sup>

On April 1, 2010, Daimler agreed to pay \$91.4 million in disgorgement to settle the SEC's charges and also agreed to pay \$93.6 million in fines to settle charges in separate criminal proceedings filed by the DOJ. The conduct of Daimler is similar to the business practices utilized by Siemens as it created a labyrinth of payments to government officials to avoid detection by U.S. authorities of the violations of the FCPA.<sup>10</sup>

The SEC's complaint alleges that Daimler used bribes to promote government sales in Russia, China, Vietnam, Nigeria, Hungary, Latvia, Croatia, and Bosnia. "Among other means, Daimler used dozens of ledger accounts, known internally as 'interne Fremdkonten' or 'internal third party accounts' to maintain credit balances for the benefit of government officials. These credit balances were controlled by Daimler subsidiaries or outside third parties, including foreign government officials or Daimler's dealers, distributors or other agents who were at times used as intermediaries to make payments to foreign government officials."

According to the SEC, "the accounts were funded through several bogus pricing mechanisms, such as 'price surcharges,' 'price inclusions,' or excessive commissions. Daimler also used artificial discounts or rebates on sales contracts to effectuate bribes. In those instances, all or a portion of the discount was kicked back through a ledger account to a foreign government official, rather than credited to the purchasing government customer."

<sup>7</sup> <http://www.sec.gov/litigation/complaints/2011/comp21922.pdf>

<sup>8</sup> <http://www.sec.gov/news/press/2011/2011-87.htm>

<sup>9</sup> <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-51.pdf>

<sup>10</sup> <http://www.sec.gov/news/press/2010/2010-51.htm>

The SEC also alleges that Daimler paid \$56 million in improper payments over a period of more than 10 years. “The payments involved more than 200 transactions in at least 22 countries. Daimler earned \$1.9 billion in revenue and at least \$90 million in illegal profits through these tainted sales transactions, which involved at least 6,300 commercial vehicles and 500 passenger cars. Daimler also paid kickbacks to Iraqi ministries in connection with direct and indirect sales of motor vehicles and spare parts under the United Nations Oil for Food Program.”

Daimler did not maintain proper books and records and had inadequate internal controls to detect and prevent these payments all in violation of Sections 30A, 13(b)(2)(B) and 13(b)(2)(A) of the Securities Exchange Act of 1934. According to the SEC’s complaint, “the bribery permeated several major business units and subsidiaries, was sanctioned by members of Daimler’s management, and continued during the course of the SEC’s investigation. Daimler’s corrupt practices were authorized by or known to the former heads of Daimler’s Overseas Sales and Commercial Vehicles departments, the former head of Daimler Export and Trade Finance (a subsidiary of Daimler Financial Services), and the former heads of Daimler subsidiaries in numerous foreign countries.”

## V. Conclusion

These cases paint a grave picture of how multinational companies promote their business around the world and particularly in Greece. They exhibit eagerness to set up slush funds and offshore accounts and to pay government officials significant bribes to secure contracts, all made with the approval of the highest ranking officers of the company. The bribes are nothing more than an increase in the prices that governments pay and are often viewed as part of the cost of doing business abroad. Greece falls in that category as both the Siemens and the J&J cases involve activities in Greece. Corruption is rampant at all levels of the economy and is reflective of the easiness with which even reputable companies succumb to such business conduct there.

What is interesting about the Siemens case is that the Greek parliament has conducted inquiries into the Siemens operations but simply lacks the resources available to our federal authorities to properly tackle such global operations. A sensible approach by the Greek authorities would be to seek the assistance of the U.S. authorities in evaluating the U.S. record given the extent of the Siemens investigation here - (300 lawyers and forensic experts involved, more than 1,700 interviews in 34 countries, more than 100 million documents and up to 1.5 million billable hours). That would provide the Greek authorities great detail in both the Siemens and the J&J cases and further prosecute conduct that involved bribes and corruption. It seems utterly illogical for the U.S. authorities to recover fines and penalties from companies that bribe Greek government officials while the Greek authorities seem to be tangled up in such complex transactions for many years without any corresponding recovery.

An additional noteworthy point is the fact that corruption in Greece must be tackled head on by the Greek authorities regardless of the interests involved given that the public has lost all confidence in the political system that has been tarnished time after time over corruption charges. The frustration of Greeks with their political system cannot be adequately dealt with unless corrupt business practices are prosecuted fully and openly. Such direction, if implemented, will legitimize any efforts by the Greek government to implement austerity measures and economic policies to save Greece from defaulting on its foreign debt obligations.

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