

LEX HELIUS: THE LAW OF SOLAR ENERGY
—Foreign Corrupt Practices Act—

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With globalization, an increasing number of companies once thought to be only national, regional, or local now operate in the global marketplace. Companies operating in the solar energy industry commonly participate in the global marketplace horizontally, with some portion of their chain of production and sales occurring outside the United States, and vertically, in that they have non-U.S. owners or they own or invest in non-U.S. entities.

Accessing the global marketplace brings many advantages to a solar energy company including access to markets, clients, and projects; more capital sources; a wider range of companies with which to collaborate; increased manufacturing efficiencies; a greater number of vendors; and more investment opportunities. Operating in the global marketplace, however, requires the management of a solar energy company to be aware of the many regulations applicable to companies that have cross-border operations and to implement company programs and policies to ensure compliance with such regulations. Regulations potentially applicable to a solar energy company with cross-border operations include, among others, anti-corruption laws such as the Foreign Corrupt Practices Act (the “FCPA”) and the Organization on Economic Cooperative Development Convention, anti-money laundering laws, U.S. trade and investment sanctions, anti-boycott laws, anti-terrorism controls, export controls, and foreign direct investment controls under the Exxon-Florio Provisions.

This chapter will focus on the FCPA.¹ The FCPA is one of the most important U.S. statutes applicable to U.S. companies with operations outside the United States and to non-U.S. companies with connections to the United States.

The notoriety of the FCPA in the energy industry is largely attributable to Siemens AG, a Germany conglomerate, and three of its subsidiaries (“Siemens”) pleading guilty in a U.S. federal court to FCPA violations in December 2008. U.S. authorities alleged, among other FPCA violations, that starting in 2001, Siemens’ Power Generation (“PG”) and Power Transmission and Distribution (“PTD”) divisions paid at least \$356.9 million in bribes to foreign officials in multiple countries. As part of its settlement with the U.S. Department of Justice (the “DOJ”) and the U.S. Securities and Exchange Commission (the “SEC”), Siemens agreed to pay a \$450 million criminal penalty and to disgorge \$350 million in wrongful profits. On the same day, Siemens announced an agreement with German prosecutors to pay a €395 million (\$569 million) fine for violating Germany’s anti-corruption laws, adding to the €201 million (\$285 million) that a Munich court sentenced Siemens to pay in October 2007.

I. Overview of the FCPA. The FCPA prohibits companies (both publicly traded and private) and individuals from paying or promising to pay foreign officials, directly or indirectly, anything of value with the corrupt intent of obtaining or retaining business and mandates internal accounting controls and record-keeping practices aimed at preventing and detecting illegal bribes.

After an overview of the potential penalties for FCPA violations, this chapter will provide a broad overview of the FCPA’s two prongs: (1) the anti-bribery provisions and (2) the books and records provisions. Thereafter, because this chapter is intended for a global audience, the jurisdictional scope of the FCPA will be described. The emergence of vicarious liability and successor liability as major enforcement trends will then be addressed, as well as a discussion of the emergence of private rights of action. With the attention that the Siemens enforcement action brought globally to the FCPA, a brief description of that enforcement action and the lessons offered by it will be addressed. A punch list of FCPA compliance action items is found at the end of this chapter.

¹ 15 U.S.C. § 78dd-1, *et seq.*

A. Who Enforces the FCPA and What Are the Penalties? The DOJ and SEC share responsibility for enforcing the FCPA. While the DOJ handles all criminal actions and all civil actions against nonissuers, the SEC handles only civil actions against issuers.

In recent years, the number of DOJ and SEC enforcement actions under the FCPA has dramatically increased. In 2007 and 2008, the DOJ and SEC brought a combined total of 71 FCPA enforcement actions—a more than 162 percent increase over the total number of FCPA enforcement actions brought in 2005 and 2006. Moreover, high-ranking officials at both agencies have indicated that this upward enforcement trend will almost certainly continue.

Such enforcement actions can result in hefty fines and even jail time. Under the FCPA's anti-bribery provisions, entities face criminal fines of up to \$2 million per violation and civil penalties of up to \$10,000 per violation. Individuals face criminal fines of up to \$100,000 or imprisonment of not more than five years, or both, per violation, and civil penalties of up to \$10,000 per violation. As for the accounting and record-keeping provisions, entities face fines up to \$25 million and individuals face up to 20 years in prison and fines up to \$5 million, or both. Additionally, under the alternative "profit disgorgement" penalty provisions, a fine can be twice the gross gain to the defendant or, if a competitor suffers a monetary loss, the greater of twice the gross gain to the defendant or twice the gross loss to the competitor.

B. The Two Prongs of the FCPA. The FCPA contains two sets of provisions geared toward battling bribery abroad. First, the FCPA's anti-bribery provisions prohibit companies (both private and public) and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business. Second, the FCPA's accounting and record-keeping provisions mandate various internal accounting controls and record-keeping practices aimed at preventing and detecting illegal bribery of foreign officials.

1. Anti-Bribery Prohibitions. The broad scope and sweeping language of the FCPA's anti-bribery provisions render compliance challenging for public and private international solar energy companies. Again, the FCPA's anti-bribery provisions prohibit companies and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business. "Anything of value" includes not only money, but also such perks as bottles of wine, tickets to sporting events, and internships for family members. Moreover, the phrase "obtaining or retaining business" encompasses everything from securing contracts, to winning tax breaks, to bypassing regulatory requirements.

The term "foreign official" is especially slippery, including not only actual government members, but also government instrumentalities, public international organizations (*e.g.*, the United Nations), political parties, political party officials, candidates for political office, and even royal family members. In countries such as China, where government instrumentalities known as state-owned enterprises ("SOEs") dominate the business arena, an array of potential business partners may arguably constitute "foreign officials." For example, in June 2008, the DOJ and SEC brought enforcement actions against AGA Medical Corporation ("AGA"), a Minnesota-based medical products manufacturer, for authorizing its Chinese distributor to pay \$460,000 in "commissions" to Chinese doctors. These doctors in turn directed their hospitals to order AGA's products. Given that these hospitals are SOEs, the doctors constitute "foreign officials" under the FCPA, thus rendering AGA's payments illegal bribes and resulting in a \$2 million penalty.

2. Accounting and Record-Keeping Provisions. Publicly traded international solar energy companies must also contend with the FCPA's accounting and record-keeping provisions. Under the

FCPA's accounting provisions, issuers must establish and maintain an internal accounting controls system that provides reasonable assurance of (1) managerial oversight of all company assets and transactions, (2) compliance with generally accepted accounting principles or other criteria applicable to financial statements, and (3) periodic comparisons between the company's recorded and actual assets.

The FCPA's record-keeping provisions require issuers to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect transactions involving an issuer's assets. In short, if an issuer bribes a foreign official to obtain or retain business, it must record this bribe in its books as a "bribe." Recording a bribe as a "discretionary payment," "performance bonus," or anything similarly deceptive constitutes an FCPA violation.

C. Jurisdictional Scope. The FCPA casts a sweeping jurisdictional net. Most U.S. criminal statutes employ the territorial principle of jurisdiction, requiring the existence of some nexus between the prohibited conduct and the territory of the United States. In contrast, the FCPA employs not only the territorial principle, but also the nationality principle, which does not require any sort of U.S. territorial connection to invoke jurisdiction. Accordingly, if a non-U.S. company bribes non-U.S. officials without implicating the territory of the United States in any way, the company still might face a DOJ or SEC enforcement action under the FCPA.

In general, the FCPA covers three categories of entities and individuals: (1) "issuers," (2) "domestic concerns," and (3) "any person other than an issuer or domestic concern." The anti-bribery provisions pertain to entities and individuals falling within any of these three categories, while the accounting and record-keeping provisions apply only to issuers.

- *Issuers:* Issuers are entities required under the U.S. Securities Exchange Act to register under Section 12 or to file reports under Section 15(d). In other words, publicly held companies with securities or American Depositary Receipts listed on a U.S. securities exchange (*e.g.*, New York Stock Exchange ("NYSE") or NASDAQ) are subject to the FCPA. The nationality principle subjects issuers to potential civil and criminal liability under the FCPA, regardless of whether they ever carry out a prohibited act within U.S. territory.²
- *Domestic Concerns:* The term "domestic concern" includes any individual who is a U.S. citizen, national, or resident. It also encompasses any business entity (public or private) with its principal place of business in the United States or that is organized under the laws of a U.S. state, territory, possession, or commonwealth. Pursuant to the nationality principle, domestic concerns who bribe foreign officials may face civil and criminal penalties under the FCPA, even if the bribery transpired completely outside of U.S. territory.³
- *Any Person Other Than an Issuer or Domestic Concern:* Under the more traditional territorial principle, an individual or entity faces FCPA exposure if it uses the mails or any means

² 15 U.S.C. §§ 78m, 78dd-1.

³ 15 U.S.C. § 78dd-2.

or instrumentalities of interstate commerce, while within U.S. territory, to carry out an act prohibited under the FCPA.⁴ In other words, if such a connection to U.S. territory exists, the individual or entity need not be an issuer or a domestic concern for the FCPA to apply. This jurisdictional hook thus applies to any foreign individual or entity that causes a prohibited act to be done within U.S. territory by any person acting as the individual's or entity's agent.

Officers, directors, employees, and agents of entities that fall within one of the three categories above also face FCPA exposure. It does not matter whether the officers, directors, employees, and agents qualify as domestic concerns or issuers or utilize an instrumentality of interstate commerce in their own rights; mere association with the covered entity suffices for purposes of imposing FCPA civil and criminal penalties.

The FCPA's unprecedented extraterritorial reach has garnered criticism inside the United States and abroad. Regardless, the DOJ and SEC have demonstrated a willingness to bring FCPA enforcement actions against companies and individuals possessing little if any connection to the United States. The DOJ's and SEC's expansive interpretation of the FCPA's jurisdictional provisions likely stems in part from the reality that many other countries are failing to enforce their own anti-bribery laws. Rather than allow U.S. companies to suffer an unfair disadvantage in the international business arena, the DOJ and SEC appear to have taken it upon themselves to level the playing field through aggressive extraterritorial enforcement of the FCPA.

II. Vicarious and Successor Liability Under the FCPA. Under the FCPA, the management of a company does not have to intend, encourage, or have actual, literal knowledge of FCPA violations in order for the company and its management to be liable for FCPA violations. Knowledge is established under the FCPA if a person is aware of a high probability of the existence of the prohibited activity.⁵ The legislative purpose of this standard is to prevent companies from adopting a "head in the sand" approach to the activities of their foreign agents and partners.⁶ From this scienter requirement flows an ocean of potential liability.

A. Third-Party Agents. Solar energy companies operating outside the United States often rely on nonemployee agents who are locally embedded and have local knowledge to assist them. Such agents are commonly responsible for networking and making introductions to individuals, companies, and agencies in a local market; recruiting talent; providing local "know-how" and "show-how"; making sales; managing marketing initiatives and public relations; overseeing leasing operations and facilities management; conducting procurement and supply; handling freight forwarding and customs management; and many other actions. Additionally, a non-U.S. joint venture partner often acts as a representative or an agent in a foreign country for a U.S. joint venture partner. In order to succeed in completing their services to a U.S. company, agents potentially may make payments to foreign officials in violation of the FCPA.

The FCPA prohibits corrupt payments through intermediaries. Obviously, a company will violate the FCPA if it encourages or authorizes corrupt payments by its agents (including joint venture partners). Of more relevant concern to compliance-conscious solar energy companies is the fact that a company will be liable for violations of

⁴ 15 U.S.C. § 78dd-3.

⁵ 15 U.S.C. § 78dd-1.

⁶ See H.R. Rep. No. 100-576, at 920 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1953.

the FCPA by its agents if such company is deemed to have demonstrated conscious disregard or deliberate ignorance that such payments were being made by its agents or joint venture partners.⁷

Solar energy companies should also recognize the risks of hiring a foreign official as an agent. Paying a government official who is an agent with the intent to obtain or retain business would clearly be a violation of the FCPA. There are limited circumstances in which a government official might be retained as an agent (for example, to assist in locating and reserving conference and hotel space for a trade exhibition), but solar energy companies should consult counsel to vet carefully and to structure such arrangements. Many individuals deemed “foreign officials” might not be intuitively considered so by companies. For example, university deans and faculty may be government employees as well as employees of businesses that have government owners.

To avoid being held liable for corrupt payments made by agents, solar energy companies must take proactive measures including conducting due diligence on potential agents and joint venture partners to determine their expertise, relationship to government agencies, and reputation. An agent who has no experience in the relevant industry raises the question of how such agent can be helpful to the company absent using government connections improperly. Likewise, solar energy companies should be wary of agents who have family members in a foreign government or are overly chummy with officials at an agency (perhaps through prior employment). Solar energy companies should conduct due diligence to determine whether the agent (including a potential joint venture partner) has been cited for FCPA or similar violations in the past or has otherwise shown disregard for regulatory compliance. Contracts should be drafted in a manner to promote compliance. In addition to making FCPA-related representations and covenanting compliance with the FCPA, agents and joint venture partners should complete a questionnaire as to their experience with and relations to foreign governments and should be required to provide receipts for all expenses paid by the company. Agency and joint venture agreements should provide for immediate termination if the company determines that the agent is violating the FCPA or has made false representations to the company regarding FCPA compliance. Solar energy companies should consider providing FCPA training to agents (in a language in which the agent is sufficiently proficient) and should have agents certify that they have received such training.

Each foreign environment presents a different set of specific risks regarding the engagement of agents. Variables include the extent to which a foreign government operates through quasi-government entities, bookkeeping and recordation practices (such as how receipts and invoices are issued), the emergence of new schemes for kickbacks and secreting income pools for bribing, and other factors. Any company that has occasion to hire an agent to represent it outside the United States should have a compliance program in place. Prior to engaging agents, solar energy companies should consult with counsel who has current knowledge of risks and enforcement trends in order to confirm that their compliance program is adequate and to tailor the legal framework for the agent’s work to the specific circumstances of the given countries.

B. Subsidiaries. Any company doing business beyond the borders of the United States through a subsidiary is potentially liable for any FCPA violations by the subsidiary. Two theories are typically pointed to, under which courts hold parents liable for FCPA violations by their subsidiaries. First, under the alter ego theory, a parent will be held liable for the actions of a subsidiary if the parent dominates the subsidiary by having control over ownership, shared directors, or shared officers, or by other means. Second, agency principles hold that a

⁷ Department of Justice, Lay-Person’s Guide to FCPA (June 2001), <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>. Moreover, companies should be aware that criminal liability does not require that the company know that the actions taken by its agents were a violation of the FCPA per se but only that the actions were unlawful in a general sense. *United States v. Kay*, 513 F.3d 461 (5th Cir. 2008).

corporation will be liable for the crimes of its agents when committed in the scope of the agent's authority and the corporation gains some benefit. Neither of these theories places much weight on whether the subsidiary is wholly or partially owned.

In practice, given how the DOJ and SEC interpret the scienter requirement, solar energy companies should be alert to the fact that they can be held liable for violations of the FCPA's anti-bribery provisions by their subsidiaries (both wholly owned and minority owned) simply by demonstrating conscious disregard or deliberate ignorance of the fact that bribes were made. Thus, as with agents, even if a parent did not authorize or encourage violations of the FCPA by its subsidiary, the parent may be subject to enforcement actions if it did not adequately take proactive measures to prevent its subsidiary's FCPA violations.

For example, Westinghouse Air Brake Technologies Corporation ("Wabtec") agreed to pay a fine and enter into a deferred prosecution agreement to resolve FCPA offenses caused by its Indian subsidiary, Pioneer Friction Limited ("Pioneer"). Pioneer was accused of making corrupt payments in order to assist it in obtaining and retaining business with the Indian Railway Board, among other motives. The SEC's complaint noted that although Wabtec's Code of Conduct in effect from 2001 to 2006 prohibited giving anything of value to improperly influence any person in a business relationship with Wabtec, the company had no FCPA policy and did not provide training or education to any of its employees, agents, or subsidiaries regarding the requirements of the FCPA. Wabtec also failed to establish a program to monitor its employees, agents, and subsidiaries for compliance with the FCPA.

In addition to violations of the FCPA's anti-bribery provisions, parents can be held liable for their subsidiaries' violations of the accounting and controls provisions of the FCPA. The FCPA requires that companies (whether U.S. or non-U.S.) that are registered with the SEC and/or are listed on a U.S. stock exchange (an "issuer") (1) make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer⁸ and (2) devise and maintain a system of internal accounting controls consistent with specific requirements under the FCPA.⁹ Subsidiaries (including non-U.S.) in which an issuer has a greater than 50 percent stake are fully subject to the FCPA accounting and record-keeping provisions. An issuer with a 50 percent or smaller stake is required to make a "good-faith attempt" to cause the foreign subsidiary to comply with the FCPA's accounting rules.

A continuing stream of DOJ and SEC enforcement actions emphasizes the importance of parent companies establishing a robust compliance program and plugging their subsidiaries into such a compliance program. Compliance programs should include at a minimum written policies, recurrent training (in languages other than English, if necessary), and internal auditing of controls. Additionally, parent companies should have agreements with subsidiaries they do not control (including joint venture partners and passive investment vehicles) that provide for FCPA representation and covenants by the subsidiary, termination in the event of actions or policies that create FCPA risk to the parent, annual certification, right to inspect books and records, and other FCPA compliance-enhancing provisions.

III. FCPA Successor Liability in the Mergers and Acquisitions and Joint Venture Investment Context. Solar energy companies face substantial risk of successor liability under the anti-bribery provisions of the FCPA when acquiring or investing in foreign targets. (While the considerations set forth in the following

⁸ 15 U.S.C. § 78m(b)(2)(A).

⁹ 15 U.S.C. § 78m(b)(2)(B).

section apply equally to companies contemplating investing in a foreign target or acquiring a foreign target, for ease of reading, “acquisition” in this section is meant to include both an acquisition and an investment transaction.) DOJ and SEC enforcement actions indicate that successor liability may attach (1) if a bribe was paid to secure a benefit that the acquiring company will share and (2) the acquiring company has knowledge of such corrupt payment. As with other aspects of FCPA enforcement, companies may be deemed to have known of the corrupt behavior if they demonstrate conscious disregard or deliberate ignorance of the fact that such payments were made. Thus, to reduce the risk of successor liability under the FCPA, solar energy companies must take proactive measures to identify and properly respond to pre-acquisition FCPA violations by targets. While asset acquisitions generally do not trigger FCPA successor liability, recent administrative rulings by the U.S. Department of Commerce in the context of export control violations, and favorable comments of such rulings by DOJ officials, suggest that the DOJ may seek to impose successor liability on asset acquisitions in the future.¹⁰

Surprising to most U.S. business people is the fact that the pre-acquisition actions of a foreign target may raise FCPA liability for the acquiring company *even if the foreign target was not subject to the FCPA prior to the acquisition*. The DOJ explains its enforcement policy by stating that it seeks to eliminate incentives for foreign companies to bribe public officials by allowing U.S. companies to acquire such companies at such a price and in such a manner so as to effectively reimburse the foreign company for its corrupt activities.¹¹ In the DOJ’s view, the acquiring company has an obligation to avoid compensating the foreign target for any past improper payments.

IV. Private Actions. The FCPA does not contain a private right of action. In other words, under the FCPA, only the U.S. government may sue entities and individuals for bribing foreign officials. However, this fact has not stopped creative plaintiffs’ attorneys from bootstrapping FCPA violations into other causes of action.

For example, in *Alba v. Alcoa*, Aluminum Bahrain B.S.C. (“Alba”), a Bahraini state-controlled company, sued its aluminum supplier, Alcoa, Inc. (“Alcoa”), for allegedly paying millions of dollars in bribes to Bahraini government officials.¹² Although Alba’s complaint raised U.S. Racketeer Influenced and Corrupt Organizations Act and common law fraud claims, these claims sounded eerily similar to standard FCPA claims. The DOJ and SEC soon intervened, prompting the federal court to stay discovery in *Alba* pending the U.S. government’s FCPA investigation. Additionally, an ironworkers’ pension fund filed a shareholders’ derivative action in the same court against 22 current and former Alcoa officers and directors, essentially relying on the same FCPA-based allegations set forth in the *Alba* complaint.¹³

As the DOJ and SEC continue to increase their enforcement of the FCPA, and the global anti-bribery movement continues to raise FCPA awareness, private lawsuits like those described above will almost certainly increase. Indeed, such lawsuits may become a common tool for companies seeking justice against their competitors for winning contracts and gaining other business advantages through bribery of foreign officials.

V. Lessons Learned from Recent FCPA Enforcement Actions. On December 15, 2008, Siemens pleaded guilty in U.S. federal court to violating the FCPA. As part of its settlement with the DOJ and SEC,

¹⁰ *In re Sigma Aldrich*, Case Nos. 01-BXA-06, 07, 11 (Aug. 29, 2002); *see also* Foreign Corrupt Prac. Act Rep. § 5:23.

¹¹ *See, e.g.*, DOJ Opinion Procedure Release No. 08-01 (Jan. 15, 2008).

¹² *See* Complaint, *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 08-cv-299 (W.D. Pa. Feb. 27, 2008).

¹³ *See* Complaint, *Hawaii Structural Ironworkers’ Pension Trust Fund, derivatively filed on behalf of Alcoa, Inc. v. Belda, et al.*, 08-cv-00614 (W.D. Pa. May 6, 2008).

Siemens agreed to pay a \$450 million criminal penalty and to disgorge \$350 million in wrongful profits. On the same day, Siemens announced an agreement with German prosecutors to pay a €395 million (\$569 million) fine for violating Germany's anti-corruption laws, adding to the €201 million (\$285 million) that a Munich court sentenced Siemens to pay in October 2007.

The \$1.6 billion penalty Siemens must pay U.S. and German authorities is roughly 35 times larger than any previous anti-corruption settlement. This staggering figure does not include the €850 million (\$1.2 billion) Siemens reportedly paid to attorneys, accountants, and other service providers to deal with its global bribery scandal since late 2006. Nor does it include the significant sums Siemens must pay an outside FCPA compliance monitor for the next four years as part of its settlement with the DOJ and SEC.

A. Wakeup Call for the Global Solar Energy Industry. U.S. authorities estimate that Siemens paid \$1.4 billion in bribes to foreign officials in Asia, Africa, Europe, the Middle East, and the Americas, and a significant portion of this illegal activity occurred in the energy industry. Indeed, starting in 2001, Siemens' PG and PTD divisions paid at least \$356.9 million in bribes to foreign officials in multiple countries.

In recent years, once the DOJ and SEC have learned of one company's violation of the FCPA, they have expanded the scope of their investigation to include other players operating in that industry. The business of solar energy companies is highly dependent on the discretion of governmental agencies (including development banks, which qualify as "foreign officials" under the FCPA). Siting, permitting, environmental review and enforcement, local community support, responding to RFPs, negotiating and performing under power purchase agreements, conducting project build out, establishing generation interconnections and transmission tie ins, obtaining transmission services, obtaining subsidies or tax advantages, safety compliance, competition and antitrust compliance, among other operations, are all aspects of an international energy company's business that often involve the discretion of a foreign official. Some of these officials expect bribes from companies (or third parties engaged by companies) in exchange for favorable treatment. The DOJ's and SEC's discovery of Siemens' corrupt activities has cast a bright spotlight over the global energy industry, making it especially fertile territory for industry-wide FCPA dragnets.

Siemens paid the massive fines it did in connection with violations of the FCPA's accounting and record-keeping provisions, demonstrating how important a compliance program is to ensuring a company avoids FCPA violations and draconian fines. The Siemens settlement provides many additional lessons and reminders for solar energy companies, including:

- *Vicarious Liability for Third Parties:* Siemens' foreign business consultants played a significant role in bribing foreign officials to secure business advantages in the energy industry. The FCPA can leave solar energy companies and individuals vicariously liable for the conduct of third parties such as consultants, distributors, and sales agents, even if the company lacks actual knowledge of their wrongdoing. Accordingly, the mere failure to recognize and investigate a foreign business consultant's suspicious activities may expose a company to FCPA liability. Such vicarious liability makes it especially important for solar energy companies to (1) conduct due diligence on their potential business consultants; (2) include FCPA-specific representations, warranties, covenants, audit rights, and termination rights in all business consultant contracts; and (3) train employees on how to recognize the red flags associated with business consultants' unsavory activities and report these red flags to management. Even compliance-conscious solar energy companies can become entangled in FCPA enforcement actions if

they do not have robust compliance programs that are tailored to specific industries and geographic locales.

- *Tone at the Top:* The DOJ and SEC have publicly criticized Siemens' senior management for tacitly condoning bribery of foreign officials as a legitimate business strategy. Both agencies have also acknowledged an intention to pursue FCPA criminal penalties (including jail time) against Siemens executives, employees, and consultants who participated in the bribery schemes. In short, Siemens lacked the necessary "tone at the top" to foster a culture of FCPA compliance within the company. Solar energy companies can take a crucial first step toward avoiding this scenario by working with their attorneys to draft a clearly articulated policy against FCPA violations. This policy should highlight prohibited behavior, accommodate employees who blow the whistle on compliance violations, and set forth disciplinary procedures to address such violations.
- *Internal Accounting Controls:* The DOJ and SEC based their charges against Siemens almost exclusively on the FCPA's accounting and record-keeping provisions. Siemens' subsidiaries attempted to cover up bribes by routing the money through slush funds or intercompany accounts and recording the illegal payments with misleading labels such as "commissions." To avoid illegal accounting tactics, businesses should centralize their accounting systems to ensure corporate headquarters review all foreign financial transactions. Careful analysis of the financial records of employees and business partners abroad can enable businesses to quickly detect and eliminate conduct prohibited under the FCPA.
- *FCPA's Jurisdictional Scope:* Siemens is a German corporation with its principal place of business in Germany, and many of the bribes it paid abroad did not implicate U.S. territory in any way. Nevertheless, Siemens is subject to the FCPA because it has listed its securities on the NYSE since 2001 and, therefore, qualifies as an "issuer" under the FCPA. Moreover, in many instances, Siemens routed bribes through U.S.-based banks, providing the U.S. government an additional jurisdictional basis for pursuing Siemens under the FCPA. These facts serve as a reminder of the FCPA's sweeping jurisdictional reach. All U.S. solar energy companies with international operations—and many of such non-U.S. companies—have FCPA liability exposure.
- *Cross-Border Enforcement:* The cooperation exhibited in the Siemens case between the DOJ and SEC, on the one hand, and the German enforcement agencies, on the other, is a noteworthy development in cross-border FCPA enforcement. Solar energy companies should recognize that the DOJ, the SEC, and their foreign counterparts share FCPA-related information about the non-U.S. operations of companies subject to the FCPA.
- *Cooperation with Government Investigations:* The DOJ and SEC have indicated that Siemens' total FCPA penalty could have been considerably larger than \$800 million. Indeed, application of the Federal Sentencing Guidelines would have resulted in an FCPA criminal fine of between \$1.35 billion and \$2.7 billion. Due to Siemens' "exceptional" cooperation with the U.S. government's investigation and demonstrated commitment to remediating its operations, however, the DOJ and SEC exhibited

leniency. Siemens' strategy of cooperating with authorities, rather than attempting to stonewall them, provides a model for future targets of FCPA enforcement actions.

VI. Action Items Summary. Compliance-savvy solar energy companies operating in the global marketplace must take proactive measures to mitigate the risk of vicarious and successor liability under the FCPA including (among other measures):

- adopting and effectively disseminating comprehensible written FCPA compliance policies;
- mandating recurrent education programs for management, employees, and agents (of both the parent and its subsidiaries, and perhaps in languages other than English when appropriate);
- conducting due diligence on potential acquisition and investment targets, joint venture partners, and third-party agents;
- entering into agreements with third parties that contain adequate FCPA representations, covenants, and compliance-monitoring mechanisms;
- establishing ongoing compliance monitoring practices of the activities of subsidiaries, joint venture partners, employees, and third-party agents; and
- taking appropriate remedial measures in the event that an FCPA violation is discovered in either pre-acquisition or pre-investment diligence or in the ongoing operations of the company; such remedial measures may require self-reporting to the DOJ.

FCPA compliance programs must be tailored to the geographic locations in which a company operates, the line(s) of business in which a company engages, the nature of a company's interaction with government officials, and the reliance that a company or its subsidiaries or agents has on discretionary actions of foreign officials, among other factors. In addition to being knowledgeable about the core proscriptions of the FCPA itself, a company and its counsel must be well versed in and have current knowledge of the DOJ's and SEC's enforcement patterns, as can be discerned from such sources as DOJ Opinion Procedure Releases and SEC No-Action Letters. FCPA enforcement patterns evolve over time. Compliance programs must be revised in light of these evolving enforcement patterns.