I. Introduction

Ten years ago, in June 1999, the U.S. Department of Justice (DOJ) issued the Principles of Federal Prosecution of Business Organizations (the “Principles”) to articulate and standardize the factors to be considered by federal prosecutors in making charging decisions against corporations. The Principles—which were amended several times over the past decade—have had a significant impact on the fate of corporations being investigated for possible criminal misconduct.

To mark the ten-year anniversary of the Principles, we examined recent DOJ corporate criminal prosecutions to assess whether any broad trends could be observed about the current state of corporate criminal prosecutions. While it is difficult to generalize, one observation is that corporate cooperation now appears to be presumed by DOJ, rather than be viewed as a potentially decisive factor for granting a more lenient resolution to the company under investigation. Another discernible trend may be an increasing focus by DOJ on the adequacy of corporate compliance systems, either as a factor to consider under the Principles in charging the corporation criminally, or as an on-going condition of a settlement agreement to be administered by an independent monitor. The case that best exemplifies these observations is, in our view, the recent criminal prosecution of Siemens AG, Europe’s largest electronics and engineering concern, where DOJ itself acknowledged the “extraordinary” cooperation provided by the corporation, but nonetheless required the corporation to plead guilty to felony violations of the Foreign Corrupt Practices Act (FCPA) and imposed an independent monitor for four years to oversee the company’s corporate compliance system as part of the plea agreement. This case is discussed further in Section III.

Of course, cooperation remains an important component of any corporate response to a DOJ investigation. Companies may be well-advised, however, to increase their focus on the development and implementation of world-class corporate compliance systems. Such a system not only may prevent or detect misconduct by employees, but may better position the company for leniency under the Principles—in the form of alternative settlements such as deferred prosecution agreements (DPA) or non-prosecution agreements (NPA)—in the unfortunate event of a DOJ criminal investigation.

II. Background

A. The Evolution of the Principles

The Principles comprise a set of nine factors to guide federal prosecutors “on investigating, charging, and negotiating a plea or other agreement with respect to corporate crimes.” Although the Principles share many factors with the U.S. Corporate Sentencing Guidelines, the Principles differ from the Sentencing Guidelines in that they do not create a formulaic decision-making process.

The original Principles that were issued in 1999 were known as the “Holder Memo” because the memo was authored by then-Deputy Attorney General Eric Holder, Jr. At the time, the Holder Memo’s factor that received the most attention from corporations was cooperation, presumably because cooperation likely was a factor over which a corporation under investigation could exert greatest control. Indeed, the Holder Memo expressly instructed federal prosecutors to consider, when evaluating the corporation’s cooperation, whether the corporation waived the attorney-client privilege or advanced legal fees to culpable employees. This, of course, led to many companies waiving privilege in order to obtain leniency from DOJ, even though such practices received some criticism.

The first-revised Principles, issued by then-Deputy Attorney General Larry D. Thompson in 2003 (known as the “Thompson Memo”), came on the heels of the Enron and WorldCom scandals and only heightened the pressure on corporations. The Thompson Memo not only permitted federal prosecutors to consider waiver of privilege as part of cooperation, but encouraged them to scrutinize “the authenticity of a corporation’s cooperation,” including by considering whether the corporation, while “purporting to cooperate,” actually impeded the investigation. Corporations, in turn, were compelled to demonstrate the “authenticity” of their cooperation by resorting to increasingly creative measures, such as conditioning legal fees to culpable employees. This, of course, led to many companies waiving privilege in order to obtain leniency from DOJ, even though such practices received some criticism.

The intense pressures on corporations to demonstrate “authentic” cooperation abated in 2006, only after judicial intervention. In United States v. Stein, the Hon. Lewis A. Kaplan held that prosecutors in the U.S. Attorney’s Office
for the Southern District of New York violated the Fifth and Sixth Amendment rights of KPMG employees by coercing KPMG, as part of its cooperation with the criminal investigation, to condition payment of the employees’ legal fees on the employees’ willingness to be interviewed by the Government. Soon after the Stein decision, Senator Arlen Specter introduced legislation to prevent prosecutors from considering the waiver of the attorney-client privilege in their prosecution decisions.

In response to these judicial and legislative rebukes, then-Deputy Attorney General Paul McNulty revised the Principles in 2006 by forbidding prosecutors from seeking information protected by the attorney-client privilege without first establishing a legitimate need for the information. The most recent version of the Principles—the “Filip Memo”—issued by then-Deputy Attorney General Mark Filip in 2008—completely removed consideration of a waiver of the attorney-client privilege and the payment of employees’ legal fees as factors in corporate charging decisions. Under the most recent version of the Principles, then, cooperation by a corporation simply means disclosure of all relevant factual information to investigators, but does not require waiver of any privileges.

B. Increasing Use of NPAs, DPAs and Independent Monitors

Separately, since 2003, DOJ has turned increasingly to alternative settlement agreements such as NPAs and DPAs to resolve corporate criminal investigations. A study published by the Government Accountability Office (GAO) in June 2009, Corporate Crime: Preliminary Observations on DOJ’s Use and Oversight of Deferred Prosecution and Non-Prosecution Agreement (“Preliminary Observations”), observed that DOJ recently “has made more use of [DPAs and NPAs],” in which prosecutors may “require companies to hire an independent monitor to oversee compliance.” Indeed, the GAO found that in 26 of the 57 DPAs and NPAs reviewed as part of its study, an independent monitor was imposed by DOJ on the corporation to monitor compliance procedures.

This trend may be, in part, due to the public outcry over the rapid demise of Arthur Andersen following the DOJ’s indictment and conviction of Arthur Andersen for obstruction of justice in 2002. Not only was Arthur Andersen’s conviction ultimately overturned by the U.S. Supreme Court, but the indictment of Arthur Andersen caused unfair harm to the thousands of innocent employees and shareholders of Arthur Andersen. Resorting to NPAs and DPAs with independent monitors allows DOJ to maintain oversight over corporations that engaged in misconduct, without putting such companies out of business.

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III. Case Study: Siemens

As noted above, we believe that the recent criminal prosecution of Siemens for FCPA violations exemplifies the above recent trends in corporate prosecutions, i.e., cooperation alone may not be sufficient to obtain leniency, and the increasing focus on the adequacy of a company’s compliance systems not only in charging decisions, but as part of a settlement.

In December 2008, Siemens AG, Europe’s largest electronics and engineering company, entered into a plea agreement to resolve bribery investigations being conducted simultaneously by the DOJ and by German authorities. In the DOJ plea agreement, Siemens agreed to
plead guilty in the United States to two counts of criminal violation of the books and records and the internal controls provisions of the FCPA, and to pay a record combined fine and penalty of $800 million to the U.S. authorities. Combined with an additional $856 million paid to the German authorities, Siemens paid a total fine of $1.6 billion.\(^32\)

DOJ required Siemens to plead guilty to felonies despite acknowledging that Siemens provided “extraordinary” cooperation during DOJ’s investigation, including by conducting an internal investigation “of unprecedented scope”\(^33\) that included “virtually all aspects of [Siemens’] worldwide operations,”\(^34\) and by sharing the results of such an investigation with the governmental authorities.\(^35\) According to published reports, Siemens paid an estimated $275 million in legal fees for the internal investigation, which involved over 297 lawyers from Debevoise LLP, who billed over 354,000 hours.\(^36\) In addition, Siemens reportedly paid $470 million to Deloitte & Touche to assist in the internal investigation.\(^37\)

Such extraordinary cooperation and expenditure, however, were not enough for Siemens to resolve the criminal investigation with a more lenient resolution, such as a DPA or an NPA. The extraordinary size and frequency of the bribe payments undoubtedly weighed heavily on the scale. Interestingly, the DOJ expressly noted the gross inadequacies of Siemens’s compliance systems in its charging documents. In the Criminal Information filed against Siemens, DOJ charged that Siemens’s internal compliance policies and procedures were nothing more than “paper program”\(^38\) and that, “for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens.”\(^39\)

DOJ also found that Siemens’s compliance systems were understaffed and small for the scale of its operations, that Siemens’s senior management ignored potential corruption issues and failed to adequately investigate such issues, and that Siemens “engaged in systematic efforts to falsify its corporate books and records and circumvent existing internal controls.”\(^40\)

As a result, in addition to the guilty plea and the record fine, DOJ prosecutors required Siemens in the plea agreement to improve its compliance policies and procedures, and to hire an independent monitor for four years to ensure, among other things, that Siemens implements an effective system of corporate governance.\(^41\) For example, the Siemens independent monitor is charged with evaluating the corporation’s internal controls, record keeping, and compliance programs.\(^42\) The monitor is obligated under the plea agreement to issue a written report making recommendations to improve the effectiveness of Siemens’s compliance programs.\(^43\) Siemens would have an opportunity to comment on any recommendations,\(^44\) but would have to adopt the report’s recommendations, unless the recommendations were “burdensome, . . . impracticable, costly or otherwise inadvisable.”\(^45\) Finally, the plea agreement requires Siemens to retain independent U.S. counsel to advise the independent monitor in the carrying out of his duties.\(^46\) Such an undertaking undoubtedly will add a significant expense and burden on Siemens for the next four years.

**IV. Conclusion**

Our review of recent DOJ prosecutions demonstrates that one clear effect that the Principles have had on corporate criminal investigations over the last decade is to hammer in the point that corporations must cooperate fully in DOJ investigations. What is not clear, in light of the recent amendments to the Principles to reign in the definition of “cooperation,” is whether cooperation alone is enough to make the difference between a guilty plea or an alternative settlement such as an NPA or a DPA.

DOJ’s increasing focus on the adequacy of compliance systems in charging decisions provides some room for corporations to seek to distinguish themselves in the unfortunate event of a criminal investigation. Implementing and maintaining a state-of-the-art compliance system not only helps a company to prevent and detect criminal wrongdoing, but also would better position the company in negotiations with DOJ. Moreover, such a company may have a better chance of talking DOJ out of imposing a costly independent monitor than a company that does not have an adequate compliance system.

**Endnotes**


2. For this article, all DOJ press releases concerning corporate criminal prosecutions for the period from May 2006 through the present, and related documents, were reviewed.


6. Holder Memo, supra note 1, § VI.


31. *Id.*

32. Siemens’ Press Release, supra note 3.

33. *Id.*


35. Siemens’ Press Release, supra note 3.


37. *Id.*


40. Siemens’s Criminal Information, supra note 38, at ¶¶ 65-88, 89.


42. *Id.*

43. *Id.* Attachment 2, ¶ 5.

44. *Id.* Attachment 2, ¶ 6.

45. *Id.* Attachment 2, ¶ 5.


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