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# Government Enforcement Update: Whistleblower Incentives; Changes to the SEC's 'Neither Admit Nor Deny' Policy; Difficulties of Multijurisdictional Settlements

## SEC's Dodd-Frank Whistleblower Hotline Remains Active

Under the new whistleblower program established by the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC is required to pay monetary awards to whistleblowers who voluntarily provide original information that leads to a successful enforcement action yielding sanctions of more than $1 million. The program took effect on August 12, 2011, and the SEC received 334 tips by September 30 — about seven tips per day. Thirteen of those tips, or approximately 4 percent, involved alleged FCPA violations. The SEC recently reported that it continues to receive the same daily average of tips, two to three of which merit investigation. The agency also reported that the quality of tips has increased, which is likely due to two factors: (1) lawyers actively soliciting whistleblowers on a contingency fee basis and providing assistance with whistleblowers' submissions before they reach the SEC; and (2) the SEC's rules permitting whistleblowers to submit information anonymously through a lawyer, which has encouraged more tips from current, senior-level employees who presumably possess higher quality information than the disgruntled former employees who historically provided information to the SEC. These trends in the number and quality of tips are likely to continue in the FCPA context, where settlements often exceed the $1 million threshold amount for whistleblower recovery.

## SEC's 'Neither Admit Nor Deny' Policy Changes

Resolutions with the SEC for alleged FCPA violations have been complicated by a new policy promulgated by the SEC's Division of Enforcement. Under this policy, the SEC no longer will accept resolutions in which a defendant "neither admits nor denies" the allegations against it where that defendant has entered into an agreement with the DOJ under which it did make factual admissions. In such cases, the SEC will require defendants to make the same admissions as those made in the criminal settlement. The SEC has indicated that the new policy should apply only to the small number of cases in which both the SEC and DOJ have conducted parallel investigations into the same conduct. In the FCPA context, it is common for defendants to enter into simultaneous civil and criminal settlements and, therefore, this policy often will apply. In these cases, DOJ resolutions often are premised on bribery violations; in contrast, SEC resolutions are typically founded on violations of the "books and records" or "internal controls" provisions of the FCPA. Given the risk of liability from private civil claims as a result of admissions to such violations, defendants should ensure that admissions in SEC resolutions go no further than those in the related criminal resolution, notwithstanding the differing basis of the settlements.

## Multijurisdictional Settlements: Recent European Developments

Multijurisdictional developments also have complicated the ability to settle a corporate investigation with certainty and predictability. Local investigations following DOJ and SEC settlements have been increasing steadily, including investigations arising out of

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the Siemens, Panalpina and Bonny Island FCPA settlements. The Greek government's recent settlement with Siemens reflects a significant milestone in this trend. In March 2012, Siemens reached an agreement with the Greek government to resolve potential administrative claims against Siemens for allegedly improper payments to Greek officials from the late 1990s through 2007. The settlement is valued at €270 million and comprised the following elements: (1) Siemens waived €80 million Euros worth of debt that Greece owed; (2) Siemens agreed to spend up to €90 million Euros on anti-corruption programs and transparency initiatives in Greece, and (3) Siemens agreed to spend more than €100 million Euros in order to stimulate the Greek economy with new investments. Siemens agreed that the program in Greece will be overseen by a compliance monitor, and the company will continue to assist Greek judicial authorities in ongoing prosecutions of individuals. Both the amounts at issue and terms of a settlement reflect aggressive action by the Greek government and highlight the importance of careful strategic planning when seeking to resolve a multijurisdictional investigation.

In the United Kingdom, the Ministry of Justice (MOJ) has opened a public consultation on adoption of deferred prosecution agreement (DPA) procedures in an effort to provide a viable middle ground between corporate pleas and civil settlements. The MOJ's proposal, which opened for public comment on May 17, 2012, generally is modeled after U.S. DPAs, but reflects two significant structural differences between the U.S. and UK systems. First, the MOJ currently views U.S.-style DPAs in which an agreement in principle can be negotiated prior to judicial involvement as incompatible with the "legal traditions in England and Wales" and not "constitutionally suitable." The MOJ proposal therefore envisions a procedure to allow the government and putative defendant early access to the criminal courts to enable a judge to assess whether a DPA would be appropriate in principle. If so, the parties would then negotiate potential terms. In the context of multijurisdictional investigations, the early involvement of a UK court may be inconsistent with a company's strategic efforts to bring a matter to a close. Second, UK law lacks clear guidance regarding corporate criminal financial penalties. The MOJ addresses this relative lack of judicial guidance by suggesting that the UK Sentencing Council develop sentencing guidelines for DPAs, by providing either "overarching narrative guideline[s]" or "offense-specific guidelines." Without sentencing benchmarks, negotiation of a DPA, and consideration of the fairness of its terms, will be difficult.