

Siemens AG Settles Foreign Corrupt Practices Act Investigation With U.S. and German Authorities; Pays \$1.6 Billion in Fines and Disgorgement

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Gary DiBianco

Washington, D.C.
202.371.7858
London
44.0.20.7519.7258
gary.dibianco@skadden.com

David Meister

New York
212.735.2330
david.meister@skadden.com

Saul Pilchen

Washington, D.C.
202.371.7655
saul.pilchen@skadden.com

Lawrence Spiegel

New York
212.735.4155
lawrence.spiegel@skadden.com

* * *

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

WWW.SKADDEN.COM

German manufacturer Siemens AG settled its long-running U.S. and German anti-corruption investigations on December 15, 2008, by agreeing to significant civil and criminal penalties, future monitoring, and an admission of improper conduct. The settlements confirm that U.S. and European regulators are devoting continued and unprecedented resources and cooperation to anti-corruption and internal-controls issues.

In the United States, Siemens settled parallel investigations by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) under the Foreign Corrupt Practices Act (FCPA).

The criminal settlement with the DOJ comprises:

- A guilty plea by parent Siemens AG to failing to devise and maintain sufficient internal controls and to falsifying books and records under the FCPA.
- Guilty pleas by subsidiaries in Argentina, Bangladesh and Venezuela to conspiracy to violate the anti-bribery and books-and-records provisions of the FCPA.
- Payment of a criminal fine of \$450 million.

The civil settlement with the SEC comprises:

- Consent to judgment in a civil case by the SEC finding that Siemens violated the anti-bribery, books-and-records and internal-controls provisions of the FCPA.
- Civil disgorgement of profits of \$350 million, in addition to the criminal fine.

In connection with the settlements, Siemens agreed to appoint former German Finance Minister Theodor Waigel as a corporate compliance monitor for up to four years, and to retain an independent U.S. law firm to support Minister Waigel.

In Germany, Siemens announced that it resolved an investigation by German authorities by agreeing to a fine of €395 million for failure to supervise its operations. This fine is in addition to a €201 million fine a Munich court sentenced Siemens to pay in October 2007.

The combined payments to U.S. and German authorities, which exceed \$1.6 billion, are more than 35 times higher than any previous anti-corruption settlement, and the resolution is the first time any company has pleaded guilty to U.S. criminal internal-controls violations. The “failure to supervise” fine imposed by German authorities is similarly unprecedented.

Court papers filed by the DOJ and the SEC focus on Siemens' failure to create and enforce controls to prevent bribery and to ensure proper authorization and recording of transactions. In particular, the papers fault Siemens for failing to respond to changes in German law in 1999, which thereafter prohibited payments to foreign officials, and for failing to develop and enforce an effective compliance program when Siemens became a U.S. issuer in 2001. More specifically, the DOJ and SEC identified the following structural weaknesses in Siemens' control systems:

- Until 2007, Siemens' chief compliance officer was a part-time position, and the compliance office was inadequately staffed to investigate, remediate and prevent corruption;
- Siemens' compliance function had competing mandates both to investigate internal reports of corruption and to defend the company against corruption allegations;
- Top management did not enforce business-practices improvements and permitted maintenance of offshore cash accounts even though they knew such accounts could be misused; and
- Business unit leaders did not take anti-corruption guidance seriously.

The court papers also allege that Siemens maintained a culture in which bribery was "a possible business strategy" to break into emerging markets. The papers document specific payments to obtain and retain business in several of Siemens' primary operational units in emerging markets in South America, Eastern Europe, Asia, and the Middle East.

The structure, content and obligations of the settlements identify a number of proactive steps that companies can take to enhance existing internal controls and minimize anti-corruption risks. These include:

- Enhanced codes of conduct and related policies and procedures as they relate to government procurement and interaction with government regulators, particularly in emerging markets;
- Targeted education of employees about relevant anti-corruption laws and how to respond to high-risk situations;
- Thorough and meaningful due diligence on third-party business partners, including consultants, intermediaries and agents;
- Effective internal reporting and investigative procedures to follow through on any indications of improper conduct; and
- State-of-the-art controls over monetary transfers, cash accounts and other disbursements.

In light of the current vigorous enforcement environment, issuers and other entities subject to the FCPA should carefully review the sufficiency of existing control structures.