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## Siemens Case Presents Warning

By Gary DiBianco and Gary A. Rubin

Siemens AG, a German stock corporation and one of the world's leading engineering, healthcare, and power companies recently paid approximately \$1.6 billion in fines and disgorgement to settle claims it made \$1.4 billion in improper payments worldwide, lacked sufficient internal controls to prevent those payments, and falsified its books and records in order to conceal those payments.

On Dec. 15, 2008, Siemens settled long-running anti-corruption investigations by U.S. and German authorities. Siemens agreed 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 Bangladesh and Venezuela to conspiracy to violate the anti-bribery and books-and-records provisions of the FCPA;
- A guilty plea by Siemens' Argentinean subsidiary to conspiracy to violate the books-and-records provisions of the FCPA; and
- Payment of a criminal fine of \$450 million.

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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; and
- Civil disgorgement of profits, in addition to the criminal fine, of \$350 million.

In connection with the settlements, Siemens agreed to appoint former German Finance Minister Theodor Waigel as a corporate compliance monitor for up to 4 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 euros for failure to supervise its operations. This fine is in addition to a 201-million-euro 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 ten times any prior 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 prohibiting payments to foreign officials and for failing to develop and enforce an effective compliance program when Siemens became a U.S. issuer in 2001.

The papers allege that Siemens maintained a culture in which bribery was "a possible business strategy" to break into emerging markets. More specifically, the DOJ and SEC identify structural weaknesses in Siemens' control systems:

- Until 2007, Siemens's chief compliance officer was a part-time position, and that the compliance office was inadequately staffed to investigate, remediate, and prevent corruption;
- Siemens's 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 DOJ and SEC court papers also document specific and widespread payments to obtain and retain business in several of Siemens' primary operational units in several emerging markets in South America, Eastern Europe, Asia and the Middle East.

The Siemens settlements demonstrate that government enforcement authorities, especially in the United States and Europe, are vigorously pursuing an anti-corruption enforcement agenda and that the potential criminal and civil exposure of companies engaging in misconduct can be significant.

In addition, in light of the Siemens settlements, companies should ensure they have sufficient internal controls in place to prevent corruption. In particular, 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

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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.

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