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FCPA Enforcement Developments Impacting Germany

The U.S. Foreign Corrupt Practices Act (FCPA) has been vigorously enforced over the past several years by the statute's twin regulators, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The DOJ and SEC have invoked the FCPA – a 35-year old U.S. law that prohibits bribing non-U.S. government officials – to secure more settlements in the past five years alone than occurred in the entire initial thirty years of the law's existence. Such FCPA settlements carry hefty fines, with Siemens setting the record in 2008 at $800 million, while other German companies, such as Daimler and Deutsche Telekom, have more recently entered into their own FCPA settlements. Vigorous enforcement of the FCPA does not seem poised to decline. Currently, U.S. regulators are conducting industry sweeps of the entertainment and financial services industries while reportedly maintaining a docket of more than 100 active FCPA investigations. Newspapers in the United States regularly proclaim the FCPA's continued prominence among U.S. criminal laws; for example, the *Wall Street Journal* recently profiled the law under the headline: "How the Sleepy FCPA Became a Hulk and Why It's Staying that Way."[1] Suffice it to say, the FCPA is a U.S. law that German companies conducting international business can ill afford to ignore. This article summarizes recent FCPA developments, with a focus on how the FCPA's broad reach has impacted German companies and individuals.

I. Tyco Waterworks Deutschland

Tyco International Ltd., the Swiss-based manufacturer, entered into parallel DOJ and SEC settlements in mid-2012 related to a dozen different schemes to bribe government officials in multiple countries.[2] The largest and most profitable scheme was orchestrated by Tyco's subsidiary in Germany, Tyco Waterworks Deutschland. According to the charges, Tyco Waterworks made payments to third-party agents that Tyco Waterworks allegedly knew would be passed to government officials to either secure contracts or to avoid the imposition of fines in eight countries: China, Croatia, India, Libya, Saudi Arabia, Serbia, Syria, and the United Arab Emirates. In total, the third-party payments allegedly assisted Tyco Waterworks in securing $4.6 million in profits (all of which was disgorged as a result of Tyco's settlement).

The charges against Tyco Waterworks illustrate a perennial FCPA risk area confronted by many multinationals operating in reputedly corrupt countries; that is, risks arising from the use of and payments to third-party agents that interact with governmental customers or regulators. Given that a large number of FCPA settlements stem from such third-party relationships, risk-based due diligence of third parties – which include agents, consultants, finders, distributors, and other similar business partners – has become a bedrock of many corporate anti-corruption compliance programs.

II. Allianz

In December 2012, the SEC announced that it had charged German-based insurance and asset management company Allianz SE with violating the books and records and internal controls provisions of the FCPA in connection with improper payments by an Allianz Indonesian subsidiary to government officials in Indonesia from 2001 to 2008.[3] Without admitting or denying the SEC's findings, Allianz agreed to pay more than $12.3 million in disgorgement of ill-gotten profits, prejudgment interest, and civil penalties.

The settlement is noteworthy because it illustrates the extent to which German-based "issuers" whose stock trades on a U.S. securities exchange are subject to the FCPA. Specifically, the SEC brought its FCPA charges under the FCPA's accounting provisions, which prohibit companies traded on a U.S. exchange from misclassifying bribes in their books and records, and that require such companies to maintain adequate internal accounting controls. Such charges can be brought against an issuer/parent even when, as was the situation for Allianz, the bribes themselves were not paid from U.S. bank accounts or have similar connections to the United States. Such charges also may arise as a matter of strict liability; in other words, the issuer/parent may be liable for the conduct of its subsidiaries even if the issuer/parent itself lacks any involvement in or knowledge of the underlying violations.

The Allianz settlement is also notable given that Allianz voluntarily had delisted its stock from U.S. securities exchanges (and therefore had ceased to be an issuer) some six months before the SEC initiated its investigation and some three years before the settlement with the SEC. The SEC premised jurisdiction on the allegation that the misrecordings in Allianz's books and records and the internal controls deficiencies arose when Allianz was an issuer. It is worth noting that, according to the SEC's charging document filed against Allianz, the allegations of improper conduct had been raised with the company in 2005, but the company did not fully remediate the problems.[4] This alleged failure, while the company was a U.S. issuer, may have been relevant to the SEC's decision to pursue the matter after Allianz had delisted. In any event, the Allianz settlement underscores that, as has been seen in other FCPA matters, the SEC will not flinch from exercising jurisdiction to enforce the FCPA whenever the SEC may have some jurisdictional ground to stand upon.

III. Prosecution of German Individuals

The DOJ and SEC have pointedly and repeatedly stated that the vigorous prosecution of individuals who violate the FCPA ranks high among their joint enforcement priorities. As a consequence, the last several years have witnessed a dramatic and purposeful increase in the number of FCPA cases against corporate directors, executives, and other employees. This uptick has resulted in the DOJ bringing criminal charges, and the

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1 See *Joe Palazzolo*, Wall Street Journal, Oct. 2, 2012.

2 See Non-Prosecution Agreement Between United States Department of Justice and Tyco International Ltd. (Sept. 24, 2012); *SEC v. Tyco Int'l Ltd*., No. 12-CV-1583 (Sept. 24, 2012) (Complaint).

3 See U.S. Securities and Exchange Commission Press Release No. 2012-266: SEC Charges Germany-Based Allianz SE with FCPA Violations (Dec. 17, 2012).

4 See In the Matter of Allianz SE, Exchange Act Release No. 68448 (Dec. 17, 2012) (Order Instituting Cease-and-Desist Proceedings).

SEC bringing parallel civil charges, against various German citizens.

Most notably, as an offshoot of the corporate charges against Siemens, the DOJ and SEC jointly charged five German citizens who served as former directors, employees, or agents for Siemens.[5] Among the charged individuals was a member of Siemens' Managing Board who oversaw the power operations group; the former president of Siemens' transportation systems operating group; and the Chief Financial Officer of a Siemens subsidiary in Argentina. According to the charges, the defendants conspired to pay bribes to Argentine government officials to obtain a billion-Euro contract to produce national identity cards throughout Argentina. The defendants allegedly orchestrated the conspiracy through various means, including sham contracts and shell companies, and via third-party agents who passed bribes to government officials. To date, none of the defendants have been arrested by U.S. law enforcement authorities, such that the criminal prosecution has been stayed. Meanwhile, the SEC case against the various defendants is proceeding. A U.S. court recently dismissed the SEC's civil complaint against one of the German citizens on jurisdictional grounds,[6] although the SEC matter remains pending as to the other defendants.

The SEC has similarly pursued FCPA charges against three former executives of a Deutsche Telekom subsidiary in Hungary.[7] The executives include the Chairman & CEO of the subsidiary, and two business executives. The executives collectively moved to dismiss the SEC's complaint against them arguing, among other things, that they did not use U.S. mails or any means of U.S. commerce to commit their offense (such usage is an element of the FCPA's anti-bribery provisions for non-U.S. citizens). The defendant's argument rested on their assertion that they sent emails from locations outside the United States that by happenstance, and without their knowledge, were routed through or stored on network servers located in the United States. The trial court rejected the argument in holding that a defendant's personal knowledge of the trajectory of emails or communications is irrelevant, and that it should be foreseeable that emails may traffic through the United States.[8] In sum, the trial court's decision, unless reversed by an appellate court, allows the U.S. government wide latitude to bring FCPA charges against a foreign defendant.

IV. DOJ/SEC Guidance

In late 2012, the DOJ and SEC published a 120-page guide on the FCPA.[9] The publication of the Guide was unprecedented in U.S. federal law enforcement in that the DOJ and SEC provided the public with such detailed information on their joint FCPA enforcement approach and priorities. Specifically, the Guide listed factors the DOJ and SEC would consider when deciding whether, and if so, how to charge companies for FCPA violations. The factors include whether the company voluntarily disclosed the matter, the degree of the company's cooperation in DOJ and SEC investigative efforts, and the breadth of a company's pre-existing compliance program and remediation once the issue came to light. Regarding FCPA compliance programs, the Guide delineated areas the DOJ and SEC view as "hallmarks" of an effective compliance program. Those hallmarks include conducting periodic risk assessments focused on identifying possible FCPA risk areas unique to the company; the maintenance of policies and procedures for traditionally sensitive activities such as the engagement and use of third-party agents; due diligence and compliance integration following corporate mergers and acquisitions; and training company employees on the law and company policies. Post-publication, companies are well-advised to ensure that their programs satisfy the programmatic standards outlined in the Guide.

The FCPA continues to be vigorously enforced by U.S. authorities, with a spate of recent charges being brought against German companies and German individuals. These matters illustrate the varied ways in which the FCPA may apply to German companies and individual citizens. Against this landscape, German companies should continue to bolster their FCPA and general anti-corruption compliance programs and vigilantly monitor for any potential corruption vulnerabilities.

5 See *United States v. Sharef,* No. 11-CR-1056 (S.D.N.Y. Dec. 12, 2011) (Indictment); *SEC v. Sharef*, No. 11-CV-9073 (S.D.N.Y. Dec. 19, 2011) (Complaint).

6 See *SEC v. Sharef*, No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion & Order).

7 See *SEC v. Straub*, No. 11-CV-9645 (S.D.N.Y. Dec. 29, 2011) (Complaint).

8 See *SEC v. Straub*, No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum & Order).

9 See *U.S. Department of Justice & U.S. Securities and Exchange Commission*, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012).