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Recent Developments in International Securities Law

Dear Committee Members,

This is the latest issue of the International Securities & Capital Markets Newsletter, published by the International Securities & Capital Markets Committee of the American Bar Association's Section of International Law. We hope you find it interesting and useful. We generally publish this newsletter on a quarterly basis and welcome submissions regarding jurisdictions not already covered. This newsletter covers developments in the first quarter of 2013 .

A special note of thanks to our contributors, who have each prepared interesting and informative pieces. If you would like to contribute, and we very much encourage you to do so, or if you have a question or suggestion, please contact me using my details at the end of the newsletter.

Regards,

Thomas M. Britt III

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INTRODUCTION TO THE U.S. FOREIGN CORRUPT PRACTICES ACT IN GERMANY

This article begins with a discussion of the legislative background of the Foreign Corrupt Practices Act (FCPA) and explains its most relevant provisions and definitions, followed by a review of FCPA investigations and enforcement actions related to Germany. Finally, this article ends with a selection of practitioner's notes, highlighting the importance of a robust compliance program and providing additional research resources.

I. History and Structure of the Foreign Corrupt Practices Act

The U.S. Congress enacted the FCPA in 1977 in reaction to the congressional discovery that 400 U.S. companies—including twenty percent of Fortune 500 companies—were making illicit payments to foreign governments.[1] The FCPA makes it illegal for "certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business,"[2] while further imposing specific accounting, disclosure and internal controls requirements on issuers. The FCPA was Congress' attempt to address corruption that was considered to run "counter to the moral expectations and values of the American public" and "[threatened] to undermine the free market be rewarding inefficient companies."[3] FCPA enforcement laid nearly dormant for thirty years until roaring into the spotlight in the middle of the last decade. FCPA violations are enforced by the U.S. Department of Justice (DOJ)(criminal), and by the U.S. Securities and Exchange Commission (SEC)(civil).

The FCPA faced criticism from the start. Critics attacked the FCPA as too broad—putting U.S. businesses at a competitive disadvantage—while simultaneously decrying its failure to prohibit "unethical" transactions.[4] Congress addressed some of these concerns in 1988 with the Omnibus Foreign Trade and Competitveness Act (the Trade Act). The Trade Act aimed to build import barriers and regulate international business practices to address the shift in the U.S. from a trade surplus to a massive trade deficit in the 1970s. The Trade Act significantly modified the FCPA, lowering certain standards and providing certain carveouts and affirmative defeneses. The FCPA was again amended in 1998 as a result of the Organization for Economic Cooperation Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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1 Koehler, The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence, 43 INDIANA L. REV. 389, 389, http://indylaw.indiana.edu/ilr/pdf/vol43p389.pdf.

2 U.S. Dept. of Justice (DOJ), *the Foreign Corrupt Practices Act*, http://www.justice.gov/criminal/fraud/fcpa.

3 DOJ, *the Foreign Corrupt Practices Act*.

4 For a brief overview of amendments to and legislative history of the FCPA, *see* Seitzinger, Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement, Congressional Research Service, 21 Oct. 2010, http://www.fas.org/sgp/crs/misc/R41466.pdf.

The FCPA is an example of American extrateritorial jurisdiction—it extends American legal values beyond the country's normal borders. Both companies and individuals can be subject to—and face criminal and civil penalties from—the FCPA without ever stepping foot on American soil. Conduct inside and outside of the U.S. may be covered if it communicates or facilitates an FCPA-covered act (the key here is that the instrumentality furthers the covered conduct) by e-mail, making a phone call, sending a fax or even having a discussion through text messages into or out of the U.S. If a foreign person comes to the U.S. for a meeting which furthers the covered conduct, that foreign person can run afoul of the FCPA as can other co-conspirators, even if the others never set foot in the United States.

Covered conduct. The FCPA (1) prohibits payments made to government officials in furtherance of (or in order to obtain) business and (2) obligates issuers to adhere to certain accounting, disclosure and internal controls requirements. More specifically, the FCPA prohibits making, offering, promising, or authorizing payment of "anything of value…to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business."[5] Under the FCPA, foreign officials include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[6] Remarkably, especially in light of the movement toward privatization, employees of certain state owned enterprises may also be considered foreign officials covered under the FCPA. The DOJ makes it clear that foreign officials include "low-ranking employees and high-level officials alike."[7] Regulators consider, *inter alia*, the following to be conduct performed in order to obtain or retain business: influencing procurement, obtainining regulatory exemptions, evading or lowering taxes or penalties, winning a contract, or avoiding contract termaination.[8]

There are important caveats here. First, items of "nominal value" are excluded—a small gift or token of esteem is acceptable, provided that the item is given openly, recorded properly in the giver's books and records, only given to express esteem or gratitude, and is permitted under local law.[9]

Further, the Trade Act amendments to the FCPA allow "facilitation payments." These payments are meant to facilitate or expedite a routine government action that is "non-discretionary" in nature.[10] These payments may include processing visa applications, providing police protection, or supplying utilities (e.g., water, electricity).[11] The payment is not considered a facilitation payment if there is a discretion component. For example, paying to process a shipment through customs quicker might be a facilitation payment, but paying to expedite the process *and* to receive a lower duty rate or to import an item that is ordinarily prohibited under local law would fall within the FCPA's definition of prohibited conduct.

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5 DOJ and the U.S. Sec. & Exch. Comm'n. (SEC), A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Guidance), Washington, 10 (Nov. 14, 2012), http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

6 Section 30A(f)(1)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1) (A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

7 Guidance at 20.

8 Guidance at 13.

9 Guidance at 15.

10 Guidance at 25.

11 Guidance at 25.

The bribe must only have corruptive *intent*. The bribe does not have to be successful for the conduct to be covered under the FCPA. The government official, for example, may reject the bribe; this would not affect liability under the FCPA. If a business executive authorizes employees to pay "whoever you need to" in the foreign government to get the job done, this would be covered even if the executive never knows the identities of those targeted for bribes.[12]

The FCPA's anti-bribery requirement is also joined by accounting requirements for issuers that stipulate certain record keeping and internal controls; also, it prohibits issuers from falsifying the company's books and records or from circumventing or failing to implement the company's system of internal controls.[13] Historically, more companies have faced charges from the SEC based on failure to comply with the accounting requirements than due to violations of the anti-bribery provisions.

Covered persons. The FCPA does not apply to everyone, but it does extend beyond U.S.-based corporations and citizens. The anti-bribery requirement applies to (i) U.S. citizens, nationals and resident alients, (ii) U.S. companies (both public and private) as well as their agents, employees and shareholders (when acting under the company's concern), (iii) most foreign subsidiaries of U.S. companies, (iv) foreign nationals acting on behalf of a U.S. company, and (v) foreign nationals who act to further a foreign bribe while in the U.S. The accounting, disclosure and internal controls obligations only extend to issuers—companies that are publicly traded in the U.S. and companies that file reports with the SEC (and their subsidiaries and majority owned affiliates, if their financials are included within the issuer's financial statements). Issuers include companies with American Depository Receipts (ADRs) traded in the U.S., as well as companies with stock that trade over the counter (OTC) in the U.S. if the company is required to file reports with the SEC.

Affirmative defenses. There are two affirmative defenses to the anti-bribery provisions of the FCPA—the local law defense and money spent as part of demonstrating a product or performing a contractual oblication. The burden to raise and to prove the defense is on the defendant. A note on the local law defense: if the payment is legal under the laws of the country in which the bribe is being made, the conduct may be exempt from the FCPA. However, the burden for this requirement is high. In *United States v. Kozeny*, the defendant was alleged to have conspired to violate the FCPA by agreeing to pay Azeri officials to encourage the privatization of Azerbaijan's state oil company.[14] Kozeny's defense was that his conduct was regularly a part of business in Azerbaijan and that his conduct would not be prosecuted under local laws. The court found that the exemption, however, does not require that the conduct escape prosecution in the local jurisdiction, but that the conduct is expressly allowed "under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country."[15] This was not the case.

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[12] Guidance at 13.
[13] Guidance at 10.
[14] *See* United States v. Viktor Kozeny, *et al*. No. 05-cr-518 (S.D.N.Y. 2005); Guidance at 23.
[15] Section 30A(c)(1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

II. The FCPA & Germany

In 2001, Siemens AG began to issue securities in the United States, making Siemens an "issuer" under the FCPA and subjecting Siemens to both the anti-bribery and accounting requirements of the FCPA. In 2008, Siemens AG reached a settlement with the SEC, the DOJ, and Munich State Prosecutor's Office I for a record $1.6 billion in fines and penalties related to bribes[16] made to foreign governmen officials in over ten countries, including China, Argentina, Iraq, Israel, Nigeria, and Russia.[17] The U.S. alleged that Siemens and its subsidiaries had made over 4,200 illicit payments totaling over $1.4 billion to government officials between March 2001 and December 2007.[18] Two years later, in 2011, the DOJ charged eight former Siemens executives and contractors with paying $60 million in bribes in order to secure a $1 billion contract for the production of government identification cards for the government of Argentina.[19] That same week, the SEC brought civil bribery charges against seven former Siemens executives, six of whom were also facing DOJ indictment. The settlement with U.S. authorities came with a common caveat, that the company did not have to admit the conduct, but also could not deny it. The Siemens' settlement with Munich required the appointment of an independent compliance monitor for the four years following the settlement; Siemens appointed Theodor Waigel, former German Federal Minister of Finance.

Although the Siemens investigation remains the largest settlement in FCPA history, it is not the only FCPA enforcement action against a German company or stemming from activities in Germany:

2008 The DOJ and the SEC settle with Siemens AG for a record $1.6 billion.

2010 Daimler AG pays $185 million to settle FCPA-related criminal and SEC charges.

2011 Deutsche Telekom AG and its Hungarian subsidiary, Magyar Telekom, Plc., settle with the SEC and the DOJ for a combined $95 million.[20]

2012 Allianz SE pays over $12.3 million to settle charges by the SEC of violating the books and records and internal controls provisions of the FCPA.

Smith & Nephew, a London-based medical device company pays more than $22 million to settle charges with the SEC related to bribes made by its U.S. and German subsidiaries to doctors in Greece.

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[16] English has over twenty synonyms and colloquial expressions for "bribe"; to name a few: graft, kickback, enticement, compensation, gravy, payola, sweetener, grease, ice.

[17] *See* Press Release, SEC, *SEC Charges Siemens AG for Engaging in Worldwide Bribery* (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm; Press Release, DOJ, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines* (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

[18] These payments resulted in $1.1 billion in profits during this same time period.

[19] Wyatt, *Former Siemens Executives Are Charged With Bribery*, NY TIMES, Dec. 13, 2011, http://www.nytimes.com/2011/12/14/business/global/former-siemens-executives-charged-with-bribery.html.

[20] At the time of the conduct, both Magyar Telekom's American Depository Receipts (ADRs) and Deutsche Telekom's ADRs traded on the New York Stock Exchange (NYSE).

> The DOJ announces a non-prosecution agreement (NDA)[21] with BizJet International Sales and Support Inc. related to alleged bribes paid to Mexican officials. BizJet's "indirect parent company" Lufthansa Technik AG was also a named party in the NDA, even though Lufthansa was not party to the covered conduct and was only mentioned as an "indirect" parent. Under the NDA, Lufthansa will not be prosecuted provided that Lufthansa cooperates with investigators and continues "implementation of rigorous internal controls."

Potential FCPA violations have arisen in Germany in the medical services and health care, manufacturing, telecommunications, and transportation industries. Indeed, even companies based outside of Germany have been subject to FCPA-related investigations due to the conduct of their German subsidiaries (e.g., Swiss-based Tyco International Ltd., U.S.-based Pfizer Inc., Immucor, Inc., Hewlett-Packard Co., and Bristol-Myers Squibb Co.). Bribes made to German officials (U.S.-based Micrus Corporation, and F.G. Mason Engineering (1990)) and cases where German banks were used to funnel funds (U.S.-based General Electric Aircraft Engines and ABB Network Management) have also come up.

Both the DOJ and the SEC regularly work on FCPA-related investigations and enfocement actions with foreign prosecutors and police agencies across the world. As a note to future FCPA-related charges, the SEC is only growing its relationship with international and foreign regulatory bodies[22] and both the SEC and the DOJ have built strong working relationships with German government officials over the last ten years.

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[21] Non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) are contracts with the government in which an individual or a company agrees to perform (or avoid performing) certain actions in exchange for the government dismissing charges or not filing charges at all. *See also* Henning, *Deferred Prosecution Agreements and Cookie-Cutter Justice*, Sept. 17, 2012, DEALBOOK, http://dealbook.nytimes.com/2012/09/17/deferred-prosecution-agreements-and-cookie-cutter-justice.

[22] The SEC's Office of Internal Affairs manages the agency's international relationships. Information about the SEC framework for international cooperation and the mechanics of information sharing is available online at http://www.sec.gov/about/offices/oia/oia_crossborder.shtml. These relationships will generally be documented via a Memorandum of Understanding (MOU).

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