

## VW Charges Renew Focus on U.S. Arrests of Foreign Nationals

On January 7, 2017, Oliver Schmidt, a German citizen and former general manager of Volkswagen's U.S. Engineering and Environmental Office, was unexpectedly arrested at Miami International Airport shortly before he was scheduled to board a flight to Germany. Following his arrest, a criminal complaint was unsealed, charging Schmidt with several offenses in connection with the Volkswagen emissions scandal. Schmidt's arrest, which came just days before the United States Department of Justice ("DOJ") announced a \$4.3 billion settlement of the criminal investigation into Volkswagen and unsealed charges against several other Volkswagen executives, exemplifies the increasing focus by the DOJ on prosecuting non-U.S. citizens in connection with alleged corporate wrongdoing. While grand jury investigations in the United States are confidential, and indictments are typically returned under seal, counsel for individuals who may be the subject of or otherwise involved in an investigation can often gain insight into the focus and progress of the investigation through direct inquiry with the appropriate authorities.

On January 11, 2017, a federal grand jury in Detroit, Michigan returned an indictment against Oliver Schmidt and five other former Volkswagen executives. The executives, all German citizens, are charged with conspiring to defraud the United States, to defraud Volkswagen's U.S. customers, and to violate the Clean Air Act. All of the defendants aside from Schmidt worked for Volkswagen AG, the German vehicle manufacturer based in Wolfsburg, Germany. Schmidt, who worked for a period of time in the Michigan office of Volkswagen AG's U.S. subsidiary, is the only indicted Volkswagen executive who was ever based in the United States.

According to the government's charges, the alleged conspiracy began in 2006, when Volkswagen sought to develop and market "clean diesel" cars for sale in the United States. When it became clear that the company's designs would not meet U.S. emissions standards at a marketable price point, employees developed software to detect and cheat U.S. emissions tests. This software was installed in Volkswagen vehicles from model years 2009 through 2016, which were then tested by the U.S. Environmental Protection Agency ("EPA"), marketed for sale as "clean diesel" cars, and sold to American consumers. The DOJ asserts that the actions of the indicted German executives fall within its jurisdiction because the executives conspired to impede the EPA's ability to implement and enforce emissions standards, sent emails from and to the United States, and intentionally deceived and defrauded American consumers.

The Volkswagen case is not unique in the DOJ's pursuit of foreign executives for alleged misconduct committed in large part outside of the United States. Other recent cases covering a wide range of sectors demonstrate that even extraterritorial conduct may fall within the ambit of U.S. criminal prosecution. U.S. prosecutors' use of sealed indictments, stayed statutes of limitations and arrest requests to border and overseas authorities, suggest that non-U.S. citizens and residents engaged in international business should be aware of the potentially applicable prohibitions of U.S. criminal law. They should stay alert to current prosecutorial priorities as well as to the existence of investigations, which can relate to long-past conduct.

The DOJ is often able to establish jurisdiction despite the fact that the conduct at issue occurred largely, if not entirely, overseas. For example, the broad wire fraud statute criminalizes any scheme to defraud that affects "interstate or foreign commerce," and may be prosecuted in the United States whenever an electronic communication, such as a telephone call or email, in furtherance of the alleged scheme travels through the United States. In July 2016, Mark Johnson, a citizen of the United Kingdom and the global head of FX trading at HSBC, was arrested at New York's John F. Kennedy airport while attempting to board a flight to London. Following his arrest, the DOJ unsealed a criminal complaint that had previously been filed in secret against Johnson and one of his colleagues in the U.K., Stuart Scott. The complaint alleged that the defendants conspired to defraud an HSBC client using a scheme commonly known as "front running." While most of the trading activity occurred in London, related trading activity and wires used to settle accounts were routed through New York.

While the Schmidt arrest occurred shortly before the resolution of Volkswagen's corporate criminal liability, arrests in other cases have followed the public resolutions of criminal investigations by the institutions that employed the individuals who were secretly charged. In October 2015, Paul Thompson, an Australian citizen and former Singapore-based derivatives trader at Rabobank, was arrested in Australia pursuant to an extradition request from the United States. Before he was arrested abroad, Thompson was charged in the U.S. with conspiracy to commit wire fraud and bank fraud, an offense that arose from the global London Interbank Offered Rate ("**LIBOR**") manipulation scandal. Notably, in October 2013, two years before Thompson was arrested, Rabobank resolved its own LIBOR liability by entering into a deferred prosecution agreement with the DOJ and paying a \$325 million penalty.

In contrast to criminal procedures in some European countries, U.S. federal criminal investigations are typically conducted via a "grand jury" (a group of citizens convened by the prosecutor to hear evidence) and occur in secret, often without notice to or the involvement of individuals under investigation. Likewise, indictments and criminal complaints are usually filed under seal when the defendant is outside of the United States. Indictments may remain sealed indefinitely and are often kept sealed until the defendant is apprehended. In addition, individuals who are arrested and charged with crimes may cooperate or plead guilty in sealed proceedings. The filing of a sealed indictment will pause, or "toll," the expiration of the statute of limitations, which prohibits the prosecution of crimes after a certain period of time (usually five years). The government may also toll the statute of limitations by making a request for information from another nation pursuant to a Mutual Legal Assistance Treaty ("**MLAT**"), which has become more common in the context of cross-border investigations.

After a criminal charge has been filed, the United States may seek the defendant's extradition. The U.S. has extradition agreements with more than 100 countries around the world. However, some countries will not extradite their own nationals. In the event that the U.S. does not have an extradition treaty with a particular country, or the treaty does not allow for extradition in a particular case, American authorities may seek an Interpol "red notice," which typically serves to trigger an alert at border crossings when an individual who is subject to a sealed arrest warrant travels internationally. U.S. authorities may also wait until a suspect travels to or transits through the United States, and then execute the arrest warrant when he or she arrives at the border. For example, in June 2015, Gregg Mulholland, a dual citizen of the United States and Canada, attempted to fly from Canada to Mexico. When the plane stopped for a brief layover at Phoenix International Airport, F.B.I. agents arrested Mulholland. In a criminal complaint that was unsealed following his arrest, Mulholland was charged with conspiracy to commit securities fraud and money laundering arising from an alleged Belize-based stock manipulation scheme.

While criminal investigations in the U.S generally are conducted in secret, prosecutors typically disclose, when asked, if a particular individual is a "subject" or "target" of an ongoing investigation. Prosecutors do this, among other reasons, to encourage cooperation by individuals under investigation – particularly when those individuals are located outside the subpoena power of the prosecutor. Thus, when there is reason to suspect that an investigation is under way, it is advisable to consult counsel regarding whether and when it may be appropriate to contact U.S. authorities, and whether travel to the United States is prudent.

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