ren Beschuldigten schützt,[61] dass aber eine Auslegung von § 97 Abs. 1 Nr. 3 StPO, nach der der Beschlagnahmeschutz unabhängig von einem Berufsgeheimnisträger-Beschuldigten-Verhältnis besteht, von Verfassung wegen nicht geboten ist.[62] Dies folgt aus einer Auslegung der Norm nach Wortlaut, Systematik, Historie und Zweck.[63] Für interne Untersuchungen bedeutet das, dass § 97 Abs. 1 Nr. 3 StPO der Beschlagnahme von Protokollen nicht grundsätzlich entgegensteht. Nichts anderes gilt für § 160 a Abs. 1 S. 1 StPO.[64] Für die Praxis folgt daraus, dass § 97 Abs. 1 Nr. 3 und § 160 a Abs. 1 S. 1 StPO einen nur sehr restriktiven Schutz vor Beschlagnahmen vermitteln und im Zweifelsfall Protokolle und Unterlagen auch dann beschlagnahmt werden können, wenn sich diese in einer Anwaltskanzlei befinden. Soweit ein Beschuldigtenstatus bereits erreicht ist, kann es empfehlenswert sein, die Unterlagen als Verteidigungsunterlagen[65] zu kennzeichnen, um einen möglichen Beschlagnahmeschutz zu erreichen.[66]

61 BVerfG 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17 – Jones Day, Rn. 80.
62 BVerfG 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17 – Jones Day, Rn. 80.
63 BVerfG 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17 – Jones Day, Rn. 85-87.
64 BVerfG 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17 – Jones Day, Rn. 73.
65 *Krug*, FD-StrafR 2015, 372751; *Jahn/Kirsch* NZWiSt 2016, 39 (40).
66 *Krug/Skoupil* NJW 2017, 2374.

## D. Fazit

Die Bedeutung von internen Untersuchungen wird im Lichte des VerSanG weiter an Bedeutung gewinnen. Mitarbeiter der untersuchenden Unternehmenseinheit sollten deswegen im Hinblick auf die zahlreichen Fallstricke geschult werden, um nicht die Ergebnisse der internen Untersuchungen zu gefährden oder sich selbst einem Haftungsrisiko auszusetzen. Obwohl noch nicht klar ist, wie die finale Fassung des Gesetzes aussehen wird, sollten Unternehmen bereits den Entwurf des VerSanG zum Anlass nehmen, die bestehenden Prozesse zur Durchführung von internen Untersuchungen zu überarbeiten.

**KONTAKT:**

Dr. Sebastian Naber
Neuwerk Rechtsanwälte PartG mbB
Gänsemarkt 35
20354 Hamburg
Tel.: 040/340 575730
Sebastian.naber@neuwerk.legal

Tim Ahrens
Ernst & Young Wirtschaftsprüfungsgesellschaft
Rothenbaumchaussee 78
20148 Hamburg
Tel.: 040/3613217874
tim.ahrens@de.ey.com

ATTORNEY LESLIE R. CALDWELL SOWIE RECHTSANWÄLTE PROF. DR. THOMAS GRÜTZNER UND DR. STEFAN BARTZ*

# Aktuelle Entwicklungen in den USA

In diesem Beitrag in der CCZ-Reihe „Aktuelle Entwicklungen in den USA" sprechen Prof. Dr. Thomas Grützner und Dr. Stefan Bartz mit Leslie R. Caldwell über die aktuellen Entwicklungen im Bereich White Collar Enforcement in den USA und die Trends für das Jahr 2020. Leslie R. Caldwell war bis 2017 „Assistant Attorney General in der Strafabteilung des US Department of Justice" (DOJ) und in dieser Rolle insbesondere verantwortlich für Ermittlungen im Zusammenhang mit Unternehmenskriminalität. Heute ist sie Partnerin der Kanzlei Latham & Watkins im Bereich White Collar & Investigations.

*There have been a number of developments in 2019 in the area of white-collar and investigations, also affecting Germany companies, such as the Guideline on Evaluation of Corporate Compliance Programs (February 2019)[1] or the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (March 2019).[2] What do you see as the most important developments in the area of white-collar and investigations in 2019 generally?*

**L. CALDWELL:** The Trump administration has continued its practice of announcing corporate friendly-sounding policy changes in the areas of white-collar criminal prosecution, particularly in the areas of corporate fraud. There has been a lot of messaging about recognizing individuals as the ones who commit crimes instead of punishing corporations and shareholders. There has been further messaging about cutting back on the number of cases that are initially focused on corporations and of cases in which the government requires a corporate resolution. The guidelines on the evaluation of corporate compliance programs and the FCPA corporate enforcement policy are also consistent with that.

However, there seems to be a significant disconnect between the rhetoric coming out of DOJ at the higher levels and the actual on-the-ground practices – maybe because the practice has not yet caught up with the rhetoric. We continue to see a big focus on corporations, a high level of

* Die Autoren sind Mitglieder der White Collar & Investigations Practice Group von Latham & Watkins LLP.
1 Vgl. hierzu auch *Hauser/von Laufenberg* CCZ 2019, 236 (238) sowie zur vorherigen Fassung *Wiedmann/Greubel* CCZ 2019, 88 (93).
2 Vgl. hierzu auch *Rieder/Güngör* CCZ 2019, 139 (140 f.).

skepticism among prosecutors about compliance programs, application of hindsight in reviewing corporate conduct and compliance programs, and a view that, if systemic failure occurred, there must have been a deficiency in the compliance program. Even the guidance itself says that this is not what prosecutors are supposed to conclude. So there is certainly a disconnect between the policies being issued, the speeches being given, and what actual prosecutors on the ground are doing.

There has also been a shift on the compliance program side. Again, consistent with the administration's corporate-friendly rhetoric, there has been an increased emphasis on granular guidance from the DOJ about implementation of compliance programs. Previously, most of the guidance entailed outlining the components of the compliance program, how it should read in formal terms, how it should be communicated throughout the company, etc. Now, significant emphasis is placed on implementation, controls testing, and consistent follow-up and updates, to see if the compliance program is actually working.

This has been interpreted by some government attorneys to take a more granular look at a company's controls. The Securities and Exchange Commission (SEC), for example, may in the past have asked what was the justification for a particular sales decision, such as the granting of a large discount to a customer. Now, they might also ask whether the person or people who approved the discount did any checking to determine see whether the stated justification was in fact true. This level of scrutiny reflects a lack of practical reality, and is yet another indicator of dissonance between the government's high-level business-friendly rhetoric versus its ground-level operations.

*In 2019, there were also a number of decisions causing controversy among white-collar practitioners, such as the continuous effect of decisions in United States v. Hoskins (August 2019)*[3] *or United States v. Connolly.*[4] *In your view, which decisions stood out in 2019?*

**L. CALDWELL**: Those two stood out quite starkly. In *Hoskins*, the Second Circuit Court of Appeals held that a nonresident foreign national cannot be held liable for conspiracy to violate the FCPA or aiding in the violation of the FCPA when he or she is not an agent of a US company or issuer or domestic concern, and is not in the US. This ruling is somewhat controversial, and it contained a concurring opinion which suggested that Congress should revisit the statute in light of the ambiguity surrounding that particular provision. As a practical matter, it may not have a significant effect on the US government's ability to effectively enforce the FCPA because the number of individuals who fall within this category relatively low. Most individuals prosecuted under the FCPA are either employees of a US company or are agents of US issuers, so they still will be subject to the FCPA.

The real significance of *Hoskins* may be that the government's expansive reading of the FCPA, which has been infrequently tested in actual court cases, may be cut back as more courts weigh in on particular aspects of the statute. As more individuals are charged with FCPA violations, more cases will be contested, and the government's reading of the statute will come under fire. in FCPA, so far, the law has not been developing in the way that the government would have preferred. Practitioners should still continue to fight where they think they have a defense in FCPA cases, especially in cases involving individual defendants.

The *Connolly* case especially stood out. There is a saying that "bad facts make bad law", and *Connolly* had very bad facts. The Court found that, rather than conducting its own investigation of the underlying facts, which involved alleged misconduct by a foreign bank and its employees, the US Commodity Futures Trading Commission (CFTC) "outsourced" the investigative work to a law firm that was retained by the foreign bank. The CFTC directed the law firm who to interview, told them when to interview, what to ask, what to do, and what not to do. The law firm reported its findings on a regular basis to the government, including a comprehensive report describing its investigative work. At the same time, the government did almost no investigative work. It was not issuing subpoenas or conducting its own interviews. The court found that the degree of control and direction that the government had over the law firm's work essentially meant that the government was directing the work, and that the firm was in effect acting as a government agent. As a result, the government was able to obtain statements from individuals without affording them the constitutional protections that would have attached had the government itself attempted to conduct the interviews. The court found that this process risked violating the interviewees' rights, and that their statements might not be admissible as evidence against them. This ruling has sent a scare through the government.

Attorneys have started seeing the government becoming more active earlier in investigations such as by subpoenas or conducting their own interviews. Also, they have been very vocal in saying things like: "*We're not telling you how to run your investigation. We would never tell you how to run your investigation. We're not telling you who to talk to and who not to talk to*", since they are afraid of being accused of "outsourcing" their investigation and violating individuals' rights.

Although the court's findings may sound extreme, in my opinion, it was because the facts were extreme. I consider the facts quite unique. I have never heard of a case where the government did so little, relied so heavily on the outside law firm, and directed the outside law firm to the degree that it did without conducting its own work. That case has probably changed the practice of government-conducted investigations. Due to the extreme facts, it probably will not have a significant long-term effect, but it has certainly had a significant short-term effect.

*Which industries will be in the US regulators' focus in 2020?*

**L. CALDWELL:** Social media companies are on the hot seat right now and will continue to fall under a great deal of scrutiny. Very large companies, such as some major social media companies, are under the microscope for all sorts of different issues. They are under investigation by US and foreign antitrust regulators, US State Attorneys General, and in some cases, US Attorney's Offices. Most likely, that will not change because these are major companies with their fingers in so many different business, many of which are in uncharted and unregulated waters.

3 United States v Hoskins, No. 16–1010 (2 d Cir.); vgl. hierzu auch *Grützner/Güngör* CCZ 2019, 45 f.; *Rieder/Güngör* CCZ 2019, 139 (142 f.).

4 United States v. Connolly, No. 16-CR-370 (CM); vgl. hierzu auch *Bartz/Böhm/Pohl* CCZ 2019, 305 ff.

Technology companies in general will continue to be of interest to regulators. As we have seen in the Northern California market, there is increased regulatory interest in pre-IPO companies, particularly those with large valuations. That will most likely continue, and as some companies postpone their IPOs for longer times than they have historically, the universe of those companies under investigation will only grow. Financial institutions and financial services will always be on the government's radar because there is a lot of money involved and a lot of potential for misconduct.

*What about the marriage between the financial industry and the tech industry, as well as cryptocurrency companies?*[5]

**L. CALDWELL:** They are very much on the radar. That is another industry where the regulators are probably questioning next steps. How do you regulate a virtual currency? Who regulates trading in cryptocurrencies? These and other questions are facing regulators right now. The companies themselves are also determining their approach to regulation: what is required? who is the regulator? what is permitted and not permitted? These are constantly evolving questions with complex implications and no easy or obvious answers. But given the large amounts of money being generated in the cryptocurrency world, the presence of many fraudulent actors, and the volatility of the markets, regulation and oversight are needed and will continue to evolve.

*How do you see the conflict in cross-border investigations between US law and the GDPR evolving?*

**L. CALDWELL:** There is a huge conflict between the two. In the US, companies generally have free access to information on corporate assets, such as computers, phones and other devices, and employees rarely have a legal basis to object when their data is reviewed. GDPR is much more strict, as it gives individuals a significant level of control over their own data. In light of GDPR, attorneys conducting corporate investigations involving EU-based data have to be much more careful than in the past, given the disparity in individual rights recognized in the US versus those recognized in the EU. And as more countries outside the EU evolve in the direction of GDPR, the challenge will only grow.

Even some US states are adopting their own strict data protection laws. For example, the California Consumer Privacy Act (CCPA) is taking effect in January 2020. The CCPA is much more aligned with GDPR than other current US laws. If you have a presence in California or have data belonging to California residents, you will be required to comply with that law. It may be that we are all heading in the direction of GDPR, especially given recent high-profile data breaches and misuses of data.

*Do the GDPR and the consumer protection laws outright preclude digital communications, such as emails, from being exculpatory in the discovery phase? Or is it that it is more complex and difficult to collect that information in discovery?*

**L. CALDWELL:** Mostly, it is more difficult to collect and transfer the information. A lot of countries – not just those within GDPR – have data protection laws, some of which might be even more stringent than GDPR. Nearly all of those laws give individuals more control over their data than they would have in the US. Maybe that is only fair since I am sure that, if f you ask foreign governments or companies, they would note that they think it is unusual that they can so readily be prosecuted in the US for all sorts of different things without actually residing or having operations in the US.

*Thank you Leslie for speaking with us today.*

**KONTAKT:**

Leslie R. Caldwell
Latham & Watkins LLP
505 Montogomery Street / Suite 2000
San Francisco, CA 94111-6538, USA
Tel.: 001/415 3958134
leslie.caldwell@lw.com

Prof. Dr. Thomas Grützner
Latham & Watkins LLP
Maximillianstraße 13
80539 München
Tel.: 089/2080 38179
thomas.gruetzner@lw.com

Dr. Stefan Bartz
Latham & Waktins LLP
Warburgstraße 50
20354 Hamburg Tel.: 040/414030
stefan.bartz@lw.com

5 Vgl. hierzu auch *Larisch/Güngör* CCZ 2019, 59 (60).