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Foreign Corrupt Practices Act Alert

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February 2013 FCPA Judicial Decisions

In our recent **FCPA Year-in-Review: Developments of 2012 and Predictions for 2013**, we noted the likelihood of judicial developments under the Foreign Corrupt Practices Act (FCPA) in 2013, specifically identifying cases in the United States District Court for the Southern District of New York. The wait was short, as February has already yielded two S.D.N.Y. opinions addressing defendants' challenges in two FCPA cases: ***SEC v. Straub, et al.*** and ***SEC v. Sharef, et al.*** While these decisions are mostly relevant to legal issues pertaining to individuals outside the United States, the decisions do add to the scant body of FCPA case law. This alert discusses the key topics addressed in these opinions: the constitutional minimum contacts necessary for a court to exercise personal jurisdiction over a defendant; whether foreign emails' contact with servers in the United States satisfies the FCPA's interstate commerce element; and the tolling of the statute of limitations while a defendant is physically outside the United States.

SEC v. Straub, et al.

In December 2011, the Securities and Exchange Commission (SEC) sued Elek Straub, Andras Balogh, and Tamas Morvai, all former executives of Magyar Telekom, the largest telecommunications company in Hungary. (Magyar Telekom had previously settled cases with the Department of Justice (DOJ) and the SEC in 2011.)[1] The SEC claimed that Straub, Balogh, and Morvai, using a Greek intermediary, bribed officials in Macedonia in an attempt to block competitors from entering the market.[2] The SEC further alleged that the defendants used sham contracts to channel the corrupt payments to government officials. Along with other documents, the sham contracts were allegedly sent and received by Balogh, on behalf of his co-defendants, via emails that were routed through servers in the United States.[3] The SEC claimed further that, to cover up the scheme, the defendants falsified certifications regarding Magyar's financial statements; during the period of alleged violations, Straub purportedly signed false management representation letters to Magyar's auditors, and Balogh and Morvai signed allegedly false management subrepresentation letters for quarterly and annual reporting periods in 2005.[4] On October 29, 2012, the defendants moved to dismiss, arguing that the court lacked personal jurisdiction, that the claims were time-barred, and that the complaint failed to adequately state the claims alleged.

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[1] *See* United States v. Magyar Telekom, PLC, No. 11-CR-597 (E.D. Va. Dec. 29, 2011) (Deferred Prosecution Agreement); SEC v. Magyar Telekom PLC, No. 11-CV-9646 (S.D.N.Y. Jan. 3, 2012) (Final Judgments as to Magyar Telekom and Deutsche Telekom).
[2] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Dec. 29, 2011) (Complaint).
[3] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Dec. 29, 2011) (Complaint ¶ 39).
[4] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 9).

On February 8, 2013, Judge Richard Sullivan in the Southern District of New York denied the motion to dismiss in its entirety.[5] Judge Sullivan's opinion addressed three issues of note: (1) whether the court could exercise personal jurisdiction over the defendants in accordance with the Due Process Clause of the Constitution; (2) whether the statute of limitations had run; and (3) whether the interstate commerce element of the FCPA was adequately pleaded.

The Due Process Clause, of course, requires that the exercise of personal jurisdiction be founded on a defendant's contact with the forum and that the exercise of jurisdiction not offend traditional notions of justice. The personal jurisdiction analysis consequently turns on an assessment of whether the defendants had "minimum contacts" with the United States and of the reasonableness of the court exercising personal jurisdiction. The examination of minimum contacts is a constitutional requirement entirely independent from the FCPA, including the FCPA's own interstate commerce element.

Drawing on precedent holding that an individual's attempt to violate a forum's laws can provide the basis for the forum exercising personal jurisdiction, Judge Sullivan found that the court had personal jurisdiction over the defendants. The court reasoned that the defendants knew or had reason to know that their conduct was designed to violate U.S. securities regulations and thus was "directed toward the United States, even if not principally directed there," because their conduct would result in the filing of false or misleading financial reports in the United States.[6] Accordingly, Judge Sullivan held that the defendants' alleged cover-up through statements to Magyar auditors and the resulting false financial statements' impact on prospective purchasers of Magyar shares traded on American exchanges provided sufficient basis to satisfy the "minimum contacts" test. Calling their concerns "overblown," Judge Sullivan rejected the defendants' argument that the exercise of jurisdiction over them would automatically imply that any individual director, officer, or employee of an issuer in an FCPA case would also be subject to personal jurisdiction; he emphasized that his decision resulted from a fact-based inquiry—namely, "an analysis of the SEC's specific allegations regarding [d]efendants' bribery scheme, [d]efendants' falsification of Magyar's books and records, and [d]efendants' personal involvement in making representations and subrepresentations with respect to and in anticipation of Magyar's SEC filings."[7] Judge Sullivan explicitly clarified that "the SEC [did] not rely on [emails sent by Balogh that transited U.S. servers] as a basis for the Court's [personal] jurisdiction over him," and that Balogh's emails were not implicated in the court's personal jurisdiction analysis.[8]

Addressing the second element of the personal jurisdiction analysis, Judge Sullivan concluded that it would not be unreasonable to exercise personal jurisdiction over the defendants. He specifically noted that the defendants had not shown that the burden of defending in the Southern District of New York would be severe or gravely difficult.[9]

Next, Judge Sullivan agreed with the SEC that a plain reading of the five-year statute of limitations provision applicable to civil FCPA violations[10] is that the five-year period did not begin to run until an alleged offender was physically present in the United States.[11] The court's decision rested on the portion of the provision providing that, within the limitations period, the offender must be "found within the United States." This holding is significant in that it extends the FCPA's civil statute of limitations—potentially substantially—in the case of a foreign individual.

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[5] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 1).
[6] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 8).
[7] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 10-11).
[8] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 11, n.9).
[9] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 8-9, 12).
[10] *See* 28 U.S.C. § 2462.
[11] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 13).

Finally, Judge Sullivan determined that the "corrupt" intent element of the FCPA's anti-bribery provisions applies only to the making of an offer, payment, promise, or authorization of a payment. The court held, as a matter of first impression, that the "corrupt" intent requirement did not extend to the interstate commerce element so as to require the SEC to also allege and prove that a defendant specifically knew or intended that the U.S. mails or other means of interstate commerce would be used in furtherance of a bribe.[12] This holding was quite relevant because the SEC alleged only that the *Straub* defendants sent emails from outside the United States that, unbeknownst to them, were routed through or stored on network servers in the United States.[13] After concluding that the plain language of the FCPA is ambiguous, Judge Sullivan looked to the legislative history of the statute and the interpretation afforded similar provisions in other statutes requiring the use of interstate commerce. The court noted that other "courts have held that the use of interstate commerce in furtherance of violations of the securities laws, the mail and wire fraud statutes, and money laundering statutes is a jurisdictional element of those offenses."[14] As such, Judge Sullivan concluded, "defendants need not have formed the particularized *mens rea* with respect to the instrumentalities of commerce."[15]

Judge Sullivan also rejected the defendants' arguments that there was *no use*—much less corrupt use—of a means or instrumentality of interstate commerce because they lacked all knowledge that their emails would be routed through or stored in the United States and that such a trajectory was unforeseeable to them when sending emails in foreign states. The defendants had argued that because the SEC had failed to allege that the defendants personally knew that their emails would be routed through or stored on U.S. servers, the SEC had inadequately pleaded facts to satisfy the FCPA's requirement that the defendants "use" interstate commerce. Judge Sullivan found the issue of personal knowledge irrelevant to the question of use of interstate commerce, and held that "Internet traffic will not necessarily be entirely local in nature," thus seemingly adopting a bright-line rule that all email and/or internet usage in furtherance of a bribe that subsequently touches the United States will satisfy the interstate commerce element.[16]

SEC v. Sharef, et al.

In December 2011, the SEC sued Ulrich Bock, Bernd Regendantz, Carlos Sergi, Uriel Sharef, Stephan Signer, Herbert Steffen, and Andres Truppel, all former Siemens executives, alleging that they orchestrated a scheme that resulted in the payment of approximately $100 million in bribes to top government officials in Argentina in connection with a $1 billion project to create national identity cards.[17] (These charges followed the December 15, 2008 enforcement actions against Siemens AG for violations of the FCPA.)[18]Although Siemens was awarded the contract, political turmoil led to the suspension of the contract and, according to the SEC, caused Siemens to renegotiate with and pay more bribes to the new Argentine government. The SEC claimed that Steffen, the former CEO of Siemens Argentina S.A. and subsequently the Group President of Siemens Transportation Systems until his retirement in 2003, urged Siemens

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[12] *See* 15 U.S.C. § 78dd-1 (requiring the "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of any money . . . or . . . anything of value" to a foreign official).

[13] Again, the interstate commerce element of the FCPA is distinct from the personal jurisdiction minimum contacts analysis. Thus, while emails could conceivably be relevant to a minimum contacts analysis, here they pertain solely to whether the defendants made use of interstate commerce—an element necessary to bring conduct within the jurisdiction of the FCPA.

[14] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 16).

[15] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 16).

[16] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 17, n.13).

[17] SEC v. Sharef, et. al., No. 11-CV-9073 (S.D.N.Y. Dec. 13, 2011) (Complaint).

[18] *See* U.S. Securities and Exchange Commission Press Release No. 2011-263: SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina (Dec. 13, 2011) (noting that Siemens was previously charged with FCPA violations and paid $1.6 billion to resolve the charges with the SEC, DOJ, and Office of the Prosecutor General in Munich, Germany).

management—particularly Regendantz—to engage in these renegotiations and to funnel more money to the Argentine officials to prevent discovery of the earlier bribes. Regendantz ultimately authorized the bribes, but only after seeking additional guidance from his superiors at Siemens. On October 12, 2012, defendant Steffen filed a motion to dismiss, arguing that the court lacked personal jurisdiction over him and that the complaint was untimely filed.

On February 19, 2013, Judge Shira Scheindlin of the Southern District of New York granted Steffen's motion, reaching only the issue of personal jurisdiction and concluding that the court could not exercise jurisdiction over Steffen. After observing that the "SEC's allegations are premised on Steffen's role in encouraging Regendantz to authorize bribes to Argentine officials that ultimately resulted in falsified filings," Judge Scheindlin determined that Steffen's "actions are far too attenuated from the resulting harm to establish minimum contacts."[19] Judge Scheindlin noted the support for the exercise of jurisdiction over individuals who played a role in falsifying or manipulating financial statements—specifically calling attention to the *Straub* decision—but explained that the SEC's allegations were not founded on claims that Steffen authorized the bribes, or that he directed, ordered, or even had awareness of the cover ups, much less that he was involved in the falsification of SEC filings in furtherance of those cover ups.[20]

Importantly, Judge Scheindlin agreed that it is "by now well-established that signing or directly manipulating financial statements to cover up illegal foreign action, with knowledge that those statements will be relied upon by United States investors" satisfies the "minimum contacts" element necessary for the exercise of personal jurisdiction.[21] In a footnote, Judge Scheindlin clarified that she did not mean to imply that signing or directly manipulating financial statements is necessary, and that drawing such a line was unnecessary in light of the facts before her.[22] Judge Scheindlin did, however, posit that the exercise of jurisdiction against foreign defendants based on the effect of their conduct regarding SEC filings was "in need of a limiting principle." She pointed out that under the SEC's theory of minimum contacts "every participant in illegal action taken by a foreign company subject to U.S. securities laws would be subject to the jurisdiction of U.S. courts no matter how attenuated their connection with the falsified financial statements."[23]

Judge Scheindlin also concluded that an exercise of personal jurisdiction would be unreasonable. She pointed to Steffen's lack of geographic ties to the United States, his age (74), and his poor proficiency in English. Moreover, she reasoned, the SEC and DOJ had already obtained "comprehensive remedies" against Siemens, and Germany had resolved an individual action against Steffen—facts she concluded lessened the United States' interest in adjudicating an individual action against Steffen.[24]

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[19] SEC v. Sharef, et. al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 15).
[20] Indeed, Judge Scheindlin held that the facts that Steffen received a phone call from the United States to discuss the bribes or that a portion of the bribery payments were deposited in a New York bank were insufficient "evidence of conduct directed towards the United States to establish minimum contacts." SEC v. Sharef, et al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 16, n.63).
[21] SEC v. Sharef, et. al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 18).
[22] SEC v. Sharef, et. al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 18, n.67).
[23] SEC v. Sharef, et. al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 18-19).
[24] On December 12, 2011, Steffen and seven other individuals were indicted by DOJ. United States v. Sharef, et al., No. 11-CR-1056 (S.D.N.Y. Dec. 12, 2011) (Indictment).

Conclusions

Interstate Commerce Element of § 78dd-1

Straub concludes that, although other elements of an FCPA action require the government to demonstrate knowledge and corrupt intent, the interstate commerce element does not. Accordingly, it is no defense that a defendant is unaware that communications, bank wire transfers, and the like may be routed through the United States. Under *Straub*'s reasoning, in the early stages of an enforcement proceeding, it is sufficient that the government merely allege facts showing that a defendant's conduct made use of some means or instrumentality of interstate commerce.

Citing the defendants' reply brief in which the defendants had conceded that emails from one foreign state to another made use of interstate commerce, Judge Sullivan noted that "[a]s an initial matter, it is undisputed that the use of the Internet is 'an instrumentality of interstate commerce.'"[25] Accordingly, Judge Sullivan did not directly address the amount of "use" necessary to satisfy the interstate commerce element of § 78dd-1.[26] Nonetheless, as noted, the court did seemingly conclude that use of the Internet by anyone anywhere foreseeably implicates interstate commerce in the U.S., observing that "the Internet is a huge, complex, gossamer web . . . , [which is] all the more reason why it should be foreseeable to a defendant that Internet traffic will not necessarily be entirely local in nature." Moving forward, *Straub* will likely be invoked by the government to argue that satisfying the FCPA's interstate commerce element at the pleading stage is a low bar.

Statute of Limitations

The FCPA does not contain its own statute of limitations. Thus, civil FCPA actions brought by the SEC are subject to the five-year limitations period set forth in 28 U.S.C. § 2462. Judge Sullivan concluded that if a defendant is not physically present in the United States in the five years after which an FCPA claim accrues, the five-year limitation set forth in 28 U.S.C. § 2462 does not begin to run. This is important in that FCPA defendants, perhaps more so than defendants under other federal statutes, may be foreign nationals residing outside the United States. This statute-of-limitations conclusion is government friendly, as it could conceivably afford the government a longer time period in which to investigate and build its case.[27]

Behavior Targeted at the United States and Reasonableness of Suit

It bears emphasis that the "minimum contacts" and "reasonableness" inquiries attendant to a personal jurisdiction analysis will, by their nature, be limited to the facts of the case before the court. In the cases before them, both Judge Sullivan and Judge Scheindlin assessed whether the conduct alleged by the SEC was sufficiently directed at the United States to satisfy the due

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[25] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 15).

[26] Interestingly, as Judge Sullivan noted, the "Complaint alleges that *Balogh* used emails in furtherance of the bribe scheme by attaching [drafts of documents related to the scheme]. . . . The Complaint further alleges that the emails were 'sent from locations outside the United States, but were routed through and/or stored on network servers located within the United States.'" SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 15) (emphasis added) (quoting Complaint ¶ 39). As the Complaint does not separately allege Straub and Morvai's use of email in furtherance of the scheme, it appears that Judge Sullivan's conclusion is that the SEC adequately pleaded the interstate commerce element of the FCPA as to all defendants by virtue of Balogh's use of interstate commerce. Indeed, at a later point in his opinion, Judge Sullivan characterizes the Complaint as "specifically alleg[ing] that Balogh emailed" the fraudulent documents "on behalf of [d]efendants." SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 17, n.13) (emphasis added) (quoting Complaint ¶ 39).

[27] The statute upon which Judge Sullivan based his conclusion applies only to the statute of limitations in civil cases. In the criminal arena, the statute setting forth the general statute of limitations for non-capital federal offenses contains different language, requiring only that an indictment or information be "found" within the five-year period. *See* 18 U.S.C. § 3282. For these two reasons, Judge Sullivan's statute-of-limitations conclusion in *Straub* is unlikely to have any impact on criminal FCPA enforcement actions.

process minimum contacts test for the exercise of personal jurisdiction. Both judges rested their conclusion on whether the alleged conduct contributed to the filing of false or misleading financial reports that would have an effect in the United States. It is thus safe to say that the further removed the conduct is from the filing of false financial statements, the better the argument that the court lacks personal jurisdiction.[28] As Judge Scheindlin observed, "[i]llegal corporate action almost always requires cover ups, which to be successful must be reflected in financial statements. . . . Absent any role in the cover ups themselves, let alone any role in preparing false financial statements," the exercise of jurisdiction is strained.[29]

Interestingly, Judge Scheindlin determined that the United States' interest in an enforcement action against Steffen was lessened by its prior successful actions against Siemens and Germany's successful action against Steffen. It is unlikely that these factors would have outweighed a decision to exercise personal jurisdiction had the court found sufficient minimum contacts. Nevertheless, in an increasingly internationalized enforcement arena that is making greater efforts at pursuing individuals, this conclusion could reverberate in cases in which the minimum contacts question is a close call.

Reconciling the Two Opinions

We do not believe that Judge Sullivan's and Judge Scheindlin's personal jurisdiction decisions are at odds with one another. In both cases, the judges' minimum contacts analyses appear to have hinged on whether the defendant engaged in ultimately U.S.-directed acts that proximately harmed U.S. investors, such as signing false financial certifications or misleading company auditors. The judges applied the same standards and relied on the same factors, but, based on the alleged facts before them, reached different conclusions. Judge Sullivan found it important that the *Straub* defendants had "signed management letters to Magyar's auditors, allegedly misrepresenting that: (1) 'we have made available to you all financial records and related data'; (2) 'we are not aware of any accounts, transactions or material agreement not fairly described and properly recorded in the financial and accounting records and underlying the financial statements'; and (3) 'we are not aware of any violations or possible violations of laws or regulations.'"[30] He concluded that this conduct was designed to violate U.S. securities laws and was thus directed toward the United States.

Conversely, Judge Scheindlin determined that Steffen's only potentially U.S.-related act was his receipt while outside the United States of one phone call placed from the United States. She explained that the SEC had not alleged that Steffen "directed, ordered or even had awareness of the cover ups, . . . much less that he had any involvement in the falsification of SEC filings in furtherance of those cover ups."[31] By basing their personal jurisdiction decisions on the defendants' alleged involvement in cover ups and the implications those cover ups would have in the United States or the filing of false financial statements that would affect U.S. investors, *Straub* and *Sharef* place consistent parameters on the fact-bound personal jurisdiction inquiry.[32]

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[28] Of course, while the connection to false financial statements was dispositive for the personal jurisdiction decisions in *Straub* and *Sharef*, and may be dispositive in other cases as well, the outcome in other cases may also depend on the degree of other contacts with the United States, such as whether the defendant is directing or undertaking conduct in the United States to further the bribery.
[29] SEC v. Sharef, et. al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 18-19).
[30] SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 8, 2013) (Memorandum and Order at 3) (quoting Complaint ¶ 63).
[31] SEC v. Sharef, et al., No. 11-CV-9073 (S.D.N.Y. Feb. 19, 2013) (Opinion and Order at 16).
[32] On February 22, 2013, the *Straub* defendants moved for certification of an interlocutory appeal arguing just the opposite. Seeking to show that Judge Sullivan's order involves a controlling question of law as to which there is substantial ground for difference of opinion, the *Straub* defendants assert that the "lack of direct Second Circuit precedent confronting the [question of personal jurisdiction in FCPA cases], the disparate outcomes in the instant case and *Sharef*, and the complexity of the questions presented, support finding substantial ground for difference of opinion." SEC v. Straub, et al., No. 11-CV-9645 (S.D.N.Y. Feb. 22, 2013) (Memorandum of Law in Support of Defendants' Motion to Certify an Interlocutory Appeal at 9).

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