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Line in the Sand: What Actions Bring Foreign Nationals Within Reach of an FCPA Action

BY THE GLOBAL COMPLIANCE AND DISPUTES PRACTICE GROUP

Last month, two judges in the Southern District of New York issued decisions considering when enforcement actions by the U.S. Securities and Exchange Commission can proceed against foreign nationals in cases involving allegations of bribes paid in foreign countries. Viewed together, the decisions provide guidance in applying an otherwise case-specific analysis.

In both cases, defendants moved to dismiss for lack of personal jurisdiction. At issue in the cases was the due process test for personal jurisdiction, which has two related components: the "minimum contacts" inquiry and the "reasonableness" inquiry. A court first must determine whether the defendant has sufficient contacts with the United States to justify the court's exercise of personal jurisdiction.[1] Most common in these types of enforcement actions is so-called "specific jurisdiction," which exists when a defendant "purposefully directs his activities at residents of the forum," and the underlying cause of action "arises out of or relates to those activities."[2] To establish the necessary "minimum contacts" to justify such "specific" jurisdiction, the plaintiff must show that the defendant "purposefully availed" himself of the privilege of doing business in the United States and that the defendant could foresee being "haled into court" there.[3] The second stage of the due process inquiry asks whether the assertion of jurisdiction comports with traditional notions of fair play and substantial justice -- that is, whether it is "reasonable" under the circumstances of the particular case.[4] As one of these recent decisions pointed out, "the reasonableness inquiry is largely academic in [such] cases brought under federal law which provides for nationwide service of process because of the strong federal interests involved."[5]

Enough Said: Finding Personal Jurisdiction

In *SEC v. Straub*, Judge Richard Sullivan denied defendant's motion to dismiss, finding the SEC met its burden of establishing personal jurisdiction over the defendants.[6] The defendants were executives of a Hungarian telecommunications company, Magyar Telekom, Plc. ("Magyar") and allegedly bribed Macedonian government officials in 2005. The defendants are all Hungarian nationals who were never physically present in the United States. At the time of the alleged bribes, Magyar's securities were publicly traded in the United States through American Depository Receipts ("ADRs") listed on the New York Stock Exchange. The defendants had signed certifications to Magyar's auditors under the Sarbanes-Oxley Act ("SOX") regarding the accuracy of the company's financial statements and internal controls.[7]

In considering these allegations, Judge Sullivan found that the SEC's allegations met the requirements for personal jurisdiction. The court emphasized that defendants allegedly: (1) engaged in a cover-up of the payments through statements to the auditors, (2) knew that the company traded ADRs on a United States stock exchange, and (3) knew that prospective purchasers likely would be influenced by any false statements or filings. The court added that "even if Defendants' alleged *primary intent* was not to cause a tangible injury in the United States, it was nonetheless their intent, which is sufficient to confer jurisdiction."[8]

Falling Short: Dismissal for Lack of Personal Jurisdiction

Less than two weeks later, another judge in the Southern District of New York reached an opposite conclusion, finding that the SEC did not allege enough facts to establish personal jurisdiction.[9] The SEC brought an action against Herbert Steffen and six other former senior executives at Siemens Aktiengesellschaft ("Siemens"), a multinational engineering and electronics company headquartered in Germany. Steffen is a German citizen who had various management roles with Siemens, including as CEO of Siemens S.A. Argentina. The SEC alleged bribes to Argentine government officials in connection with obtaining and renewing a contract to create national identity cards.

With respect to defendant Steffen, Judge Shira Scheindlin found that extending personal jurisdiction over him would exceed the limits of due process. Judge Scheindlin explained that the allegations against Steffen were premised on his role in encouraging others to authorize payments that ultimately resulted in falsified filings signed by others.[10] Based on these allegations, Judge Scheindlin doubted whether Steffen's actions were even a proximate cause of the false filings and found them "far too attenuated from the resulting harm" to establish the requisite minimum contacts.[11] She explained that extending personal jurisdiction under the SEC's theory would mean that "*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. This would be akin to a tort-like foreseeability requirement, which has long been held to be insufficient."[12]

Judge Scheindlin contrasted Steffen's situation from that addressed by *Straub*, emphasizing that the defendants in *Straub* were alleged to have (1) orchestrated the scheme, (2) signed off on misleading management representations to the company's auditors, and (3) signed false SEC filings. As to Steffen, on the other hand, the SEC did not allege that he (1) authorized the bribes, (2) directed, ordered, or was aware of any cover up, or (3) had any involvement in falsified SEC filings in connection with the cover up. Judge Scheindlin also noted other factors that weighed against finding personal jurisdiction: Steffen's lack of geographic ties to the United States, his age, his poor proficiency in English, the DOJ and SEC already obtained remedies against Siemens, and Germany already resolved an action against him.[13]

Other Notable Take-Aways from *Straub*

While the two cases provide some guidance regarding personal jurisdiction over foreign nationals, the Straub decision also addressed two legal issues in a way that may expand the exposure of foreign defendants.

Statute of limitations awaits physical presence in the United States: First, the court rejected an argument that the SEC's action, filed in 2011, was untimely because the alleged conduct took place in 2005. The statute of limitations period is set forth in 28 U.S.C. § 2462, which states that "an action . . . shall not be entertained unless commenced within five years from the date when the claim

first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." The SEC argued that the statute thus applies only if the offender is found within the United States within that period.[14] The court agreed, rejecting the defendants' argument that the five-year statute of limitations begins to run when a defendant is "subject to service of process elsewhere by some alternative means."[15] The court focused on the plain meaning of the statute and found that the defendant's physical presence in the United States is necessary for the five-year statute to start running.[16]

Conduct sufficient to trigger statutory jurisdiction: Second, the court considered the substantive requirement of a defendant's use of "the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money" to a foreign official.[17] The SEC alleged that defendants sent documents regarding the alleged scheme through emails routed through or stored on network servers located in the United States, although the senders and recipients were outside of the United States. Defendants argued that they did not know or intend that servers in the United States would be involved. The court thus had to consider whether there is an intent element applicable to the use of instrumentalities of interstate commerce. Considering the legislative history of the statute on this matter of first impression, Judge Sullivan found that Congress did not intend for an intent requirement for the "make use of . . . any means or instrumentality of interstate commerce" element of the statute.[18] Therefore SEC only needed to allege that servers in the United States were used in the transmission of the emails. Regarding whether it was foreseeable that emails would "touch servers located elsewhere," the court pointed to defendants' own argument that "the internet is a huge, complex gossamer web" and found it "foreseeable to a defendant that Internet traffic will not necessarily be entirely local in nature."[19]

This appears to be an extension of the government's position regarding the conduct necessary to trigger this statutory provision. In 2012, the DOJ and SEC asserted their position that this provision is triggered through any use of interstate commerce in furtherance of a corrupt payment, including "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States" or "sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system."[20]

Straub thus removes any knowledge or intent element to the use of interstate commerce. Nonetheless, such conduct may not be sufficient to establish the minimum contacts necessary for personal jurisdiction over a foreign national. In Sharef, Judge Scheindlin considered Steffen's participation in a phone call initiated from the United States and the fact that a portion of the payments in question were deposited in a New York bank. In the context of the minimum contacts analysis for personal jurisdiction, Judge Scheindlin found that Steffen did not place the call and did not direct that the funds be routed through a New York bank, such that neither factor provided "sufficient evidence of conduct directed towards the United States to establish minimum contacts."[21]

Conclusion

At first glance, these two decisions may suggest expanded risk for foreign nationals through tolled statute of limitations, broad statutory jurisdiction, and expansive personal jurisdiction. But on closer analysis, the decisions also highlight circumstances when U.S. judges trim the reach of the FCPA across borders. Undoubtedly, the decisions provide additional guidance on where courts might draw the line when considering their reach over foreign nationals.

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[1] *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Metro Life Ins. Co. v. Robertson—Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).

[2] *Metro Life Ins. Co*, 84 F.3d at 567-68.

[3] *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 242-43 (2d Cir. 1999); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-76, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[4] *Id.*

[5] *Securities & Exchange Commission v. Straub*, No. 11 Civ. 9645, 2013 Dist. LEXIS 22447, at *33-34 (S.D.N.Y. Feb. 8, 2013).

[6] *Straub*, 2013 Dist. LEXIS 22447, at *25.

[7] *Id.* at *6-8.

[8] *Id.* at *25.

[9] *Securities & Exchange Commission v. Sharef*, No. 11 Civ. 9073, 2013 U.S. Dist. LEXIS 22392 (S.D.N.Y. Feb. 19, 2013).

[10] *Sharef*, 2013 U.S. Dist. LEXIS 22392, at *16.

[11] *Id.*

[12] *Id.* at *21 (emphasis in original).

[13] *Id.* at *2 n.2.

[14] *Straub*, 2013 Dist. LEXIS 22447, at *39.

[15] *Id.* at *38-89.

[16] *Id.* at *36-39.

[17] 15 USC § 78dd–3.

[18] *Straub*, 2013 Dist. LEXIS 22447, at *44-46.

[19] *Id.* at *46-51.

[20] U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" at 11 (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resourceguide.pdf.

[21] *SEC v. Sharef*, 2013 U.S. Dist. LEXIS 22392 at *17-18 n. 63.