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Jurisdiction

How Broad Is the FCPA's Reach Over the Acts of Foreign Nationals?

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Within the last few months, U.S. courts, the Department of Justice and the Securities and Exchange Commission clarified the reach of the FCPA over foreign nationals, and courts determined that physical presence is required to begin the statute of limitations for bribery claims. This article distills important takeaways from those authorities and provides insight on those issues, harmonizing the holdings of *SEC v. Straub* and *SEC v. Sharef* and the FCPA Resource Guide.

Territorial Requirement and Intent

The Guidance

In November 2012, the U.S. Department of Justice and the Securities and Exchange Commission issued their much-anticipated FCPA Guidance[1] In it, the two agencies explained that the FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States. See "DOJ and SEC Officials Provide Candid Insight into the Recently Issued FCPA Guidance," The FCPA Report, Vol. 1, No. 13 (Nov. 28, 2012).

The Guidance's descriptions of when a company is an "issuer" or "domestic concern" for purposes of the FCPA are relatively straightforward. Beyond those categories, the Guidance advanced several theories of jurisdiction, particularly with respect to foreign issuers and the requisite nexus to interstate commerce, foreign nationals, and non-issuer foreign companies. For example, the Guide asserts that foreign issuers, and their officers, directors, employees, agents, or stockholders, may be subject to prosecution based on nothing more than "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States . . . [,] sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States." The Guidance also expresses the agencies' position that "[a] foreign national or company may be liable if it aids or abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the U.S." (Guidance at 11).

The Straub Case Removes Intent from Interstate Commerce Requirement

Earlier this year, the Southern District of New York agreed with this interpretation as sufficient U.S. nexus under the "interstate commerce" requirement for FCPA claims against foreign-private issuers and their non-U.S. officers and employees under 15 U.S.C. § 78dd-1.[2] See "One U.S. District Court in New York Affirms Broad Jurisdictional and Temporal Reach of the FCPA While Another Dismisses FCPA Case for Lack of Contacts," The FCPA Report, Vol. 2, No. 4 (Feb. 20, 2013).

At issue was 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.[3] In the case, the SEC argued that defendants met the requirement by sending documents regarding the alleged scheme by e-mails 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 intend or know that United States servers would be involved. The court thus needed to decide whether the "use of instrumentalities of interstate commerce" requirement included an intent element, an issue of first impression.

The court turned to the legislative history of the statute and found that Congress did not intend for an intent requirement to apply to the "make use of . . . any means or instrumentality of interstate commerce" element of the statute.[4] Accordingly, the court deemed it sufficient for the SEC to allege that servers in the United States were involved, regardless of defendants' knowledge of intent. As the court explained, it was "foreseeable to a defendant that Internet traffic will not necessarily be entirely local in nature."[5] Defendants have sought interlocutory appeal of the decision.

This decision appears to be an extension of the government's position regarding the conduct necessary to trigger this statutory provision because it removes any knowledge or intent element to the use of interstate commerce. Notably, however, such conduct may not be sufficient to establish the minimum contacts necessary for personal jurisdiction over a foreign national.

The Steffen Case Finds Insufficient U.S. Contacts

Also in February 2013, the Southern District of New York considered a defendant's participation in a phone call initiated from the United States and the deposit of a portion of the alleged improper payments in a New York bank as triggers for personal jurisdiction. The court emphasized that the defendant did not place the call and did not direct that the funds be routed through a New York bank. Therefore, the court determined that neither factor provided "sufficient evidence of conduct directed towards the United States to establish minimum contacts."[6]

An Emphasis on the Signing of SEC Filings for Personal Jurisdiction

At issue in the two recent decisions in the Southern District of New York is the due process test for personal jurisdiction, which consists of two inquiries: "minimum contacts" and "reasonableness." Courts must consider whether defendants have sufficient contacts with the United States to justify the court's exercise of personal jurisdiction.[7] Among the considerations before the courts are whether a defendant "purposefully directs his activities at residents of the forum"[8] and "purposefully avails" himself of the privilege of doing business in the United States such that a defendant could foresee being "haled into court" there.[9] In addition, courts consider whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice – that is, whether it is "reasonable" in the particular case.[10]

In SEC v. Straub,[11] the Southern District of New York found that the SEC met its burden of establishing personal jurisdiction over the defendants and denied a motion to dismiss.[12] Defendants were executives of a Hungarian telecommunications company, Magyar Telekom, Plc.

(Magyar), and allegedly bribed Macedonian government officials in 2005. Although defendants were Hungarian nationals who were never physically present in the United States, they had signed certifications to Magyar's auditors under the Sarbanes-Oxley Act regarding the accuracy of the company's financial statements and internal controls.[13] 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.

Given these allegations, Judge Sullivan found that the SEC's complaint met the test 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."[14]

Less than two weeks later, in *SEC v. Sharef*, another court in the Southern District of New York reached the opposite conclusion, finding allegations insufficient to establish personal jurisdiction.[15] 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, the court found that personal jurisdiction over him would exceed the limits of due process. The court noted 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.[16] The court thus found it doubtful that these actions were even a proximate cause of the false filings and moreover that the actions were "far too attenuated from the resulting harm" to establish the requisite minimum contacts.[17] The court went further, explaining that to extend personal jurisdiction as the SEC argued 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."[18]

The *Sharef* decision itself contrasted the *Straub* decision. Harmonizing the results, the *Sharef* court emphasized that the *Straub* defendants allegedly (1) orchestrated the scheme, (2) signed off on misleading management representations to the company's auditors, and (3) signed false SEC filings. On the other hand, the SEC in *Sharef* did not allege that Steffen (1) authorized the bribes, (2) directed, ordered, or was aware of any cover up, or even (3) had any involvement in falsified SEC filings in connection with the cover up. While a core distinction appears to rest on the defendants' signing SEC filings, this was not the only differentiation. Other factors contributed to the *Sharef* court's finding of no personal jurisdiction: Steffen's lack of geographic ties to the United States, his age, his poor proficiency in English, the DOJ's and SEC's prior settlement with Siemens, and Germany's resolutions of an action against Steffen.[19]

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Running the Statute of Limitations Clock

In considering the potential reach of the FCPA over foreign nationals, *Straub* offers another warning. Defendants had argued that the SEC's action, filed in 2011, was untimely because the alleged conduct took place in 2005. The relevant statute of limitations 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."[20] The SEC argued that the statute only began to run once the offender was present within the United States.[21] The court agreed, rejecting 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."[22] The court focused on the plain meaning of the statute and found that defendant's physical presence in the United States is necessary for the five-year statute to start running.[23]

Mixed Success for Prosecutors

Over the past year, United States prosecutors have had mixed success advancing their theories of FCPA liability in the courts. These recent developments both support the government's theories and limit their application. On the one hand, at least one court has now endorsed the United States government's position and expanded the reach of the FCPA over foreign nationals through tolled statute of limitations, broad statutory application, and expansive personal jurisdiction. The *Straub* holdings mean that non-U.S. officers of U.S. registrants or their consolidated subsidiaries could face potential liability under the FCPA in near perpetuity based on a single e-mail sent and received entirely abroad if that e-mail is merely and unwittingly routed through the United States. But the *Sharef* decision reminds us that another separate limitation on the reach of the courts remains. The personal jurisdiction analysis allows U.S. courts to trim the reach of the FCPA across borders. In analyzing potential liability, a comprehensive approach and analysis is even more necessary given this additional guidance on where courts might draw the line when considering their reach over foreign nationals.

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[1] 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), available here.

[2] *Securities & Exchange Commission v. Straub*, No. 11 Civ. 9645, 2013 Dist. LEXIS 22447, at *43-51 (S.D.N.Y. Feb. 8, 2013).

[3] 15 USC § 78dd–3.

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

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

[6] *Securities & Exchange Commission v. Sharef,* No. 11 Civ. 9073, 2013 U.S. Dist. LEXIS 22392, at *17-18 n. 63 (S.D.N.Y. Feb. 19, 2013).

[7] *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).

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

[9] *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).

[10] *Id*.

[11] *Straub*, 2013 Dist. LEXIS 22447, at *33-34.

[12] *Id*., 2013 Dist. LEXIS 22447, at *25.

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

[14] *Id*. at *25.

[15] *Sharef*, 2013 U.S. Dist. LEXIS 22392.

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

[17] *Id*.

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

[19] *Id*. at *2, n.2.

[20] 28 U.S.C. § 2462.

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

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

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