Recent SDNY Opinions Provide Guidance for Foreign Nationals Charged with Violations of the FCPA

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Two recent decisions out of the Southern District of New York provide new guidance on the scope of the jurisdictional breadth of the FCPA. These cases — *SEC v. Straub, et al.*, No. 11 Civ. 9645 (RJS) (S.D.N.Y. 2013), and *SEC v. Sharef, et al.*, No. 11 Civ. 9073 (SAS) (S.D.N.Y. 2013) — together provide valuable insight into the contours and limits of SEC jurisdiction over foreign national FCPA defendants.

In *Straub*, Judge Richard J. Sullivan denied a motion to dismiss filed by three former executives of a Hungarian telecommunications company whom the SEC charged with bribing foreign officials and covering up these bribes by falsifying corporate records and filings. The *Straub* decision broke ground in two respects. First, in a matter of first impression, Judge Sullivan held that the five-year statute of limitations applicable to FCPA actions does not start to run until a defendant is physically present in the United States. Second, Judge Sullivan held that the FCPA did not set forth a *mens rea* requirement for the use of instrumentalities of interstate commerce; as a result, the SEC is not required to prove that a defendant intended to use an instrumentality of interstate commerce (in this case, the routing of foreign emails through a U.S. server), but rather must simply show that such instrumentalities were in fact used. Judge Sullivan also found that the exercise of personal jurisdiction was proper because the defendants' alleged conduct was sufficiently directed toward the United States to establish minimum contacts.

In *Sharef*, Judge Shira A. Scheindlin granted a motion to dismiss filed by a foreign national former CEO whom the SEC alleged facilitated the payment of bribes to foreign officials to obtain and retain business. Judge Scheindlin held that the court lacked personal jurisdiction over the defendant in *Sharef*. Notably, Judge Scheindlin found that the defendant's actions in the alleged scheme were far too attenuated for the SEC to establish minimum contacts because the defendant merely urged and pressured another executive to make bribes and did not actually authorize the bribes. Since the bribes were authorized by other "higher-ups" at the company, it was questionable whether the defendant was even the proximate cause of the bribes themselves. In addition, the SEC failed to allege that the defendant directed or was aware of the subsequent cover-up and falsification of SEC filings that U.S. investors would have relied upon.

STRAUB BACKGROUND

In *Straub*, the SEC brought an action against three former executives of Magyar Telekom, Plc., a Hungarian telecommunications company that also operated in Macedonia through a subsidiary. In early 2005, the Macedonian government enacted a new law that liberalized the

telecommunications industry in a manner that created additional costs for Magyar and allowed for a new competitor to start doing business there. To mitigate the law's adverse effects, the defendants allegedly bribed Macedonian government officials from both political parties, resulting in a secret agreement whereby Magyar's Macedonian subsidiary would pay €95 million to the Macedonian government as a dividend payment and millions of Euros more to government officials. The defendants allegedly hid the payments to Macedonian officials by recording them as contracts for consulting or marketing services. Moreover, the SEC alleged that the defendants lied to Magyar's auditors and falsely certified management representation letters for quarterly and annual reporting periods in 2005.[1]

The defendants moved to dismiss, arguing, *inter alia*, that the SEC's action was time barred, since more than five years had passed since the SEC's claims first accrued; and that the complaint failed to adequately allege that they made use of interstate commerce in furtherance of their scheme, since the SEC did not allege that the defendants personally knew that their emails would be routed through or stored on servers within the United States.

THE DECISION

On February 8, 2013, Judge Sullivan denied the defendants' motion to dismiss in its entirety. Judge Sullivan analyzed the statute of limitations issue by looking to the language of the catch-all provision in 28 U.S.C. § 2462, which provides that an FCPA claim must be brought "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."

At issue was whether the limitations period begins to run only once a defendant is physically within the United States, or if the limitations period could also begin to run once a defendant is subject to service of process elsewhere by some other means. After examining the text, Judge Sullivan found that the statute was not ambiguous and that the plain meaning of the statute requires that an offender be physically present in the United States for the statute of limitations to run. In so holding, Judge Sullivan rejected the defendants' arguments that the Hague Service Convention — which allows for service of individuals who are not found in the United States — altered the effect of Section 2462. Simply put, because the foreign national defendants had not been present in the United States since the time of the alleged offense, the limitations period had not started to run and the SEC's claims were timely.

Regarding whether the SEC adequately alleged that the defendants made use of an instrumentality of interstate commerce, at issue was the interpretation of 15 U.S.C. § 78dd-1(a), which provides that it is unlawful for covered persons to

> make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment,

[1] Both Magyar and its parent, Deutsche Telekom AG, are U.S.-registered foreign-private issuers whose securities are traded on the New York Stock Exchange in the form of American Depositary Receipts (ADRs).

> promise to pay, or authorization of the payment of any money . . . or . . . anything of value to [a foreign official].

The SEC alleged in its complaint that the defendants sent emails from outside the United States, and that those emails were either routed through or stored on servers within the United States. The defendants argued, however, that this was not enough, because the word "corruptly" as used in the FCPA requires some element of knowledge or intent with respect to the use of the means or instrumentality of interstate commerce.

Noting that the statutory language was ambiguous, Judge Sullivan looked to the legislative history and found that while Congress intended to create a *mens rea* requirement for the underlying bribery, it did not express a corresponding intent to create a *mens rea* requirement for the use of an instrumentality of interstate commerce. This reading, Judge Sullivan noted, is consistent with how courts have interpreted similar provisions in federal securities laws, mail and wire fraud statutes, and money laundering statutes. Judge Sullivan thus concluded that by pleading that emails were routed through or stored on severs within the United States, the SEC adequately pled the jurisdictional element of an FCPA violation — even if the defendants were not aware of where their emails would be routed or stored. In other words, the term "corruptly" as used in the FCPA applies to the act in furtherance of an improper payment, and not to the use of the mails or any means or instrumentality of interstate commerce.

Judge Sullivan's holding that a defendant need not intend to use an instrumentality of interstate commerce is intertwined with his related holding on the issue of personal jurisdiction. He found that the defendants had sufficient minimum contacts with the United States because they allegedly covered up their improper payments knowing that Magyar's securities traded in the United States and that prospective purchasers of Magyar's securities would be injured by their conduct. These two holdings together underscore the potential breadth of the FCPA and its impacts on foreign national defendants, particularly those who are officers or employees of issuers. Yet while the implications of these holdings are potentially very broad, another decision issued soon after by another judge in the same court provides practitioners with guidance as to the limits of this theory.

SHAREF BACKGROUND

In *Sharef*, the SEC brought an action against seven foreign nationals who were former senior executives at Siemens AG. The court's instant ruling was on a motion to dismiss filed by Herbert Steffen, a German national and the former CEO of Siemens's Argentine subsidiary. The SEC alleged that between 1996 and 2007, the defendants engaged in a bribery scheme in which Siemens paid over $100 million in bribes to government officials in Argentina relating to a contract for a billion-dollar project to create national identity cards. After the project was canceled, Siemens instituted an arbitration proceeding to recover lost profits and costs; but because the bribes initially paid to obtain the contract would preclude recovery in arbitration, the defendants concealed the bribes, and ultimately paid additional bribes to conceal the initial bribery scheme. Siemens was awarded $217 million in the arbitration proceeding. The SEC alleged that the quarterly and annual Sarbanes-Oxley certifications filed from 2002 to 2006 by Siemens's operating group were fraudulent.

Steffen moved to dismiss on the grounds that the court lacked personal jurisdiction and that the SEC's claims were untimely.

THE DECISION

On February 19, 2013, Judge Scheindlin granted Steffen's motion and dismissed the charges against him. Judge Scheindlin found that the SEC had not alleged sufficient minimum contacts for Steffen to be subject to personal jurisdiction in the United States. While Steffen may have "urged" and "pressured" another executive, Bernd Regendantz, to make bribes, Regendantz did not actually make the bribes until after he had consulted with "higher-ups" who allegedly gave the ultimate instructions to make the improper payments. Steffen did not authorize the bribes (in fact, he had retired before some of the bribes were made), and the SEC failed to allege that Steffen had any role in the subsequent cover-up and falsification of SEC filings.[2] Consequently, it was doubtful whether Steffen proximately caused the bribes to be paid, making his contact with the United States more attenuated. Interestingly, Judge Scheindlin found that the SEC's allegation that a portion of the bribery payments were deposited in a New York bank account did not provide sufficient evidence of conduct directed toward the United States, since Steffen did not direct that the bribery payments be routed through a New York bank. Judge Scheindlin also held that a phone call made from the United States by Sharef — a managing board member — to Steffen in connection with the bribery scheme was insufficient evidence of conduct directed toward the United States to establish minimum contacts, since Steffen did not place the calls to Sharef.

Judge Scheindlin specifically distinguished *Straub* and noted that the lynchpin for decisions exercising jurisdiction in these types of cases is that the defendant "participates in a fraud *directed* to deceiving United States shareholders." While signing a false financial statement satisfies this test, Judge Scheindlin held that "the exercise of foreign jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of some limiting principle"; if the court were to find personal jurisdiction existed over Steffen, "minimum contacts would be boundless." Without any alleged role in the cover-up or any role in preparing the false financial statement, the exercise of personal jurisdiction would exceed the limits of due process.[3] The *Sharef* decision is important in that it demonstrates that SEC jurisdiction over foreign nationals is not limitless, even for issuers and even where some U.S. conduct is present.

LOOKING AHEAD

Together, the *Straub* and *Sharef* decisions help to inform the boundaries for jurisdictional issues in FCPA cases. In *Straub*, the combination of the court's statute of limitations analysis and its

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[2] The SEC alleged that Regendantz signed the falsified quarterly and annual certificates, not Steffen.

[3] Judge Scheindlin also found that the exercise of personal jurisdiction over Steffen would be unreasonable given Steffen's advanced age, poor proficiency in English, and the forum's diminished interest in adjudicating the matter. As Judge Scheindlin found the personal jurisdiction issue dispositive, she did not analyze Steffen's statute of limitations argument.

interpretation of the interstate commerce requirement — coupled with its personal jurisdiction holding — is a potentially powerful tool for the government in extending the reach of the FCPA, and it could make it harder for foreign national FCPA defendants to defeat these types of cases on jurisdictional grounds. For one, it could make it more difficult for individual defendants employed abroad by a U.S. issuer to contest personal jurisdiction, especially where such defendants are aware that their conduct will affect investors in the United States. And for defendants with more than a tangential role in authorizing or paying bribes, *Straub* could result in even fewer foreign nationals contesting claims against them, resulting in more settlements. Standing alone, *Straub* might encourage the SEC to broaden its net and bring charges against even more foreign nationals.

However, when read in conjunction with *Sharef*, it becomes apparent that there are still limits to personal jurisdiction over foreign national FCPA defendants. The *Sharef* decision gives defendants with minimal roles in bribery schemes — roles short of authorizing payments or directing (or knowing about) cover-ups — a strong basis for contesting personal jurisdiction in these types of cases. While the personal jurisdiction analysis is bound to be fact-specific, Judge Scheindlin's decision in *Sharef* does provide some relief to those who feared that the jurisdictional limits of the FCPA would be boundless.

The jurisdictional holdings as set forth in *Straub* and *Sharef* will likely serve as guideposts for other courts facing these issues. Still, much of the jurisdictional landscape between the *Straub* and *Sharef* decisions remains unchartered, and counsel should remain apprised of the evolving and important jurisprudence in this area.

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