Legal Backgrounder

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PERSONAL JURISDICTION OVER FOREIGN NATIONALS IN FOREIGN BRIBERY CASES CURTAILED

by
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Two federal district court judges in the Southern District of New York recently issued decisions addressing whether United States courts have jurisdiction over foreign individuals whom the Securities and Exchange Commission ("SEC") charged with violating the Foreign Corrupt Practices Act ("FCPA"). In *SEC v. Straub*, Judge Richard Sullivan denied defendants' motions to dismiss, finding that personal jurisdiction existed over Hungarian citizens who allegedly directed bribes paid by Magyar Telekom, Plc ("Magyar") to Macedonian government officials and who allegedly signed misleading management representation letters and false SEC filings.[1] Conversely, in *SEC v. Steffen*, Judge Shira Scheindlin granted a defendant's motion to dismiss, finding that personal jurisdiction did not exist over a German citizen allegedly involved in bribes paid by Siemens Aktiengesellschaft to Argentine government officials because the defendant, unlike the defendants in *Straub*, was not alleged to have participated directly in the falsification of financial statements purportedly relied on by United States investors.[2] The distinction between these two cases – whether the defendant played a role in the falsification of SEC filings and thus directed conduct toward the United States – suggests a limiting principle regarding the extent of the FCPA's reach.

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1 Memorandum and Order, *SEC v. Elek Straub*, 11 Civ. 9645 (Feb. 8, 2013), Dkt. Entry No. 48 [hereinafter Straub Order].

2 Opinion and Order, *SEC v. Sharef et al.*, 11 Civ. 9073 (Feb. 19, 2013), Dkt. Entry No. 33 [hereinafter Steffen Order].

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SEC v. STRAUB

On December 29, 2011, the SEC and the Department of Justice ("DOJ") each charged Magyar, a Hungarian telecommunications company, with violating the FCPA's anti-bribery provisions by bribing government officials in (a) Macedonia, to mitigate the effects of unfavorable legislation, and (b) Montenegro, to secure favorable terms for the acquisition a state-owned telecommunications company. The SEC also charged, and the DOJ entered into a deferred prosecution agreement with, Magyar's German parent, Deutsche Telekom AG, in connection with violations of the FCPA's books and records and internal controls provisions. These alleged violations were based on false entries in Magyar's books and records that were consolidated into Deutsche Telekom's books and records. Magyar and Deutsche Telekom agreed to resolve the enforcement actions taken against them by paying over $95 million in criminal fines and civil penalties. The companies were supposedly subject to personal jurisdiction in the United States because their securities were publicly traded through American Depository Receipts ("ADRs") on the New York Stock Exchange.

The SEC also charged three former Magyar executives: Elek Straub, Magyar's former Chairman and Chief Executive Officer; Andras Balogh, Magyar's former Director of Central Strategic Organization; and Tamas Morvai, Magyar's former Director of Business Development and Acquisitions. The SEC alleged that the three individuals authorized payments to an intermediary knowing that the payments would be forwarded to Macedonian government officials and that payments were being disguised as "bogus 'consulting' and 'marketing'" contracts. The complaint further alleged that the individuals made false and misleading statements to Magyar's auditors in connection with the company's financial statements by signing management representation letters that stated Magyar's books and records were accurate.

Unlike the corporate defendants, Staub, Balogh, and Morvai did not settle. On October 29, 2012, the defendants jointly asked Judge Richard Sullivan in the Southern District of New York to dismiss the SEC's lawsuit against them. The defendants argued that as Hungarian nationals who lived and worked outside the United States, they lacked the "minimum contacts" with the United States required for an American court to have personal jurisdiction over them.

On February 8, 2013, Judge Sullivan denied the defendants' motion in its entirety. With respect to the question of personal jurisdiction, Judge Sullivan analyzed whether the SEC had met its burden of establishing that the exercise of personal jurisdiction comported with constitutional due process. In Judge Sullivan's view, the SEC met its burden because it adequately pled conduct designed to violate U.S. securities regulations. The complaint alleged that the defendants "engaged in a cover up through their statements to Magyar's auditors knowing that the company traded [securities] on an American exchange, and that prospective purchasers" – including prospective American investors – "would likely be influenced by any false financial filings."[3]

Judge Sullivan rejected defendants' argument that the exercise of personal jurisdiction over them would "automatically imply that 'any individual director, officer, or employee of an issuer in

[3] Straub Order at 9.

ISBN 1056 3059

any FCPA case' would also be subject to personal jurisdiction," but noted his decision did not create a *per se* rule regarding employees of an issuer. Specifically, Judge Sullivan found that "[a]lthough [d]efendants' alleged bribes may have taken place outside the United States (as is typically true in cases brought under the FCPA), their concealment of those bribes, in conjunction with Magyar's SEC filings, was allegedly directed toward the United States."[4]

SEC v. STEFFEN

The SEC's case against former Siemens Aktiengesellschaft ("Siemens") employee Herbert Steffen, another foreign individual, ended with a different result. By way of background, in 2008, Siemens paid a record-breaking $1.6 billion to resolve bribery cases with United States and German authorities. Three years later, in December 2011, the SEC charged seven former Siemens employees with FCPA violations relating to a piece of the larger case against Siemens.[5] Specifically, the SEC's allegations against the individuals concerned a bribery scheme to win a $1 billion contract for a national identity card in Argentina. According to the complaint, Siemens employees paid an estimated $100 million in bribes to top Argentine officials

Of the seven individual defendants charged in the SEC's case, only Steffen moved to dismiss the complaint. According to the SEC, Steffen violated the FCPA by "pressuring" another Siemens employee in Argentina to authorize the payment of bribes, resulting in falsified SEC filings, namely the filing of annual and quarterly reports with the SEC that misrepresented Siemens' financial position and included falsifying certifications required by the Sarbanes-Oxley Act.

Steffen, a 74-year-old German citizen who was the former CEO of Siemens S.A. Argentina and who never worked in the United States, argued that the court lacks personal jurisdiction over him. Judge Scheindlin agreed with Steffen.

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4 *Id.* at 11. Judge Sullivan also disagreed with the defendants' other arguments for dismissal. Most notably, he rejected defendants' statute of limitations argument, concluding that, because the applicable statute – 28 U.S.C. § 2462 – requires "by its plain terms, that an offender must be physically present in the United States for the statute of limitations to run," the SEC's complaint was timely given that defendants' were not present in the U.S. *Id.* at 13. Judge Sullivan also found that, because the "means or instrumentality of interstate commerce" clause in the FCPA was a jurisdictional element and therefore did not have a *mens rea* requirement, use of emails routed through the U.S. – even if defendants did not know the emails would go through the U.S. – satisfied this element. *Id.* at 16. And agreeing with a recent decision from the Southern District of Texas, Judge Sullivan held that the FCPA did not require that the SEC allege defendants knew the identities of the "foreign officials" they intended to bribe. *Id.* at 18 (quoting *SEC v. Jackson*, No. H-12-0563, 2012 WL 6137551, at *12 (S.D. Tex. Dec. 11, 2012)).

5 In addition, eight former executives and agents of Siemens − all foreign nationals – were indicted in the Southern District of New York for conspiracy to violate the anti-bribery, books and records, and internal controls provisions of the FCPA, money laundering, and wire fraud. *See* Indictment, *United States v. Sharef*, No. 1:11-CR-01056 (S.D.N.Y. Dec. 12, 2011), Dkt. Entry No. 1. According to a letter submitted by the government to the court on December 12, 2011, "[t]he defendants in this case all reside overseas and none of the defendants is currently in custody. As such, none of the defendants will be arraigned in the near future." *See* Endorsed Letter, *United States v. Sharef*, No. 1:11-CR-01056 (S.D.N.Y. Dec. 15, 2011), Dkt. Entry No. 11.

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Judge Scheindlin was troubled by the lack of a "limiting principle" for the SEC's assertion of personal jurisdiction over Steffen. In Judge Scheindlin's view, "[i]f this court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover-up, much less played any role in the falsified filings, minimum contacts would be boundless."[6] Judge Scheindlin rejected the SEC's arguments that minimum contacts could be established from a telephone call that Steffen received from the United States or the deposit of some bribery payments in a New York bank (though not at the direction of Steffen).[7] Moreover, Judge Scheindlin determined that the exercise of personal jurisdiction would be unreasonable in light of "Steffen's lack of geographic ties to the United States, his poor proficiency in English, his age, the burden to defend this suit, and the previous adjudications [in other fora]."[8]

CONCLUSION

As trial court decisions, neither *Straub* nor *Steffen* is binding on other courts. The decisions nevertheless suggest a principle that personal jurisdiction in FCPA actions does not automatically extend to all officers, directors, or employees of a foreign issuer whose securities trade on United States exchanges, but rather depends on facts specific to each individual case. In this regard, *Straub* and *Steffen* offer a jurisdictional limitation on the FCPA's reach. Curiously, the *Straub* and *Steffen* courts appear to rest their analysis on whether the defendants falsified financial statements or signed false accounting certifications, even though the SEC did not allege that those financial statements were materially misleading.[9] This approach appears to ignore one of the FCPA's key purposes to create a level playing field where business can be conducted honestly and transparently. The Straub defendants have sought leave to appeal which, if granted, would elevate the issue to the Second Circuit. As of the time this LEGAL BACKGROUNDER went to press, however, the SEC had not appealed the *Steffen* decision.

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6 Steffen Order at 18.

7 *Id.* at 16 n. 63.

8 *Id.* at 20-21.

9 For a statement (financial or otherwise) to be actionable under the antifraud provisions of the federal securities laws the statement must be, among other things, material. *See TSC Industries, Inc. v. Northway*, *Inc.*, 426 U.S. 438 (1976). Giving that neither case alleged the making of materially false statements or even that the underlining transactions that gave rise to the FCPA charges were material, the analysis seem rather deficient on this point.

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