

White Collar Defense and Investigations

Two Federal Court Decisions Analyze Due Process Limits on Asserting Personal Jurisdiction Over Non-U.S. Employees of Public Companies in FCPA Cases

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Introduction and Summary

The Foreign Corrupt Practices Act (FCPA), enacted more than 35 years ago, inherently targets conduct occurring outside the United States. Moreover, it can be (and has been) used to prosecute not only U.S. persons but also foreign nationals. Until this year, however, there has been no judicial guidance on how Constitutional limits on U.S. federal courts' exercise of personal jurisdiction apply in an FCPA case. Two recent decisions from the United States District Court for the Southern District of New York – *SEC v. Straub, et al.* and *SEC v. Sharef, et al.* – address that question in the context of civil FCPA charges brought by the Securities and Exchange Commission (SEC) against foreign nationals in two different alleged foreign bribery matters. These decisions have potentially serious consequences for any corporation with a foreign subsidiary, as they would permit the SEC to bring FCPA charges against a foreign national employee operating entirely outside of the United States. Corporate counsel should ensure that the corporation's FCPA compliance program covers such employees, irrespective of whether their work is directly connected to the United States.

In brief, the two decisions held that:

- The Constitution's minimum contacts test for personal jurisdiction was satisfied as to foreign executives of a company whose securities were publicly traded in the United States where the executives, in attempting to cover up the bribery scheme, knowingly caused the company and its parent to make falsified SEC filings through statements to the company's auditors (*Straub*).
 - The FCPA's requirement that a defendant make use of interstate commerce is satisfied by the sending of emails that, unbeknownst to the defendant, traveled through U.S.-based servers in transit from one foreign location to another.
- Minimum contacts sufficient to satisfy the Constitutional test for personal jurisdiction did not exist as to a foreign executive employed by a foreign subsidiary of a publicly traded corporation, where the executive neither made nor authorized the alleged bribes, and had no role in or knowledge of actions to conceal the bribes that resulted in falsified SEC filings by the parent corporation (*Sharef*).

The *Straub* Decision

In *Straub*,¹ the SEC alleged that three executives of the Hungarian telecommunications company Magyar Telekom, Plc. (Magyar), all foreign nationals, had engaged in a scheme to bribe Macedonian officials to limit proposed legislation that would have licensed a competitor company and imposed various regulatory burdens. The SEC alleged that all three defendants

were personally involved in executing the scheme, including by signing illicit agreements with Macedonian government officials. During the time of the alleged scheme, the securities of both Magyar and its parent corporation, Deutsche Telekom AG, were publicly traded through American Depositary Receipts (ADRs) listed on the New York Stock Exchange and registered with the SEC. The SEC alleged that the defendants signed management and sub-management representation letters to Magyar's auditors falsely asserting that they had disclosed all relevant financial information and were unaware of any unlawful activity. The SEC claimed that the company's auditors relied on those false statements in preparing their audit reports, which became part of Magyar's annual SEC filings. The defendants were charged with violating the FCPA's anti-bribery provision and with aiding and abetting Magyar's violations of the FCPA's requirement that public companies maintain accurate books and records.

The *Straub* defendants moved to dismiss the complaint for lack of personal jurisdiction, arguing principally that the SEC failed to establish that they had sufficient minimum contacts with the United States to satisfy the Fifth Amendment's Due Process Clause. They also moved to dismiss on the independent ground that the FCPA's requirement for non-U.S. persons, that the conduct involve the use of "interstate commerce," was not met because the only alleged use of interstate commerce was that the defendants, in emailing each other from non-U.S. locations using Hotmail accounts, had sent emails in furtherance of the scheme that were routed through U.S.-based email servers. The court rejected both arguments.

Personal Jurisdiction

With respect to the personal jurisdiction argument, the court held that sufficient minimum contacts existed because the defendants made false statements to the company's foreign auditors knowing that those statements would likely affect Magyar's financial filings, including those filings made with the SEC in the United States. The court stated that it was not adopting a *per se* rule for asserting jurisdiction over employees of an SEC-regulated securities issuer. It found, however, that in this case personal jurisdiction existed because of the fact that "Magyar traded securities through ADRs listed on the NYSE," combined with the fact that the defendants misled the company's auditors through their false certifications while knowing that those certifications would inform the company's forthcoming SEC filings as a publicly traded company in the United States.²

Interstate Commerce

For an anti-bribery charge involving a non-U.S. person, the FCPA requires that the defendant have made use of interstate commerce in furtherance of the improper payment. The *Straub* court held that the SEC need not show that the defendants intentionally or knowingly used interstate commerce. In this case, it was enough that the defendants' emails, unbeknownst to them, were routed through the United States. *Straub* is the first FCPA case in which the government has relied solely on the fact of emails going through U.S.-based servers to establish the use of interstate commerce (neither defendant was in the United States when the emails were sent). That said, the concept that an interstate commerce requirement can be satisfied without specific knowledge by the defendants that their actions resulted in that use of interstate commerce is consistent with existing jurisprudence in other contexts.

The Sharef Decision

In *Sharef*,³ another judge in the Southern District of New York issued a decision in another FCPA matter concerning the Constitutional limits on personal jurisdiction over foreign nationals acting outside of the United States. This case arose out of the Siemens FCPA matter, which was settled by the company in 2008 but which then led to charges against various individuals. Specifically, in the case at issue here, the SEC charged seven former executives at Siemens AG (the parent corporation) and its subsidiary in Argentina with participating in a scheme to bribe Argentinean officials.

One defendant, Herbert Steffen, is a German national who had served as CEO of the Argentinean subsidiary prior to the events alleged in the complaint, and later as the group president of another Siemens sub-

subsidiary. According to the SEC, Steffen was recruited for the bribery scheme because of his connections in Argentina and for the purpose of placing pressure on the then-CFO of Siemens Argentina to authorize bribes to Argentinean officials. The then-CFO later authorized the bribes, but only after seeking guidance from his superiors at Siemens, who did not include Steffen. The then-CFO also signed false quarterly and annual certifications presented to the auditors of Siemens Argentina that ultimately resulted in the parent corporation making false SEC filings. The SEC charged all seven defendants with violating the FCPA's anti-bribery provision and with aiding and abetting violations by the parent corporation of the FCPA requirement that public companies maintain accurate books and records.

Steffen moved to dismiss for lack of personal jurisdiction. The court granted the motion, rejecting the SEC's argument that Steffen's alleged participation in a bribery scheme by a company that filed SEC periodic reports created sufficient minimum contacts with the United States. In distinguishing *Straub*, the court reasoned that Steffen's role was too attenuated from the SEC filings, noting that he neither authorized the bribes nor participated in the alleged cover-up through misrepresentations to auditors, nor was it shown that he knew of any cover-up. The court expressed concern that the SEC's theory would grant federal courts personal jurisdiction over any foreign national employed by a foreign corporation whose securities are publicly traded on an American exchange. "Absent any alleged role in the cover ups themselves, let alone any role in preparing false financial statements the exercise of jurisdiction here exceeds the limits of due process . . ." ⁴

Conclusion

Straub and *Sharef* represent the first judicial attempts to delineate when conduct occurring abroad will satisfy the Constitutional prerequisites for U.S. courts' exercise of personal jurisdiction over defendants in FCPA matters. While this issue has not been decided by any Court of Appeals, a few instructional points emerge:

- Personal jurisdiction over a foreign person employed by a foreign subsidiary of a company whose securities are traded in the United States and registered with the SEC may not be based solely on the fact that the foreign subsidiary's financial statements are consolidated with the financial statements of the parent company.
- In order to be prosecuted in an FCPA matter involving conduct occurring abroad, a foreign national must take actions directed toward the United States such that it would be fair for a U.S. court to exercise personal jurisdiction, as the Supreme Court required long ago in *International Shoe*.⁵ Mere participation in an alleged bribery scheme overseas will not suffice. Rather, some culpable role in the conduct that establishes minimum contacts with the United States – which includes actions leading to incorrect SEC filings – is required.

ENDNOTES

1. *S.E.C. v. Straub*, --- F. Supp.2d ---, No. 11-9645, 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013).
2. *Id.* at *7.
3. *S.E.C. v. Sharef*, --- F. Supp.2d ---, No. 11-9073, 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013).
4. *Id.* at *5.
5. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

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