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New FCPA Decision: How Long is the FCPA's Reach?

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A little more than a year after Deutsche Telekom (“DT”) and Magyar Telekom entered into multi-million dollar settlements with the SEC and DOJ to resolve claims that the two companies violated the FCPA, three former Magyar executives lost their bid to have their parallel SEC enforcement action dismissed. On February 8, 2013, Judge Richard J. Sullivan of the Southern District of New York denied the former Magyar executives’ motion to dismiss “in its entirety” in an opinion that—if upheld—could have far reaching implications for the government’s expansive interpretation of the FCPA.¹

BACKGROUND

On December 29, 2011, the SEC and DOJ announced settlements totaling almost \$100 million with DT and its Hungarian wholly-owned subsidiary Magyar based on Magyar’s offering or making of improper payments to Macedonian and Montenegrin government officials, as well as both Magyar’s and DT’s failure to keep accurate books and records.²

On the same day that Magyar and DT entered into their respective settlement agreements with the SEC and DOJ, the SEC filed an action against three former Magyar executives (the “Defendants”). As with the allegations brought against Magyar and DT, the SEC alleged that Defendants bribed public officials in Macedonia in order to dilute telecommunications regulations and delay the entry of a third party into the Macedonian telecommunications market.

The Defendants moved to dismiss the SEC’s complaint, arguing that they were not subject to personal jurisdiction in the United States, that the SEC’s claims were time-barred, and that the SEC failed to plead facts adequate to state a claim.

Last week, Judge Sullivan denied Defendants’ motion to dismiss in its entirety.

BROAD VIEW OF PERSONAL JURISDICTION

None of the Defendants had ever lived in the United States, conducted business there, or “intended” to cause an injury in the United States. Nevertheless, Judge Sullivan found that all three Defendants had the necessary “minimum contacts” with New York and that they could reasonably anticipate being brought before a United States court.

¹ *SEC v. Straub, et al.*, No. 1:11-cv-09645 (S.D.N.Y.) (RJS).

² For a detailed discussion of the DT and Magyar settlement, see D. Anthony Rodriguez, *2011’s Big FCPA Finish: Aon and Magyar Telekom*, Law360, (Jan. 31, 2012).

Client Alert.

Barely Minimum Contacts

Judge Sullivan held that Defendants had the necessary “minimum contacts” with New York because Defendants’ former employers participated in the United States securities markets and because the SEC linked Defendants’ wrongdoing to their employers’ participation in those markets. While the SEC acknowledged that its jurisdictional theory was novel, Judge Sullivan determined that the Court was not “by any means ‘breaking new ground’ with [its] finding.”

Specifically, Judge Sullivan found that Defendants knew or had reason to know that any false or misleading financial report would be given to prospective American purchasers of those securities because:

1. Magyar and its parent DT had securities that were publicly traded on the New York Stock exchange and registered with the SEC;
2. Magyar and DT made regular quarterly and annual consolidated filings during that time; and
3. “Defendants allegedly 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 would likely be influenced by any false financial filings.”

Thus, Judge Sullivan ruled that “[t]he Court thus has little trouble inferring from the SEC’s detailed allegations that, even if the 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.”

Inconvenient, but Not Gravely Difficult

Judge Sullivan further held that, given the particular facts at issue, “this is not the rare case where the reasonableness analysis defeats the exercise of personal jurisdiction.” The court found that “although it might not be convenient for Defendants to defend this action in the United States, Defendants have not made a particular showing that the burden on them would be ‘severe’ or ‘gravely difficult.’” And, showing some deference to the SEC, the court concluded that asserting jurisdiction was reasonable because “there is no alternative forum available for the government” to bring its enforcement action.

A “FLEXIBLE” STATUTE OF LIMITATIONS

Judge Sullivan also held that the SEC’s action was not time barred under 28 U.S.C. § 2462, the “catch-all” limitations period that applies in FCPA enforcement actions. Looking at the plain language of that statute and the statute’s “original purpose,” Judge Sullivan concluded that the statute of limitations does not run while the defendant is living outside of the jurisdiction of the United States: “the operative language [of the statute] requires, by its plain terms, that an offender must be physically present in the United States for the statute of limitations to run.”

According to Judge Sullivan, this reading is consistent with the statute’s statement of purpose, as was originally understood: courts at the time of the statute’s original enactment in 1839 “understood that the statute of limitations would not begin to run while defendants were outside of the United States.” Thus, Judge Sullivan held that “although the purpose underlying the [statute] may no longer be as compelling as it might have once been [...] it is not for this Court to second-guess Congress and amend the statute on its own.”

Client Alert.

UNKNOWNING USE OF UNITED STATES INTERSTATE COMMERCE

Last but not least, Judge Sullivan rejected Defendants' argument that the Complaint failed to allege facts sufficient to establish that Defendants "ma[de] use of the mails or any means or instrumentality of interstate commerce" as required by 15 U.S.C. § 78dd-1(a). In doing so, Judge Sullivan decided "a matter of first impression in the FCPA context": whether § 78dd-1(a) requires that a defendant intend to use the "mails or any means or instrumentality of interstate commerce."

The SEC claimed that one of the Defendants used emails "in furtherance of the bribe scheme" by attaching drafts of the documents which were the "alleged means by which Defendants concealed the true nature of the payments offered to the Macedonian government officials." The SEC further alleged that this Defendant sent the emails from outside the US on behalf of the other Defendants to third-party intermediaries and that in doing so the emails were routed through or stored on US servers. Defendants argued that they did not use interstate commerce because they did not personally know that their emails would be routed through the US Internet or stored in US servers.

According to Judge Sullivan, however, that the emails were routed through or stored on US servers—even without the Defendants' actual knowledge—was sufficient for the SEC to state a claim that Defendants made use of interstate commerce under Section 78dd-1(a).

As a preliminary matter, Judge Sullivan stated that "it is undisputed that the use of the Internet is an instrumentality of interstate commerce." And although the Court "[did] not disagree with Defendants that '[t]he Internet is a huge, complex, gossamer web,'" Judge Sullivan determined that "that is all the more reason why it should be foreseeable to a defendant that Internet traffic will not necessarily be entirely local in nature." Looking to the FCPA's legislative history, Judge Sullivan further concluded that "although Congress intended to make an 'intent' or *mens rea* requirement for the underlying bribery, it expressed no corresponding intent to impose such a requirement in the 'make use of . . . any means or instrumentality of interstate commerce' language.

KEY TAKEAWAYS

Judge Sullivan's opinion will likely be appealed and the Court of Appeals for the Second Circuit will have the opportunity to reexamine Judge Sullivan's analysis. However, particularly in the FCPA context where there is a dearth of jurisprudence, every opinion has the potential of carrying significant weight.

On the issue of personal jurisdiction, Judge Sullivan specifically disavowed the notion that he was creating a "per se rule" that "employees of an issuer" are subject to personal jurisdiction in the United States. His reasoning for finding personal jurisdiction over the defendants could nonetheless be applied in almost any case where the defendant is an employee of an issuer and there are allegations that the defendant engaged in wrongdoing that affected purchasers of his employer's securities in the United States. Thus, unless the Second Circuit overturns Judge Sullivan's expansive view of personal jurisdiction, future defendants seeking to make personal-jurisdiction defenses on a motion to dismiss will need to stress that Judge Sullivan's decision was admittedly "fact-based" and will need to be prepared to distinguish their particular facts.

Judge Sullivan's statute of limitations holding is potentially more troublesome because it arguably permits the government to bring claims against foreign defendants long after the underlying facts arose and the claims would otherwise be stale. Given the potentially inconsistent implication this decision could have in prosecuting US nationals versus foreign defendants, we would expect the issue to be addressed either by the Court of Appeals or

Client Alert.

by other courts as other litigants contest the issue—particularly given the growing trend for US regulators to prosecute foreign nationals.

Likewise, Judge Sullivan's first impression ruling on the intent requirement—or lack thereof—for the use of interstate commerce for purposes of the FCPA is likely to be an issue that courts will revisit. Judge Sullivan concluded that the FCPA on its face was ambiguous and therefore it was necessary to reach the legislative history for interpretation. However, the counterargument could be made that the statute is clear on its face and the express language requires that the use of interstate commerce must have been done "corruptly." If intent is required, then the unknowing use of interstate commerce will not be a sufficient basis to establish FCPA liability.

CONCLUSION

Contrary to the Court's view, the *Straub* decision indeed breaks new ground. It gives US regulators expansive powers to enforce the FCPA against foreign defendants. Whether or not the decision will be upheld or followed by other courts remains to be seen. However, it may embolden the government's aggressive FCPA enforcement against foreign nationals.

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