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Client Alert

Special Matters

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Courts Diverge on the Reach of Personal Jurisdiction in FCPA Cases Against Foreign Defendants

Last month, two federal judges in the Southern District of New York reached differing conclusions about the minimum contacts required for U.S. courts to exercise personal jurisdiction over foreign defendants in civil enforcement cases prosecuted by the Securities and Exchange Commission (SEC) under the Foreign Corrupt Practices Act (FCPA). This alert briefly attempts to harmonize these decisions and offer some practical insights about what they mean for foreign employees of companies – whether foreign and domestic – whose securities are publicly traded in U.S. markets.

Background

As most FCPA observers are aware, the SEC shares overall FCPA enforcement responsibility with the U.S. Department of Justice. Generally speaking, the SEC has civil jurisdiction in cases involving "issuers" (companies with SEC-registered securities or SEC filing obligations) and their personnel, whereas the DOJ has co-extensive jurisdiction in issuer cases and sole jurisdiction both in non-issuer civil cases and in all criminal cases. While it is widely assumed that corporate issuers – whether physically based in the U.S. or not – voluntarily subject themselves to civil FCPA jurisdiction in U.S. courts by virtue of accessing the U.S. capital markets and filing reports with the SEC, substantial doubt exists concerning whether and to what extent foreign employees of such issuers similarly subject themselves to personal jurisdiction in the U.S. courts simply by accepting employment with an issuer. The two recent cases from New York provide rare and useful judicial guidance on that issue.

SEC v. Straub (Magyar Telekom)

In December 2011, the SEC and DOJ jointly filed and settled both civil and criminal FCPA charges against Hungarian telecommunications company Magyar Telekom Plc., an issuer with SEC-registered securities and SEC filing obligations.[1] The case alleged bribes to government and political officials in Macedonia and Montenegro, some allegedly made through a Greek intermediary. At the same time, the SEC filed related civil FCPA charges against three former Magyar executives who had no ostensible connection to the U.S. other than their past employment status with Magyar.[2] The executives moved to dismiss the SEC's case for, among other reasons, lack of personal jurisdiction, but U.S. District Judge Richard Sullivan denied their motion.[3]

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Applying the two-step test for personal jurisdiction established by the Supreme Court's seminal decision in *International Shoe Co. v. Washington* and its extensive progeny, Judge Sullivan held that the SEC had alleged sufficient "minimum contacts" with the U.S. and that the exercise of personal jurisdiction over the defendants in the case would be reasonable. He found largely dispositive the SEC's allegations that each of the defendants signed false management representation letters or "sub-representation" letters to mislead Magyar's auditors, allegedly with knowledge that the company's securities traded in the U.S. and that U.S. investors would likely be influenced by the resulting financial statements.[4]

SEC v. Steffen (Siemens)

Less than two weeks after Judge Sullivan decided *Straub*, his SDNY colleague, U.S. District Judge Shira Scheindlin, decided a similar personal jurisdiction issue in a separate FCPA case arising from the SEC and DOJ investigation of German manufacturing giant Siemens AG, an issuer with SEC-registered securities and SEC filing obligations. Siemens settled civil and criminal FCPA charges with the SEC and DOJ in December 2008,[5] and three years later the SEC sued seven former Siemens executives for related civil FCPA violations, one of whom settled with the SEC while certain others either defaulted or appeared inclined to settle.[6] One defendant, who had no ostensible connection to the U.S. apart from his former role as CEO of the Argentinean subsidiary of the issuer Siemens, moved to dismiss for lack of personal jurisdiction (along with other reasons not addressed by the court), and Judge Scheindlin granted his motion.[7]

Judge Scheindlin applied the same two-part test that Judge Sullivan applied in the *Straub* case, but obviously reached a different result. She held that the defendant's alleged role in "encouraging," "urging," and "pressuring" a colleague to authorize a bribe to be paid on behalf of Siemens in Argentina was "far too attenuated from the resulting harm to establish minimum contacts" with the U.S., despite the fact that Siemens was an issuer.[8] Explicitly distinguishing Judge Sullivan's prior decision in *Straub*, Judge Scheindlin noted that the "lynchpin" of that decision, and others cited therein, was that the executive "participated in a fraud *directed* to deceiving United States shareholders (emphasis in original)," for example by "signing or directly manipulating financial statements to cover up illegal foreign action, with knowledge that those statements [would] be relied upon by United States investors."[9] She found no such allegations in the case before her. With respect to the reasonableness prong of the two-part test for personal jurisdiction, Judge Scheindlin found that the defendant's "lack of geographical ties to the United States, his age [74-years old], his poor proficiency in English, and the forum's diminished interest in adjudicating the matter, all weigh against personal jurisdiction."[10] She cited in particular the fact that the defendant had already resolved a related action filed against him in Germany.[11]

Lessons and Caveats

Although the *Straub* and *Steffen* decisions represent the views of only two federal judges from the same district court, they provide rare and useful judicial guidance on how far the SEC can go in asserting personal jurisdiction over foreign defendants in FCPA cases. And although the decisions reached opposite outcomes, they can be readily harmonized to offer several lessons of significance to all foreign employees of U.S. issuers, regardless of where they are headquartered.

First and foremost, neither case supports the notion that mere employment by an issuer anywhere in the world is sufficient to establish minimum contacts with the U.S. Indeed, even Judge Sullivan made this point explicitly in *Straub*.[12]

Second, both cases appear to agree that even if a foreign employee of an issuer has no other meaningful contacts with the U.S., the employee's direct participation in falsifying the issuer's financial statements or accounting records will

likely suffice to establish minimum contacts, especially if the employee is generally aware that the issuer's securities are publicly-traded in the U.S. and that U.S. shareholders will likely rely on the company's financial statements.

Finally, a few caveats. First, both cases were decided on motions to dismiss, so the SEC's factual allegations were accepted as true. Of course, in the *Straub* case, the SEC will still need to prove its allegations on the merits to avoid later dismissal of its case.

Second, either or both of these cases will likely end up in the Second Circuit, which of course could take an entirely different approach to personal jurisdiction. Indeed, the Straub defendants have already moved for certification of an interlocutory appeal, so stay tuned.

Finally, it should be noted that the two-prong test for personal jurisdiction applied in the *Straub* and *Steffen* cases is not particularly relevant to criminal FCPA prosecutions initiated by the DOJ. In criminal FCPA cases against individuals who are neither citizens, nationals, nor residents of the U.S., the government generally must allege and prove that the defendant engaged in some act in furtherance of a corrupt payment or offer "while in the territory of the United States."[13] Although the law is not well developed regarding the reach of this statutory phrase, a fair reading would appear to require, at a minimum, some physical appearance by the defendant in the U.S. in furtherance of the alleged FCPA violation.

If you would like to discuss any of these issues, or if you have other questions about the SEC or its Enforcement program, please do not hesitate to contact us.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

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[1] *See* SEC Litigation Rel. No. 22213 (Dec. 29, 2011).
[2] *Id.*
[3] *SEC v. Straub,* 2013 U.S. Dist. LEXIS 22447 (S.D.N.Y. Feb. 8, 2013).
[4] *Id.* at *23-*25. Judge Sullivan separately agreed with the SEC's argument that the 5-year statute of limitations applicable to the agency's request for civil penalties was indefinitely tolled as to the defendants, citing a clause in the relevant statute saying it applies "if, within the [5-year] period, the offender . . . is found within the United States in order that proper service may be made thereon." *Id.* at *35-*41 (citing 28 U.S.C. § 2462). We note a certain irony in the fact that the defendants' lack of physical entry into the U.S. was considered dispositive in depriving them of protection under the statute of limitations yet of little help to them on the personal jurisdiction issue.
[5] *See* SEC Litigation Rel. No. 20829 (Dec. 15, 2008).
[6] See SEC Litigation Rel. No. 22190 (Dec. 13, 2011).
[7] *SEC v. Sharef,* 2013 U.S. Dist. LEXIS 22392 (S.D.N.Y. February 19, 2013).
[8] *Id.* at *16-*17.
[9] *Id*. at *20.
[10] *Id* at *24.
[11] *Id*.
[12] *See Straub,* 2013 U.S. Dist. LEXIS 22447, at *30 (S.D.N.Y. Feb. 8, 2013).
[13] *See generally* 15 U.S.C. § 78dd-3(a).