SEC Update

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Southern District of New York Ruling May Present Challenges for FCPA Defendants

AUTHORS

William H. Devaney

Nancy R. Grunberg

Jan Lawrence Handzlik

Geoffrey R. Garinther

Hillary S. Profita

A recent ruling in the Southern District of New York rejected two defenses in a Foreign Corrupt Practices Act (FCPA) case, resulting in an interpretation of the law that could have damaging consequences for defendants who are foreign nationals. In *Securities and Exchange Commission v. Straub*, Judge Richard J. Sullivan held that the general federal statute of limitations that applies to most federal offenses is also applicable in FCPA investigations. As a result, the limitations period does not begin to run until the target of the investigation is physically present in the United States. Additionally, Judge Sullivan held that the government is not required to prove a defendant's intent to use interstate commerce to engage in a corrupt scheme, finding instead that the interstate commerce element is a jurisdictional factor that does not require proof of *mens rea*.

The Securities and Exchange Commission (SEC) alleged that beginning in 2005, the defendants – former executives of Magyar Telekom PLC, a Hungarian telecommunications company – orchestrated a scheme to bribe Macedonian officials. Details of the scheme were memorialized in various documents attached to e-mails sent to and from locations outside of the United States but stored in or routed through U.S.-based servers. Throughout this period, shares of the company were publicly traded in the United States and were registered with the SEC. The SEC alleged that the defendants had made false certifications by concealing the true nature of the transactions that formed the basis of the bribery scheme.

The defendants moved to dismiss the SEC's allegations that they had engaged in a scheme to bribe Macedonian government officials to mitigate the effects of a new law on their company. They argued in part that the SEC had failed to allege the defendants' intent to use interstate commerce in furtherance of the alleged scheme and that the SEC's claims were time barred.

Knowledge and Intent to Use "the mails or any means or instrumentality of interstate commerce"

The defendants argued that the FCPA requires an element of knowledge or intent as to the use of "the mails or any means or instrumentality of interstate commerce." The SEC alleged that the defendants used e-mails – routed through or stored on network servers within the United States – in furtherance of the bribery scheme, by attaching drafts of the scheme's governing documents, which concealed the true nature of payments offered to the Macedonian government. However, the defendants argued that the SEC failed to adequately plead their knowledge or intent as to the use of "the mails or any means or instrumentality of interstate commerce," because the SEC did not allege that the defendants personally knew that their emails would be routed through United States servers.

Judge Sullivan rejected this argument, noting that the issue of whether the SEC must allege and prove that a defendant intended to use "the mails or any means or instrumentality of interstate commerce" was a matter of first impression in the FCPA context. Finding the statutory text ambiguous, the court examined the FCPA's legislative history. As a result, the court concluded that Congress intended to make mens rea an element of the underlying bribery of a government official. However, "[Congress] expressed no corresponding intent to make such a requirement for the 'make use of...any means or instrumentality of interstate commerce' element."

Judge Sullivan noted that his interpretation was aligned with several federal appellate court interpretations of similar interstate commerce provisions in other statutes. For instance, the court cited a Second Circuit opinion, which held that "there is no mens rea requirement as to the purely jurisdictional element of interstate communication under the wire fraud statute." United States v. Blackmon, 839 F.2d 900, 907 (2d Cir. 1988); see also *United States v. Cooper*, 482 F.3d 658, 664 (4th Cir. 2007) ("Jurisdictional elements generally assert federal jurisdiction but do not create additional statutory elements as to which defendants must have formed the appropriate mens rea in order to have broken the law.")

Statute of Limitations

Because five years had elapsed since the SEC's claims first accrued, the defendants argued – based on the governing statute of limitations, 28 U.S.C. § 2462 – that the claims were time barred. Section 2462 provides:

- "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced 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." (emphasis added.)

The parties' dispute centered on the interpretation of the final "found within" clause of Section 2462. The SEC argued that because the defendants were not physically present in the United States during the limitation period, the "found within" clause of the statute dictated that the limitations period had not yet begun. Applying a textual analysis of the statute, the court agreed, holding that the plain meaning of Section 2462 required that the "found within" clause must be interpreted to mean that "an offender must be physically present in the United States for the statute of limitations to run." The court rejected the defendants' argument that the clause relates only to the ability to serve a defendant with process and thus does not require that a defendant be physically present in the United States. While Congress initially added the "found within" clause in 1839 based on the understanding that defendants outside the United States were not amenable to service, the court noted that Congress retained it in subsequent codifications, despite the fact that service could, by then, be made upon defendants outside of the United States. As such, the court was reluctant to "second guess Congress and amend the statute on its own."

Minimum Contacts Ruling in *Securities and Exchange Commission v. Sharef*

Another recent Southern District of New York decision found a "limiting principle" in the exercise of personal jurisdiction over foreign defendants in FCPA cases, based on the effect of their conduct on SEC filings. Judge Shira Scheindlin dismissed the SEC's complaint against a 74-year-old German citizen, Herbert Steffen. The complaint against Steffen alleged that, as Group President of Siemens Transportation Systems, he "facilitate[d]" the payment of bribes to Argentinian officials by "pressur[ing]" the CFO of the company's operating group to authorize the bribes, which ultimately resulted in falsified SEC filings. Judge Scheindlin found that Steffen's role in the scheme was "tangential at best," because Steffen "did not actually authorize the bribes," direct the cover up, or play "any role in the falsified filings."

Judge Scheindlin noted that there was "ample (and growing) support in case law for the exercise of jurisdiction over individuals who played a role in falsifying or manipulating financial statements relied upon by U.S. investors in order to cover up illegal actions directed entirely at a foreign jurisdiction." But Judge Scheindlin distinguished Steffen's case from *Straub*, because the *Straub* defendants "orchestrated a bribery scheme" and "signed off on" false SEC filings. On the contrary, Judge Scheindlin concluded that exercising jurisdiction over Steffen would mean that "*every* participant in illegal action taken by a foreign company subject to U.S. securities laws would be subject to the jurisdiction of U.S. courts no matter how attenuated their connection with the falsified financial statements."

While these rulings in the Southern District of New York are not binding on other federal courts, they are significant given the general lack of FCPA jurisprudence. Most FCPA cases are resolved by settlement agreements and/or deferred prosecution agreements. The ruling is also significant because non-U.S. based defendants represent the overwhelming proportion of individual defendants in FCPA actions. In 2011, all of the Department of Justice's individual criminal actions were against non-U.S. based defendants and 75 percent of the SEC's individual enforcement actions were against non-U.S. based defendants.

Click here to view Venable's FCPA Snapshot which provides further statistics on FCPA cases in 2011. If you have any questions concerning this alert or the FCPA, please contact the authors or other attorneys in **Venable's Foreign Corrupt Practices Act and Anti-Corruption Group**.