Some greater clarity on the FCPA's reach over foreign nationals

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Despite the government's ever-expanding crusade against foreign bribery, there has been little in the way of judicial guidance as to how far the Foreign Corrupt Practices Act allows the government to go. Most cases settle at the gate as only the most brazen (or reckless) defendants want to take on the government in its drive to root out foreign bribery.

The case law is thus limited and the legal boundaries ill-defined, leaving would-be violators particularly vulnerable to the whims of U.S. enforcement bodies (the Securities and Exchange Commission and Department of Justice). But thanks to a pair of recent motion-to-dismiss decisions out of the U.S. District Court for the Southern District of New York, the FCPA's reach over foreign nationals might have gotten just a little bit clearer.

The first decision, *SEC v. Straub*, No. 11 Civ. 9645, 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013), by U.S. District Judge Richard J. Sullivan involves an action against several executives of the Hungarian telecommunications company Magyar Telekom. The SEC charged these individuals with actively participating in a scheme to bribe officials of the Macedonian government. The purpose was apparently to prevent regulatory changes that would have opened the Macedonian telecom market to Magyar's competitors.

These executives allegedly directed company officials to disguise the bribes through sham consulting and marketing agreements. They also allegedly made false certifications to the company's auditors to further conceal the bribes. These certifications were ultimately incorporated into the company's U.S. securities filings, the SEC says.

That was all the court needed to find jurisdiction under the FCPA. It did not matter that the executives had never stepped foot in the U.S. What mattered was that they "allegedly engaged in conduct that was designed to violate United States securities regulations and was thus necessarily directed toward the United States, even if not principally directed there."[1]

Indeed, given the defendants' direct participation in the bribery scheme and its cover-up, the court had "little trouble" finding the "minimum contacts" test for jurisdiction easily satisfied.[2] Judge Sullivan likewise readily dispensed with the defendants' statute-of-limitations defense, finding it inapplicable because the defendants were never physically present in the country to trigger the five-year time-bar.[3]

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The second decision, *SEC v. Sharef*, No. 11 Civ. 9073, 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013), by U.S. District Judge Shira Scheindlin, issued less than two weeks after *Straub*, involved an action against a former executive of the German electronics conglomerate Siemens. The SEC charged the executive with facilitating bribes to the Argentinean government to secure business contracts there.

However, the defendant's role in the alleged bribery scheme was more attenuated than that of the defendants in *Straub*. While he supposedly encouraged others to make the bribes, they were ultimately authorized by more senior executives of the company. And there were no allegations that he had any involvement in or even knowledge of the company's alleged falsification of the company's U.S. securities filings.

Judge Scheindlin made a point of distinguishing the two cases for these very reasons, concluding that the defendant's role in the alleged scheme was "tangential at best."[4]

The judge did not stop there. As far as the *Straub* court went to find jurisdiction, Judge Scheindlin went out of her way to assert the "need of a limiting principle" on the boundaries of U.S. jurisdiction. Otherwise,

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she cautioned, the FCPA could reach "every participant in illegal action taken by a foreign company subject to U.S. securities law ... no matter how attenuated their connection with the falsified financial statements."[5]

Judge Scheindlin buttressed this admonition with an extended "reasonableness" inquiry that the court in *Straub* summarily dispensed with in its decision as "largely academic."[6] Judge Scheindlin considered the defendant's lack of ties to the U.S., his relatively old age (74), his poor proficiency in English and the fact that Siemens had already settled the matter with the government for hefty fines as additional reasons why it was unnecessary (and unreasonable) to further prosecute the former executive.

Two decisions, two very different outcomes:

- *Straub* extended the FCPA by not allowing foreign nationals to escape U.S. liability merely because of limited physical contact with the U.S.
- *Sharef* limited the "boundless" extension of U.S. jurisdiction.

Each court took a result-oriented approach that best accounted for its own particular concern, even if it meant stretching the analysis ever so far.

In *Straub*, for example, the court found the interstate commerce requirement satisfied merely because some of the defendants' email communications were — unbeknownst to the defendants — routed through or stored in network servers located within the U.S. That's a rather thin and novel basis for finding interstate commerce.

Taken together, the opinions serve as useful guideposts on the appropriate boundaries of the FCPA's extraterritorial reach.

For its part, the *Sharef* court seemed unduly swayed by the severe government penalty to which Siemens had already been subject even though it had little bearing on the question of the defendant's individual complicity.

What ultimately seemed to drive the courts' reasoning in these competing decisions was the defendants' connection to the alleged bribes and whether that conduct was in some clear way directed to the U.S. Everything else was given comparatively short shrift. In this way, the two decisions were entirely compatible (and at the end of the day, rightly decided). Taken together, they serve as useful guideposts on the appropriate boundaries of the FCPA's extraterritorial reach.

With *Straub*, the defendants went too far with their alleged bribery activity and its direct connection to the U.S. With *Sharef*, it was the government that went too far in trying to police conduct that lacked this direct connection. As the government's FCPA enforcement campaign will no doubt continue in full force, hopefully these decisions will provide more precision — for foreign executives and the government alike — on exactly the type of activity the law is supposed to cover. WJ

NOTES

[1] *SEC v. Straub*, No. 11 Civ. 9645, 2013 WL 466600, at 8 (S.D.N.Y. Feb. 8, 2013).

[2] *Id.* at 9.

[3] *Id.* at 12-14. The SEC initiated the action about six years after the events giving rise to the FCPA claim.

[4] *SEC v. Sharef*, No. 11 Civ. 9073, 2013 WL 603135 at 16 (S.D.N.Y. Feb. 19, 2013).

[5] *Id.* at 18.

[6] *Id.* at 21.

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