

FCPA CLIENT ALERT

NEW FCPA DECISIONS: LIMITS TO THE FCPA'S JURISDICTIONAL REACH

INTRODUCTION

Last month, Judges Richard Sullivan and Shira Scheindlin of the United States District Court for the Southern District of New York reached different conclusions on motions to dismiss implicating the issue of the minimum contacts required for U.S. courts to exercise personal jurisdiction over foreign nationals alleged to have violated the FCPA. These key FCPA decisions provide judicial guidance on the limits to the FCPA's expansive jurisdictional reach.

SEC v. STRAUB

On February 8, 2013, Judge Sullivan denied a motion to dismiss filed by three executives of a Hungarian telecommunications company, Magyar Telekom.¹ The SEC alleged that the defendants bribed Macedonian government and political officials to gain unfair business advantages in the telecommunications industry for their company, which had traded American depository receipts on a U.S. exchange.² Under the two-step test set forth by the Supreme Court in *International Shoe*,³ Judge Sullivan concluded that SEC had alleged sufficient "minimum contacts" and that the exercise of personal jurisdiction over the foreign defendants was appropriate and reasonable despite the fact that none of the foreign defendants had physically entered the U.S. in connection with the alleged bribery scheme.⁴ In particular, Judge Sullivan found that SEC met its burden of proving a prima facie case of jurisdiction by alleging that each of the defendants made false certifications to mislead Magyar auditors with knowledge that the company's securities were

publicly traded on the U.S. stock exchange and that the misrepresentations in Magyar's financial statements would likely influence U.S. investors.⁵ Judge Sullivan noted that the Court had little trouble inferring from the SEC's allegations that "even if Defendants' alleged primary intent was not to cause a tangible injury in the U.S., it was nonetheless their intent, which is sufficient to confer jurisdiction."⁶

SEC v. SHAREF

On February 19, less than two weeks after Judge Sullivan decided *SEC v. Straub*, Judge Scheindlin granted a motion to dismiss filed by Herbert Steffen, a former senior executive at Siemens.⁷ SEC alleged that Steffen had facilitated the payment of bribes to Argentine officials by pressuring a Siemens employee in Argentina to authorize the bribes, which ultimately resulted in falsified SEC filings.⁸ Judge Scheindlin applied the same two-step test that Judge Sullivan applied in *Straub*, but reached a different conclusion. Judge Scheindlin found that while Steffen's actions may have been the proximate cause of the false SEC filings, Steffen's actions were "too attenuated from the resulting harm to establish minimum contacts" with the U.S.⁹ Judge Scheindlin also noted that even if minimum contacts were present, requiring Steffen to defend his case in the U.S. would be unreasonable due to his "lack of geographic ties to the U.S., his age, his poor proficiency in English, and the forum's diminished interest in adjudicating the matter," and due to the fact that the "SEC and the Department of Justice [had] already obtained comprehensive remedies against Siemens and Germany [had] already resolved an action against Steffen individually."¹⁰

In her decision, Judge Scheindlin emphasized that "the exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is

¹ *SEC v. Straub*, 11 Civ. 9645, 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013).

² *Id.* at *1-3.

³ The two-step test set forth in *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), provides that due process requires that if a defendant is "not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." The analysis consists of two parts: the minimum contacts analysis and a reasonableness analysis.

⁴ *Id.*

⁵ *Id.* at *7.

⁶ *Id.* at *7.

⁷ *SEC v. Sharef*, No. 11 Civ. 9073, 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013).

⁸ *Id.* at *1-3.

⁹ *Id.* at *4.

¹⁰ *Id.* at *5-6.

in need of a limiting principle.”¹¹ She explained that if “support for the bribery scheme satisfied the minimum contacts analysis, even though [the foreign defendant] never authorized the bribe, nor directed the cover-up, much less played any role in the false filings, minimum contacts would be boundless.”¹² Judge Scheindlin then concluded that “[a]bsent 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, as articulated by the Supreme Court and the Second Circuit.”¹³

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CONCLUSION

The *Straub* and *Sharef* decisions provide useful judicial guidance on the limits of jurisdiction over foreign defendants in FCPA cases. Both decisions indicate that even if a foreign employee of an issuer has no other contacts with the U.S., a foreign employee’s direct participation in falsifying financial statements and SEC filings and his general knowledge that U.S. investors will rely on the falsified financial statements will probably be enough to establish minimum contacts. However, based on the *Sharef* decision, personal jurisdiction over a foreign defendant may be limited to a more active and direct involvement in falsifying an issuer’s financial statements and SEC filings.

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¹¹ *Id.* at *5.

¹² *Id.* at *5.

¹³ *Id.* at *5.