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The Ever-Expanding Jurisdiction in FCPA Cases

From the Experts

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In the recent Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA), the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) noted that the FCPA's antibribery provisions apply to "foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise or authorization to pay) while in the territory of the United States." The government's continued and increased focus on the acts of foreigners has resulted in more concerted efforts to bring to U.S. courts corporations and individuals that have few ties to the United States.

This article examines how the U.S. government and courts recently have applied and expanded the jurisdictional reach of the FCPA antibribery provisions.

Predicate Jurisdiction—FCPA's Application to Foreign Entities

The FCPA applies to different types of businesses and their associated individuals, including officers, directors, employees, agents and the like. First, it applies to companies that are "issuers." Broadly speaking, this means companies that are listed on a domestic exchange, including foreign companies traded on U.S. exchanges as American Depositary Receipts, and those that are traded over-the-counter and are required to file reports with the SEC. In addition to the basic prohibition against bribery of foreign



Eyeidea Inc.

officials, these companies are required to maintain adequate books and records and to institute controls intended to assure that assets are used in foreign bribery schemes. As part of their duties with respect to SEC filings, the companies' officers must certify the accuracy of these books and records; thus, knowingly certifying falsified records also violates the FCPA. Second, the FCPA applies to companies (and their associated individuals) that are "domestic concerns"—basically, any entity organized under the laws of a U.S. state or territory. The third, "territorial" basis extends the FCPA to apply to any person, including foreign persons and foreign entities that are not U.S. issuers or domestic concerns (called "foreign non-issuer entities"), that commit any act in furtherance of a violation of the FCPA while in U.S. territory.

The SEC and DOJ have recently pursued several foreign issuers. For example, in

September 2012, Tyco International Ltd., an issuer based in Switzerland, settled with both the SEC and the DOJ a matter concerning allegations that its subsidiaries committed FCPA violations in Asia and the Middle East. Likewise, in May 2013, Total S.A., a French company trading as an ADR on the New York Stock Exchange, settled DOJ and SEC charges relating to payments to an Iranian official.

Personal Jurisdiction Over Foreign Individuals in FCPA Cases

Once the basic jurisdictional predicate has been satisfied, the question in civil SEC cases remains whether a foreign individual can be pursued in U.S. courts. For these purposes, the SEC must satisfy the constitutional requirement of due process: the court must find that the defendant had "minimum contacts" with the U.S. and that the exercise of jurisdiction would be reasonable.

These are famously vague concepts, known to torture several generations of first-year law students. And, as one would expect, courts have not agreed on who will be subject to personal jurisdiction in FCPA cases. Two recent decisions, both from the Southern District of New York, illustrate the somewhat unsettled law of personal jurisdiction in the FCPA context.

In *SEC v. Straub*, 11-cv-09645 (S.D.N.Y. Feb. 8, 2013), the SEC charged former foreign executives of Magyar Telekom plc., a Hungarian issuer that traded as an ADR on U.S. exchanges and was registered with the SEC, with alleged FCPA violations involving Macedonian officials. The court denied defendants' motion to dismiss for lack of personal jurisdiction, citing the foreign executives' intentional participation in a scheme to violate the laws of the U.S. and the acts they undertook in furtherance of that effort. In particular, the foreign executives were alleged to have knowingly signed false financial statements and certified false records on behalf of Magyar in order to conceal the bribes and used email to discuss the corrupt payments. Although their electronic communications did not originate or terminate in the U.S., the judge gave considerable weight to the allegation that they passed through U.S. servers. With these facts arrayed against the defendants, the court found that it "has little trouble inferring from the SEC's detailed allegations that, even if 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."

Less than two weeks later, another court in the Southern District came to a different conclusion.

In *SEC v. Sharef*, No. 11-cv-09073 (S.D.N.Y. Feb. 19, 2013), the SEC charged seven foreign individuals, all executives of German corporation Siemens Aktiengesellschaft and its Argentine subsidiary, with FCPA violations relating to allegedly corrupt payments to officials in Argentina. As with *Straub*, the FCPA's jurisdictional predicate was met by Siemens' status as an issuer because its ADRs trade on a U.S. exchange.

However, one defendant, Herbert Steffen, a German citizen and former CEO of Siemens Argentina, successfully moved to dismiss the charges against him based on lack of personal jurisdiction. Specifically, Steffen argued that the government had failed to demonstrate that he had the sufficient "minimum contacts" with the U.S. to support personal jurisdiction in U.S. courts. The court agreed, finding that Steffen's role in the bribery scheme was limited to urging other defendants to follow through with the corrupt transactions on a single phone call originating in the U.S. Unlike other defendants, Steffen was not alleged to have knowingly filed or signed false financial statements or certified false books and records. Thus, the court concluded:

"The exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle. If this court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed [a related] cover up, much less played any role in the falsified filings, minimum contacts would be boundless."

Furthermore, "Steffen's lack of geographic ties

to the United States, his age, his poor proficiency in English, and the forum's diminished interest in adjudicating the matter, all weigh against personal jurisdiction."

Why did two courts of the Southern District, after hearing

motions to dismiss in cases that appear similar, reach results that are, at first blush, so different? The answer could lie in the particular allegations made in each complaint.

One should bear in mind that each case was decided on a motion to dismiss, for which the allegations in the complaint will (generally) be taken as true. Therefore, it is entirely conceivable that additional allegations concerning Steffen's conduct could have been made, but were left out of the SEC's complaint for one reason or another. One might expect the regulators to include alleged facts sufficient to justify personal jurisdiction in future complaints.

Conclusion

Because even relatively minor contacts with the U.S. may subject a foreign entity or individual to jurisdiction in the United States, foreign companies and individuals that do any business with U.S. companies should be familiar with the FCPA antibribery provisions and ensure that all employees are properly trained. Conduct that may be common in a foreign nation could very well be viewed as illegal by U.S. authorities, and foreign entities and individuals that fail to properly educate themselves on the FCPA do so at significant peril.

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Steffen	Straub Defendants
<ul style="list-style-type: none"> Urged others to authorize foreign bribes, but did not direct the payments or do anything more. Participated "in a phone call initiated by [employee] from the United States in connection with the bribery scheme" General lack of ties to U.S., age 	<ul style="list-style-type: none"> Made false entries in company's records. Falsely certified to auditors that financial statements were accurate. Discussed bribery scheme over Internet email passing through U.S. Involved trading on U.S. exchanges
<ul style="list-style-type: none"> ⇒ No minimum contacts, so no personal jurisdiction ⇒ Also unreasonable to exercise personal jurisdiction 	<ul style="list-style-type: none"> ⇒ Sufficient contacts to justify personal jurisdiction

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