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FCPA Overreach? Courts Address Personal Jurisdiction In Cases Against Foreign Defendants

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In the past decade, the U.S. government has interpreted the Foreign Corrupt Practices Act (FCPA) increasingly broadly, especially in cases against non-U.S. defendants. In particular, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have asserted jurisdiction over foreign defendants in a manner that seems to greatly expand the reach of the law.

The government's jurisdictional interpretations have largely gone untested in the courts because corporations, the traditional targets of FCPA enforcement actions, tend to settle with the government rather than litigate. Recently, however, a few judicial decisions in cases against individuals have begun to shed light on the FCPA's jurisdictional parameters, including what the government can (and cannot) use as the basis to pursue non-U.S. parties.

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This article discusses those developments in the context of FCPA enforcement actions that appear to push the boundaries of the law's jurisdiction, especially with respect to asserting personal jurisdiction over FCPA defendants. The article also analyzes the significant impact of these cases on how the U.S. government may enforce the FCPA in the future, especially against non-U.S. parties.

Overview Of Law

At its core, the FCPA has two components: first, a prohibition against bribery of non-U.S. public officials; second, a requirement to maintain effective internal controls and records. The anti-bribery provisions apply to (1) "issuers" on U.S. stock exchanges, defined to include companies required to file certain regular reports with the SEC; (2) domestic concerns, including U.S. persons and companies incorporated in the United States; and (3) persons or entities, regardless of nationality, that act in furtherance of a bribe while in the "territory" of the United States. The accounting and recordkeeping provisions, which are administered by the SEC, apply only to issuers.

The DOJ and SEC share responsibility in enforcing the FCPA. Generally speaking, the SEC has jurisdiction over civil cases involving "issuers." The DOJ has co-extensive jurisdiction with the SEC over issuers in civil cases, and exclusive jurisdiction over issuers and non-issuers in all criminal cases.

To establish an FCPA violation by a non-U.S. person, the government must prove (among other elements) that the defendant corruptly made "use of the mails or any means or instrumentality of interstate commerce" in furtherance of an improper payment to a foreign official. In addition, for defendants that are neither domestic concerns nor issuers, the statute requires the government to demonstrate that the defendant's corrupt action took place "while in the territory of the United States."

Pushing The Boundaries Of FCPA Jurisdiction

In the past decade, the U.S. government has asserted jurisdiction over non-U.S. corporations using a variety of theories. Most cases against non-U.S. entities have been based on theories of conspiring with, aiding and abetting, or acting as an agent of an issuer or domestic concern in committing acts of bribery, regardless of whether any such acts were committed in the United States. The much-anticipated FCPA guidance published by the DOJ and SEC in November 2012, the Resource Guide to the U.S. Foreign Corrupt Practices Act (the "Resource Guide"), reaffirms the government's belief in these theories of jurisdiction. For

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example, the Resource Guide asserts that a "foreign national or company may be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States."

In one recent matter that settled (and thus was not litigated in a court), *U.S. v. JGC Corp*., Japan-based JGC Corporation agreed to pay $218.8 million for its role in a conspiracy to bribe Nigerian officials as part of a joint venture with other corporations that themselves were charged with FCPA violations.[1] JGC is neither a domestic concern nor an issuer, and was not alleged to have been an agent of a domestic concern or issuer. Nevertheless, the DOJ asserted jurisdiction because JGC's co-conspirators were either issuers or domestic concerns.[2] While the conspiracy and aiding-and-abetting bases for the action were apparently adequate to proceed in the JGC matter, interestingly, the DOJ included allegations suggesting that FCPA liability could also be based on a "territorial jurisdiction" theory because of the use of correspondent bank accounts. Specifically, the criminal information included allegations that JGC caused corrupt payments to be transferred between two European accounts via correspondent accounts in New York.[3] Such transfers are foreign transactions between foreign banks that electronically transit the United States along the way. While unclear and untested in courts, it appears that the DOJ was asserting that such minimal conduct in the United States was nonetheless sufficient to (i) constitute action "while in the territory of the United States" and thus (ii) trigger FCPA liability.

In another recent case, *SEC v. Straub*, the U.S. District Court for the Southern District of New York found for the government in a civil case against foreign defendants who were employees of a non-U.S. issuer. In particular, the Court opined that emails sent by the defendants that were routed through and/or stored on network servers located within the United States were sufficient to establish the FCPA jurisdictional requirement of "corruptly" making "use of the mails or any means or instrumentality of interstate commerce" even though the defendants were not aware of where their emails would be routed or stored.[4]

Limitations On Jurisdiction

Enforcement actions against non-U.S. corporations generally settle out of court, and those settlements typically offer little of the clarity and certainty that case law provides. Recent court decisions involving foreign individuals – including the *Straub* case referenced above – are therefore of particular interest in helping to scope out the extent to which jurisdiction may (and may not) apply in FCPA matters.

The first of those cases was the U.S. government's case against Pankesh Patel, one of 22 defendants charged with violating the FCPA following an undercover operation against small-arms dealers. The DOJ asserted jurisdiction over Patel, a UK citizen and director of a non-issuer UK company, based on allegations that he mailed a corrupt purchase agreement from the UK to Washington, DC.

Patel challenged the case on the basis that the U.S. government lacked territorial jurisdiction over Patel.[5] The court agreed, dismissing the government's argument for jurisdiction. In particular, the court reasoned that territorial jurisdiction attaches against a non-U.S. person (and non-U.S. issuer) only when the corrupt act takes place *within* the territorial United States. Under *Patel*, therefore, and under a plain reading of the language of the statute, physical presence in the United States in connection with a corrupt act is required for the assertion of territorial jurisdiction under the FCPA.

Two more recent cases from the Southern District of New York have explored issues of personal jurisdiction in civil cases where the SEC brought FCPA actions against foreign employees of non-U.S. issuers. Interestingly, these two cases reached different conclusions as to whether the foreign defendant had sufficient minimum contacts with the United States to permit the court to assert personal jurisdiction.

The first is the *Straub* case, in which the SEC alleged that three Hungarian executives of Magyar Telekom, a Hungarian company that is a U.S. issuer, bribed public officials in Macedonia and Montenegro to mitigate adverse effects of a new telecommunications law. The allegations against Straub included that he signed SEC filings and management representation letters that failed to acknowledge possible violations of U.S. law related to the bribery scheme.

The court held that the defendants' concealment of bribes, matched with Magyar's SEC filings, amounted to conduct "directed toward the United States," and thereby constituted sufficient "minimum contacts" with the United States to establish personal jurisdiction over the defendants. The defendants argued that exercising jurisdiction over them would automatically imply that "any individual director, officer, or employee of an issuer in any FCPA case" would also be subject to personal jurisdiction. The court declared this argument to be "overblown." The court emphasized that it was not creating a "*per se* rule" related to employees of issuers, but rather deciding the case on a fact-specific basis.

By contrast, in *SEC v. Steffen*, decided just two weeks after *Straub*, another judge in the same court dismissed an FCPA claim against a former non-U.S. executive of Siemens AG for *lack* of personal jurisdiction.[6] Steffen allegedly participated in a scheme to bribe government officials in Argentina related to a contract for a billion-dollar project to create national identity cards. The SEC alleged that the company filed fraudulent certifications with the SEC from 2002 to 2006.

According to the court, Steffen neither authorized the bribes nor directed, ordered, or knew about the alleged cover-up. The court distinguished the holding in *Straub*, saying that the executive in that case "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." By contrast, the court emphasized, the *Steffen* defendant was not, according to the SEC, involved in the falsification of SEC filings. The court thus held that the SEC failed to show that Steffen had sufficient minimum contacts with the United States. The court emphasized that asserting personal jurisdiction under such circumstances would inappropriately extend jurisdiction to "every participant in illegal action taken by a foreign company subject to U.S. securities laws."[7]

Conclusion

The U.S. government appears to be going strong when it comes to FCPA enforcement. It continues to pursue broad interpretations of the statute's scope, particularly in cases against non-U.S. entities and individuals.

While the recent cases discussed above have shed some light on the FCPA's jurisdictional reach, the precise parameters of that reach are still unclear. *Patel* appears to stand for the proposition that mailing documents to the United States is insufficient to show the corrupt "use of mails or any means or instrumentality of interstate commerce" in the "territory" of the United States, but *Straub* seems to support the conclusion that emails routed through the United States can be sufficient to satisfy the "use of mails or any means or instrumentality of interstate commerce." This is not an entirely satisfactory distinction.

Two holdings in *Straub* certainly highlight the potential breadth of the FCPA and its impact on non-U.S. defendants: first, that a defendant need not intend to use an instrumentality of interstate commerce in order for her/his conduct to fall within the scope of the FCPA; and second, a defendant's participation in falsifying SEC filings, even when that conduct occurred completely outside the United States, may be enough to establish "minimum contacts" with the United States. These holdings certainly suggest that courts may be willing to support a very broad interpretation of the reach of the FCPA against foreign employees of non-U.S. issuers. At the same time, the *Steffen* ruling appears to provide some protection for a defendant whose role falls short of active participation in a bribery scheme and cover-up of the improper conduct.

We think it is likely that the U.S. government will continue to pursue aggressive and broad theories of liability under the FCPA. Many corporations are likely to continue to settle with the government, even in the face of such expansive (and perhaps poorly evidenced) U.S. government arguments for jurisdiction. That may leave it up to individual defendants to challenge these arguments in court. Like the decisions in *Straub* and *Steffen*, the outcome of such future cases should be watched closely by anyone subject to the FCPA, especially non-U.S. entities and individuals subject to the law only by virtue of the SEC's jurisdiction over issuers.

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1 Each of the other partners to the venture also paid significant monetary penalties for violating the FCPA. *See, e.g., DOJ Press Release, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine,* No. 09-112 (Feb. 11, 2009), available at http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

2 In addition, the DOJ took the (in our view, remarkable) step of considering the fact that JGC "initially declin[ed] to cooperate with the Department based on jurisdictional arguments" in determining the penalty against the company.

3 *See* Criminal Information, *United States v. JGC Corp.,* No. 11-CR-260 (S.D. Tex. April, 6, 2011).

4 *See* Memorandum and Order, *SEC v. Elek Straub (Magyar Telekom),* No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2013).

5 *United States v. Patel,* No. 1:09-CR-00335 (D.D.C. Feb. 24, 2012).

6 *See* Opinion and Order, *SEC v. Sharef et al.,* 11 Civ. 9073 (Feb. 19, 2013).

7 Notably, on April 15, 2013, another defendant in the case, Uriel Sharef, who was involved in scheme to bribe Argentinian officials, resolved the allegations against him with the SEC, agreeing to pay a $275,000 civil penalty, one of the highest monetary penalties yet assessed against an individual in an FCPA case. *See* SEC Litigation Release, *Former Siemens Executive Uriel Sharef Settles Bribery Charges,* No. 22676 (April 16, 2013), available at http://www.sec.gov/litigation/litreleases/2013/lr22676.htm.