The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

April 2013 | Volume 21, No. 4

District Court Rules FCPA Jurisdiction Has Limits

Jonathan Leiken, Ted Chung and Jean-Paul Boulee

JONES DAY

Last fall, the U.S. Department of Justice and the Securities and Exchange Commission jointly issued their long-promised "Resource Guidance to the U.S. Foreign Corrupt Practices Act" (the "Guidance"). As we commented at the time, that Guidance, while useful, is perhaps as notable for what it does not say as for what it says.[1] One important subject on which DOJ and SEC offered very little enlightenment is the extent to which the FCPA permits enforcement proceedings against foreign nationals whose allegedly unlawful conduct occurs wholly outside the U.S. Given both agencies' aggressive assertion of FCPA jurisdiction in recent years, the boundaries of that concept have seemed to move farther and farther outward with each successive case. A February 19, 2013, decision by Judge Shira Scheindlin in *SEC v. Sharef*, No. 11 Civ. 9073 (S.D.N.Y. Feb. 19, 2013) reminds us, however, that limits can and should be set.

In its very succinct treatment of FCPA jurisdiction, the Guidance largely states the obvious. On pages 11 and 12, it declares that the FCPA can apply to anyone who furthers a corrupt scheme by committing any act in U.S. territory or by using U.S. mails, wires, banks, or any other instrumentality of commerce, as well as to any U.S. national involved in corrupt payments anywhere in the world and anyone who acts directly or indirectly on behalf of any such person or entity. All of this comes from the express language of the statute and required little or no clarification. The Guidance augments it with the unremarkable declaration that foreign nationals and companies (including American subsidiaries) who conspire with, aid and abet, or serve as agents for FCPA violators will be subject to prosecutions themselves.[2]

The only hypothetical the Guidance offers on this topic deals with the straightforward situation in which executives of American "Company A" and European "EuroCo" meet in New York and plot to bribe high-ranking foreign oil ministry officials to approve their bid for a construction contract. To implement their scheme, they hire a "consultant" who meets with the plotters in New York and later greases the skids with millions of dollars funneled from his "commissions." Not surprisingly, the Guidance concludes that Company A, EuroCo, and the intermediary all face FCPA liability, with EuroCo and the intermediary potentially snagged as conspirators, even if their conduct wholly occurred outside U.S. territory. (Oddly, the Guidance says nothing about the risks faced by the individual executives whose meeting set the bribe in motion.)

The Guidance does not address other, more difficult scenarios where potential defendants somehow may involve themselves in a scheme that foreseeably impacts securities sold in the U.S., but neither directly implement the scheme themselves nor travel to this country while the scheme unfolds. Recent DOJ and SEC filings have signaled that even the most attenuated contact with this country may provide a jurisdictional hook by which to reel foreign offenders into American courts. For example, in its prosecution of Japan's JGC Corporation, for one of the participants in the notorious Nigerian Bonny Island bribery scheme, DOJ based jurisdiction on allegations that wire transfers originating at a foreign bank in Amsterdam passed through correspondent New York banks before being credited to accounts in Switzerland and Monaco.[3] And in moving to stay a civil suit against an alleged FCPA violator, DOJ declared its need to investigate a foreign corporation that allegedly received discounted aluminum prices in exchange for improper payments in Bahrain, noting that the payments had been made by offshore wire transfers through U.S. accounts.[4]

The *Sharef* case took another step in this direction. In its 2011 complaint there, the SEC sued seven executives of Siemens and its subsidiaries, alleging their participation in a $100 million Argentinian bribery scheme extending for more than a decade.[5] The defendants included Uriel Sharef, a former Siemens managing board member; Herbert Steffen, a former CEO of Siemens S.A. ("Siemens Argentina"); and Bernd Regendantz, a former CFO of Siemens Business Services, which provided consulting, oversight, and management services for Siemens Argentina. The bribery scheme allegedly centered on a $1 billion contract to produce national identity cards for every Argentine citizen. The complaint asserted that the defendants initially bribed senior officials to win the contract, then unsuccessfully bribed other senior officials to reinstate the contract after a new government cancelled it, and later made still more bribes to cover up their conduct so that Siemens could pursue international arbitration proceedings in which it ultimately recovered more than $200 million for

*Jonathan Leiken is a Partner in Jones Day's New York and Cleveland offices and formerly a federal prosecutor in the Southern District of New York, represents businesses and individuals in significant government investigations, complex civil lawsuits, and at trial. **Ted Chung**, a Chicago-based Partner, represents organizations in complex civil litigation, conducting internal corporate investigations and responding to government investigations and enforcement actions. **Jean-Paul Boulee**, a Partner in Jones Day's Atlanta office, focuses on commercial and securities litigation, and white-collar criminal cases involving antitrust violations, the FCPA, and a variety of other issues.*

Please email the authors at jleiken@jonesday.com, ttchung@jonesday.com or jpboulee@jonesday.com with questions about this article.

wrongful cancellation.

The SEC's allegations were particularly sparse as to defendant Steffen, a 74-year-old German national who retired from Siemens in 2003, four years before the scheme allegedly ended. Although the SEC's complaint declared generally that each defendant used means or instrumentalities of interstate commerce in the course of the scheme,[6] it specified no such use by Steffen himself, nor any act of any kind by or directed by him in, to, or from the U.S. The complaint asserted only: (i) that he met with officials in Argentina and offered them the initial bribes (before any Siemens' securities were listed on the New York Stock Exchange);[7] (ii) that Sharef called Steffen from the U.S. one or more times in connection with the scheme;[8] that Sharef included him in a contract "crisis management team" in 2001;[9] (iii) that Steffen and others "continuously urged" management to bribe officials to keep silent during the arbitration;[10] (iv) that Steffen "urged" and "pressured" Regendantz in 2002 to authorize cover-up bribes that Regendantz ultimately approved after receiving instructions from more senior Siemens executives;[11] and (v) that Steffen "urged" Sharef, his superior, to meet additional bribery demands in 2003.[12] Steffen responded by moving to dismiss for lack of personal jurisdiction. On February 19, Judge Scheindlin dismissed him from the case, deciding that Due Process concepts of minimum contacts and reasonableness require more than the SEC alleged.

In opposition to Steffen's motion, the SEC argued that his conduct caused foreseeable consequences in this country. It declared that, as a senior Siemens executive, he was in a position to know the company's reporting obligations. He also would have understood that American investors relied on Siemens' public filings. Furthermore, when he pressured Regendantz to authorize bribes, he knew or should have known that Regendantz would sign false certifications that would result in false SEC filings.[13] The SEC therefore contended that the complaint adequately alleged facts sufficient to support personal jurisdiction over Steffen.

Judge Scheindlin disagreed, finding that foreseeability alone has never sufficed.[14] Holding that Steffen's actions were "far too attenuated from the resulting harm to establish minimum contacts,"[15] Judge Scheindlin declared that:

> [T]he 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 the cover up, much less played any role in the falsified filings, minimum contacts would be boundless. Illegal corporate action almost always requires cover-ups, which to be successful must be reflected in financial statements. Thus, under the SEC's theory, 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. This would be akin to a tort-like foreseeability requirement, which has long been held to be insufficient.[16]

Assuming Steffen urged Regendantz to approve unlawful payments, Regendantz did so only after receiving instructions from his superiors. Unlike the defendants in *SEC v. Straub*, No. 11 Civ. 9645 (RJS), 2013 WL 466600, at *8 (S.D.N.Y. Feb. 8, 2013), where Judge Richard Sullivan very recently denied a similar motion, Steffen certified no misleading representations and signed no false SEC filings, exhibiting no intent to cause any tangible injury in this country.[17] Here, the SEC did not allege that Steffen had actual knowledge of any falsification, nor did it contend that Steffen actually had authorized bribes himself. Moreover, it did not appear that he had initiated calls to or from the U.S. or directed funds to be routed through U.S. banks. His conduct was focused on Argentina, not the U.S. In Judge Scheindlin's view, the allegations against Steffen therefore fell "far short" of Due Process requirements.[18]

Judge Scheindlin relied on reasonableness considerations to bolster her decision:

> 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. Geographic ties alone do not dictate the extent of the reasonableness inquiry. However, it would be a heavy burden on this 74-year-old defendant to journey to the United States to defend against this suit. Further, the SEC and the Department of Justice have already obtained comprehensive remedies against Siemens, and Germany has resolved an action against Steffen individually.[19]

Expect Judge Scheindlin's analysis to be widely quoted and referenced in the future, especially in discussions between defense counsel and our colleagues at the DOJ and SEC regarding ongoing investigations. Whether her views will lead to the reliable "limiting principle" she called for remains to be seen. We hope that one effect of her ruling will be to cause DOJ and SEC lawyers to proceed more cautiously. On the other hand, her decision may be downplayed as narrowly confined to very limited facts unlikely to be replicated in later cases. Still, her opinion serves as a clear pronouncement that FCPA jurisdiction has its limits. Unlawful foreign acts implicating SEC filings will not always warrant haling foreign actors into U.S. courts, and individual burdens faced by foreign defendants should be carefully and thoughtfully considered.

---

1 *See* "DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis," *available at* http://www.jonesday.com/doj_sec_resource_guide_to_fcpa/.

2 "A foreign national or company may also 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." Guidance at 12 (citing separate criminal informations filed against JGC Corporation and the Dutch subsidiary of an Italian corporation in connection with bribes of Nigerian officials considering an oil refinery bid).

3 *See* Criminal Information, *United States v. JGC Corp.*, No. 11-CR-260 (S.D. Tex. April, 6, 2011), ¶¶ 19.e. and 22, *posted at http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf.*

4 *See* Memorandum of Law in Support Of The Unopposed Motion Of The United States To Intervene And For A Stay Of Discovery, filed in *Aluminum Bahrain B.S.C. v. Sojitz Corp.*, No. 4:09-cv-04032 (S.D. Tex. May 27, 2010), *available at* http://www.fcpablog.com/blog/2010/6/1/feds-seek-sojitz-stay.html. It appears that DOJ also may have argued for jurisdiction, in part because of the payments' alleged effects in the U.S. aluminum market. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion Of The Foreign Corrupt Practices Act*, 45 Ga. L. Rev. 489, 552-53 (2011).

5 *See* Complaint, *SEC v. Sharef*, No. 11 Civ. 9073, pp. 1-2 (S.D.N.Y. Dec. 19, 2011) ("*Sharef* Complaint").

6 *Id.* at ¶ 8.

7 *Id.* at ¶ 12.

8 *Id.*

9 *Id.* at ¶ 34.

10 *Id.* at ¶ 37.

11 *Id.* at ¶¶ 12, 39, and 40-42.

12 *Id.* at ¶ 51.

13 Plaintiff Securities and Exchange Commission's Memorandum in Opposition to Defendant Steffen's Motion to Dismiss the Complaint, *SEC v. Sharef*, No. 11 Civ. 9073, pp. 6-7 and 12 (S.D.N.Y. Oct. 12, 2012).

14 *SEC v. Sharef*, No. 11 Civ. 9073, slip op. at 13 (S.D.N.Y. Feb. 19, 2013).

15 *Id.* at 15.

16 *Id.* at 18-19 (footnote omitted) (emphasis in original).

17 *Id.* at 17.

18 *Id.* at 19.

19 *Id.* at 20-21(footnotes omitted).