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Judicial Guidance Concerning Foreign Nationals' Exposure Under the FCPA

Two recent decisions from the U.S. District Court for the Southern District of New York provide rare guidance concerning the thorny issue of when foreign nationals with limited U.S. contacts may be haled into U.S. federal court and pursued under the Foreign Corrupt Practices Act ("FCPA"). Although the extraterritorial reach of the FCPA remains quite broad, there now exists a "limiting principle," which may offer some protection for foreign nationals.

The decisions, released less than two weeks apart, involve two cases filed by the U.S. Securities and Exchange Commission ("SEC"): *SEC v. Straub* and *SEC v. Sharef*. In both cases, the SEC alleged multi-million dollar, multi-person schemes to bribe foreign government officials and – critically – concurrent efforts to cover-up those schemes by, among other things, falsifying financial statements. In *Straub* (Feb. 8, 2013), Judge Richard Sullivan determined that the Court could exercise personal jurisdiction over three foreign nationals. In *Sharef* (Feb. 19, 2013), however, Judge Shira Scheindlin reached the opposite conclusion, determining that personal jurisdiction could not be exercised over an accused foreign national.

Both decisions agreed on the principles governing personal jurisdiction over foreign nationals in civil FCPA actions. The Due Process Clause of the Fifth Amendment to the U.S. Constitution (which applies to cases brought under the federal securities laws) requires that before a defendant can be forced into a U.S. court, she must have sufficient "minimum contacts" with the U.S. and the exercise of jurisdiction must be "reasonable." This minimum contacts requirement is satisfied if (1) the defendant purposefully availed herself of the privilege of doing business in the U.S., (2) the defendant could foresee being haled into court in the U.S., and (3) where specific (rather than general) jurisdiction is asserted, the litigation arises out of or is related to the defendant's U.S. contacts. The reasonableness of exercising jurisdiction is influenced by several factors, including the burdens on the foreign national of litigating in the U.S. and the interests of the U.S. and the SEC in obtaining relief.

The facts of the *Straub* and *Sharef* cases (as alleged by the SEC) can be summarized as follows:

	SEC v. Straub	***SEC v. Sharef***
Foreign National(s) Implicated	Three foreign executives of a public Hungarian telecommunications firm, Magyar Telekom, Plc., which is controlled by Deutsche Telekom	A 74-year old German citizen and former Siemens executive, who had "longstanding connections in Argentina"
Alleged Bribery Scheme	Offer and payment of up to €10M in bribes to public officials in Macedonia to mitigate or postpone unfavorable effects of a telecommunications law	Payment of an estimated $100M in bribes over 11 years to government officials in Argentina to secure a contract to create national identity cards
Alleged Cover-up	• Secret agreements with Macedonian officials and sham contracts to pay bribes • False certifications and management representations concerning the truthfulness of financial statements, signed by the Defendants themselves • Falsified SEC filings	• Sham consulting agreement with a front company used to pay bribes • False Sarbanes-Oxley certifications representing the truthfulness of financial statements, signed by co-defendants only • Falsified SEC filings
U.S. Contacts	• Defendants knew their firm's securities were publicly traded in the U.S. and registered with the SEC • Defendants' cover-up was designed (among other things) to violate, and to hide violations of, U.S. securities regulations	• Receipt of a call from a co-defendant located in the U.S. • Urging a co-defendant to continue paying bribes
Reasonableness Factors	• No particular showing by Defendants that litigating in the U.S. would be "severe" or "gravely difficult" • No alternative forum to pursue the Defendants (though Magyar and Deutsche Telekom previously settled with the SEC and DOJ and paid nearly $100M in disgorgement and penalties)	• Defendant's lack of a geographic ties to the U.S., advanced age (74), and poor English proficiency • SEC and DOJ "already obtained comprehensive remedies against Siemens" and Germany previously resolved an action against Defendant individually
Result	Personal jurisdiction permitted	Personal jurisdiction rejected

These divergent results turn on the defendants' differing roles in the alleged bribery and cover-up.

The *Straub* defendants allegedly created the bribery scheme, negotiated and approved the secret agreement, evaded internal controls, falsified financial statement certifications, and signed false SEC filings. The *Sharef* defendant, by contrast, only "urged" and "pressured" a co-defendant to pay bribes; he did not authorize the bribes, direct the cover-up, or participate in the falsification of SEC filings.

These two cases demonstrate that the SEC will continue aggressively to bring FCPA actions against foreign nationals. Indeed, in its recently issued guidance on the FCPA, the government emphasized its ability to pursue foreign companies and individuals in FCPA cases. The one "limiting principle" provided in the *Sharef* case, a non-binding trial level decision, is that a foreign national may escape FCPA liability in those (rare) instances where the SEC sues him despite his having played only a tangential role in foreign bribery. Where, however, the SEC alleges a foreign national authorized a bribery scheme and/or directed or participated in a fraud designed to deceive U.S. investors, such as by falsifying or manipulating financial statements to hide bribes, personal jurisdiction will likely provide no defense.

While supplying a welcome guidepost concerning the reach of the FCPA, this "limiting principle" is, in the end, itself quite limited.

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