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FCPA**FCPA Jurisdiction: The Courts Weigh In**

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Introduction

The jurisdictional reach of the Foreign Corrupt Practices Act ("FCPA") is famously long. U.S. regulators have claimed that the statute applies to U.S. and foreign corporations; U.S. nationals anywhere in the world; foreign nationals anywhere in the world whose conduct directly, and sometimes indirectly, touches U.S. soil; transactions occurring entirely in the U.S.; and transactions whose only contact with the U.S. was the routing of payments through domestic banks.

The FCPA outlaws corporate bribery of foreign officials or third-party intermediaries through its anti-bribery provisions, which prohibit payments to foreign officials made to attract or retain business. The FCPA's

books and records provisions require accurate accounting and adequate internal accounting controls.

In light of the potential civil and criminal penalties involved, not to mention the reputational stakes, FCPA cases are rarely litigated. As a result, the limits to FCPA jurisdiction are more often asserted by regulators in settlement papers than defined by courts in written opinions. This uncertainty has made it difficult for corporate counsel to provide meaningful guidance to executives and others who operate in the FCPA's shadow.

One especially thorny question is whether and when the FCPA can be used against foreign nationals residing outside the U.S. In important ways, this issue is less a matter of the statutory scope of the FCPA than of old-fashioned due process. In other words, at what point does the seemingly unstoppable force of the FCPA's expanding reach meet the immovable object of traditional limits on jurisdiction?

Two recent decisions from the Southern District of New York addressed this issue head-on. In *SEC v. Straub* and *SEC v. Steffen*, decided within two weeks of one another in February 2013, two judges on that court weighed in on the interplay of the FCPA and personal jurisdiction over foreign nationals. In *Straub*, Judge Richard J. Sullivan concluded the SEC had stayed within its jurisdictional bounds, while in *Steffen*, Judge Shira Scheindlin held that the SEC had gone too far.

Read together, the two decisions provide some guidance for corporate counsel seeking to define their FCPA risks with regard to foreign nationals employed by their

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companies and to adopt appropriate, effective safeguards.

Straub and Steffen

In both *Straub* and *Steffen*, jurisdiction was not based on the defendant's role in making corrupt payments. Rather, both involved schemes to cover up bribery by falsifying or manipulating financial statements.

Straub involved three former executives of Magyar Telekom, the Hungarian telecommunications company, who allegedly engaged in a scheme to bribe Macedonian officials. The SEC premised its jurisdiction on the fact that the company's auditors made SEC filings in reliance on certifications provided by the defendants stating that they were aware of no unlawful conduct and that the company's books and records were clean. Judge Sullivan agreed that this was sufficient because the defendants allegedly knew that Magyar was publicly traded in the U.S. and knew or should have known that U.S. investors would likely be influenced by SEC filings. In short, the offending conduct was "directed to" the U.S., and so the defendants fell within U.S. jurisdiction.

Two weeks later, Judge Scheindlin reached the opposite conclusion in *Steffen*. Yet another outgrowth of the Siemens FCPA investigation, the case involved a German national who was the former CEO of Siemens AG's Argentine subsidiary and who allegedly took part in a scheme to pay \$27 million in bribes to Argentinian officials. Specifically, Steffen allegedly pressured another Siemens executive to pay the bribes, to falsify accounting documents, and to sign an untrue Sarbanes-Oxley disclosure. The SEC did not allege that Steffen himself signed any disclosures pursuant to U.S. securities laws; had any direct involvement in the cover up; or occupied a position at the company that would have made him aware of falsified SEC filings. None of Steffen's conduct took place in the U.S., although he received a phone call initiated by a co-conspirator in the U.S., and payment of a portion of the bribes were paid through U.S. bank accounts.

Judge Scheindlin dismissed the complaint for lack of jurisdiction. She began by acknowledging *Straub* as part of a trend toward the exercise of jurisdiction over foreign nationals who play a role in manipulating U.S.-filed financial statements to cover up bribery "directed entirely at a foreign jurisdiction." But such jurisdiction is in need of a "limiting principle," according to the court.

Lessons for Corporate Counsel

Unfortunately, neither court provided any new or easily identified "limiting principles." The map is still being drawn, and corporate counsel must continue to manage FCPA compliance with little concrete guidance from the courts. This is especially true in the specific context in which these cases arose, namely, foreign nationals employed by foreign companies subject to SEC jurisdiction who were allegedly involved in bribery and cover-up schemes entirely or almost entirely outside the U.S.

Nevertheless, corporate counsel can draw a number of lessons from *Straub* and *Steffen*.

- *Thus far and no farther.* The cases demonstrate that there are, in fact, limits to FCPA jurisdiction.

Under both cases, foreign nationals residing outside the U.S. can only be subjected to FCPA jurisdiction if they have "minimum contacts" with the U.S. In these decisions, the minimum contacts test essentially came down to whether the defendants' activities were purposely directed toward the U.S. For example, despite their different outcomes, both *Straub* and *Steffen* highlight that one very clear path to personal jurisdiction is when a foreign national signs SEC filings.

- *The cover-up is more damaging than the crime.* Both cases involved alleged manipulation of accounting records to hide traces of corrupt payments. The bribery schemes themselves took place almost entirely outside the U.S. But the falsification of accounting records, which had a far more obvious impact in the U.S., were the hook upon which the SEC predicated jurisdiction (albeit unsuccessfully as to *Steffen*). This highlights a common, but not universal, trait of FCPA matters: corrupt payments themselves offer fewer possible routes to U.S. personal jurisdiction than the manipulation of SEC filings and books and records.
- *The employer does not dictate the employee's fate.* Personal jurisdiction over foreign nationals is not established by the mere fact that they are employed by entities subject to U.S. securities laws. Particularly after *Steffen*, some additional factor—direct participation in the cover-up, a knowing role in preparing false financial statements, or some other discernible conduct that a court could find was "directed at" the U.S.—is required.
- *Follow the email path.* The SEC and DOJ have long taken the view that emails sent as part of a bribery scheme can bring foreign companies and foreign executives within the reach of the FCPA. Judge Sullivan agreed with this view in *Straub*. The court's holding means that emails sent and received outside the U.S. by non-U.S. nationals but routed through the U.S. could create FCPA jurisdiction even if neither sender nor recipient intended to or knew of the U.S. nexus.
- *There Are Still No Bright Lines.* Neither *Straub* nor *Steffen* provided any bright line test. Both decisions were grounded in the particular facts at issue; neither set forth new or even existing guiding principles other than the inherently fact-specific minimum contacts analysis. In fact, the most important takeaway from *Straub* and *Steffen* may be the lack of clear guidance. The legal landscape remains uncertain, and as a practical matter the outer limits of the FCPA's reach may continue to be drawn by aggressive regulators and prosecutors, not by courts.

How should counsel respond to this uncertainty? As before, by adopting, maintaining, and continually updating robust compliance and training programs throughout the organization, setting the proper tone at management levels throughout the company, and, as appropriate, insisting that third party intermediaries with whom the company works follow those same policies.