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Legal Update
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FCPA Update: Mid-Year 2013

Continuing a seven-year trend, 2013 has seen a continued surge in activity on the Foreign Corrupt Practice Act ("FCPA") front, both with respect to noteworthy new judicial decisions impacting the FCPA's applicability and significant enforcement actions brought by the Justice Department ("DOJ") and the Securities and Exchange Commission ("SEC"). Below, we briefly recap some of the most important FCPA happenings of the year so far.

Steffen and *Straub*—Defining the Reach of the FCPA

The year started with a pair of major decisions out of the Southern District of New York that provide guidance on the reach of the FCPA to foreign nationals. The decision in the first case, *SEC v. Straub, et al.* ("*Straub*"),[1] largely vindicated the government's long-held position that the FCPA applies broadly to foreign nationals involved in overseas bribery schemes, regardless of whether the individual defendant had direct contacts with the United States. The second decision, *SEC v. Sharef et al.* (popularly known as "*Steffen*," after defendant Herbert Steffen),[2] on the other hand, limits the government's position by making clear that the FCPA is still subject to traditional principles of personal jurisdiction.

Both cases involved civil charges brought by the SEC against foreign executives. In *Straub*, the defendants were executives of Magyar Telekom who allegedly bribed officials in Macedonia and Montenegro in order to influence new regulations in those countries. At the time, both Magyar and its parent company, Deutsche Telekom, were publicly traded on the New York Stock Exchange and were registered with the SEC. According to the SEC's complaint, the corrupt payments had been inaccurately recorded in Magyar's books, resulting in material misstatements in the company's annual SEC filings. The defendants—all foreign nationals—moved to dismiss, in part, on the ground that the US court lacked personal jurisdiction over them.

Calling the defendants' concerns "overblown," Judge Richard Sullivan denied the motion for essentially two reasons. First, the court explained, the SEC had shown a sufficient jurisdictional nexus by alleging that emails relating to the corrupt scheme had passed through computer servers in the United States, even though none of the defendants were actually in the United States when sending or receiving the emails. Second, the court said, because Magyar was registered with the SEC and traded in the United States, any attempt by the defendants to conceal their bribes in relation to public filings was conduct sufficiently "directed toward the United States" to give rise to personal jurisdiction.

Although the court stressed that it was not "creat[ing] a *per se* rule regarding employees of an [US] issuer," the opinion alluded to few, if any, limiting principles on the SEC's capacious view of personal jurisdiction. Under a broad reading of *Straub*, nearly any employee of a US

issuer, wherever they are located, might be hauled into a US court under the theory that their participation in a corrupt scheme had consequences in this country.

On February 19, 2013, just 11 days after the *Straub* decision was issued by her Southern District colleague, Judge Shira Scheindlein granted a very similar motion to dismiss for lack of personal jurisdiction in *Steffen*. In that case, the defendant was an executive working for an Argentine subsidiary of Siemens, a German corporation that is publicly traded in the United States. According to the SEC's complaint, between 1996 and 2007, Siemens had paid more than $100 million in bribes to public officials in Argentina. The SEC did not contend that the defendant had been directly involved in paying the bribes. Rather, the complaint alleged that a Siemens board member had recruited the defendant to facilitate the bribes because of his ties to the Argentine government, and that the defendant had "pressured" executives to authorize the bribes during a telephone call with the United States.

Citing *Straub*, Judge Scheindlein's decision noted, "[i]t is by now well-established that signing or directly manipulating financial statements to cover up illegal foreign action, with knowledge that those statements will be relied upon by United States investors satisfies th[e] [personal jurisdiction minimum contacts] test." But, 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."

The court then distinguished *Straub* by noting that the *Steffen* defendant had "neither authorized the bribe, nor directed the cover up, much less played any role in the falsified [SEC] filings." The court also rejected the SEC's argument that the defendant's telephone call with the United States provided a sufficient jurisdictional nexus, since the defendant personally "did not place [those] calls," he had merely participated on them. The court also noted its practical concerns regarding exercising personal jurisdiction over the defendant, emphasizing the defendant'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 … [since the US government] ha[d] already obtained comprehensive remedies against Siemens' and Germany ha[d] resolved an action against [defendant] individually."

To date, the SEC appears to have taken no steps to seek appellate review of Judge Scheindlein's decision. FCPA-watchers may have to wait a while before learning how the Second Circuit will resolve the apparent tension between *Straub's* broad application of the FCPA and *Steffen's* more limited view.

Non-Prosecution Agreements—A First for the FCPA

In another significant development for FCPA enforcement, on April 22, 2013, the SEC announced its first ever FCPA-related non-prosecution agreement (NPA), resolving its investigation into US apparel company Ralph Lauren Corp. The Justice Department was also a participant in the NPA. According to the NPA, employees of a Ralph Lauren subsidiary in Argentina had made almost $600,000 in corrupt payments to public officials in that country in order to secure favorable importation and customs treatment for Ralph Lauren products. Ralph Lauren executives had also provided costly products, such as clothing and perfume, to several public officials as unreported gifts.

In announcing the NPA, the SEC praised Ralph Lauren for its "level of self-policing, along with its self-reporting, and cooperation." The alleged violations had come to light after changes in the company's FCPA compliance program caused Argentine employees to report the problems. Ralph Lauren then quickly launched an internal investigation and made a voluntary disclosure to regulators within a few weeks of uncovering the payment scheme. Following this voluntary

disclosure, Ralph Lauren also took other remedial actions and conducted a worldwide audit and compliance review, which found no other violations. Regulators at the SEC and the DOJ have touted Ralph Lauren's case as an example of the benefits that are accorded to those companies that responsibly handle FCPA violations and voluntary disclose such violations to law enforcement.

Enforcement Actions—Aggressive Regulators, Big Settlements, and A Focus on Individual Prosecutions

After a slow start to the year, federal regulators aggressively picked up the pace of FCPA enforcement over the spring and summer of 2013. By July 2013, the Justice Department had already brought 12 enforcement actions— it brought 11 in all of 2012.

The dollar values of some of these enforcement actions have been enormous. For example, on May 29, 2013, the DOJ and SEC announced a joint settlement with Total S.A., under which the French energy giant agreed to pay a $245.2 million fine to the DOJ and $153 million in disgorged profits to the SEC. Regulators had been investigating Total in connection with allegations that it paid approximately $60 million in bribes to Iranian officials in order to obtain oil and gas contracts. The combined $398 million settlement was the fourth largest monetary resolution in the history of the FCPA.

Even that hefty payment did not resolve Total's legal issues entirely. On the very day of the settlement, French prosecutors announced that they also intended to pursue Total and a number of its executives for violations of French law. Thus, the Total case stands as a stark reminder of two basic truths for multinational corporations: *first*, unaddressed FCPA violations can prove extremely costly; *second*, legal regimes in different countries can result in duplicative or overlapping exposures for those accused of violating anti-corruption laws.

In brief, other notable enforcement actions from the first half of 2013 include:

- **Parker Drilling Company.** On April 16,2013, this Houston-based drilling and project management company settled charges with the DOJ and the SEC, arising out of a longstanding investigation into an alleged scheme to bribe customs officers in Nigeria. According to the charging documents, Parker executives authorized an intermediary to pay approximately $1.25 million for the illicit purpose of "entertain[ing]" several Nigerian officials. To settle the charges, Parker agreed to pay a nearly $11.8 million fine and disgorge over $4 million in ill-gotten profits and interest.
- **BizJet Executives.** In a sign of regulators' continued focus on individual prosecutions, on April 5, 2013, the DOJ announced criminal charges against four former executives of Tulsa-based aircraft maintenance company BizJet International Sales and Support, Inc. In March of 2012, BizJet and its German parent company entered into deferred prosecution agreements with the DOJ. According to those agreements, BizJet executives allegedly authorized and paid bribes to officials in Mexico and Panama in an attempt to secure contracts to service government air fleets in those countries. The DOJ's pursuit of criminal charges against the four executives demonstrates the agency's continued commitment to an enforcement model that favors incentivizing self-disclosure by corporations while aggressively prosecuting individual violators.
- **Frederic Cilins.** In another significant individual prosecution, on April 15, 2013, the DOJ announced the arrest of French citizen Frederic Cilins for obstructing a grand jury investigation into an alleged corrupt scheme to obtain mining rights in the Republic of Guinea. The five-count indictment accuses Cilins of attempting to bribe the widow of a former high-ranking Guinean official to

destroy documents that had been subpoenaed by the grand jury. Unbeknownst to Cilins, the widow was cooperating with the FBI and had recorded their conversations. Cilins has pleaded not guilty. His trial is currently scheduled for December 2, 2013.

- **BANDES Prosecutions.** In May and June 2013, the DOJ arrested three employees of New York-based broker-dealer Direct Access Partners LLC ("DAP") and a senior minister of Venezuela's state economic development bank ("BANDES") relating to allegations that the employees had paid the BANDES official more than $5 million over a three-year period in exchange for directing more than $66 million in business to DAP. The Venezuelan official was detained in Miami, where she had come to visit the broker-dealer employees. The case represents the first criminal charges brought in what looks to become a widening investigation of the broker-dealer industry, with a particular focus on those broker-dealers doing business with foreign state banks or sovereign wealth funds.

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Endnotes

[1] No. 1:11-cv-09645-RJS (S.D.N.Y. Feb. 8, 2013).
[2] No. 1:11-cv-09073-SAS (S.D.N.Y. Feb. 19, 2013).

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