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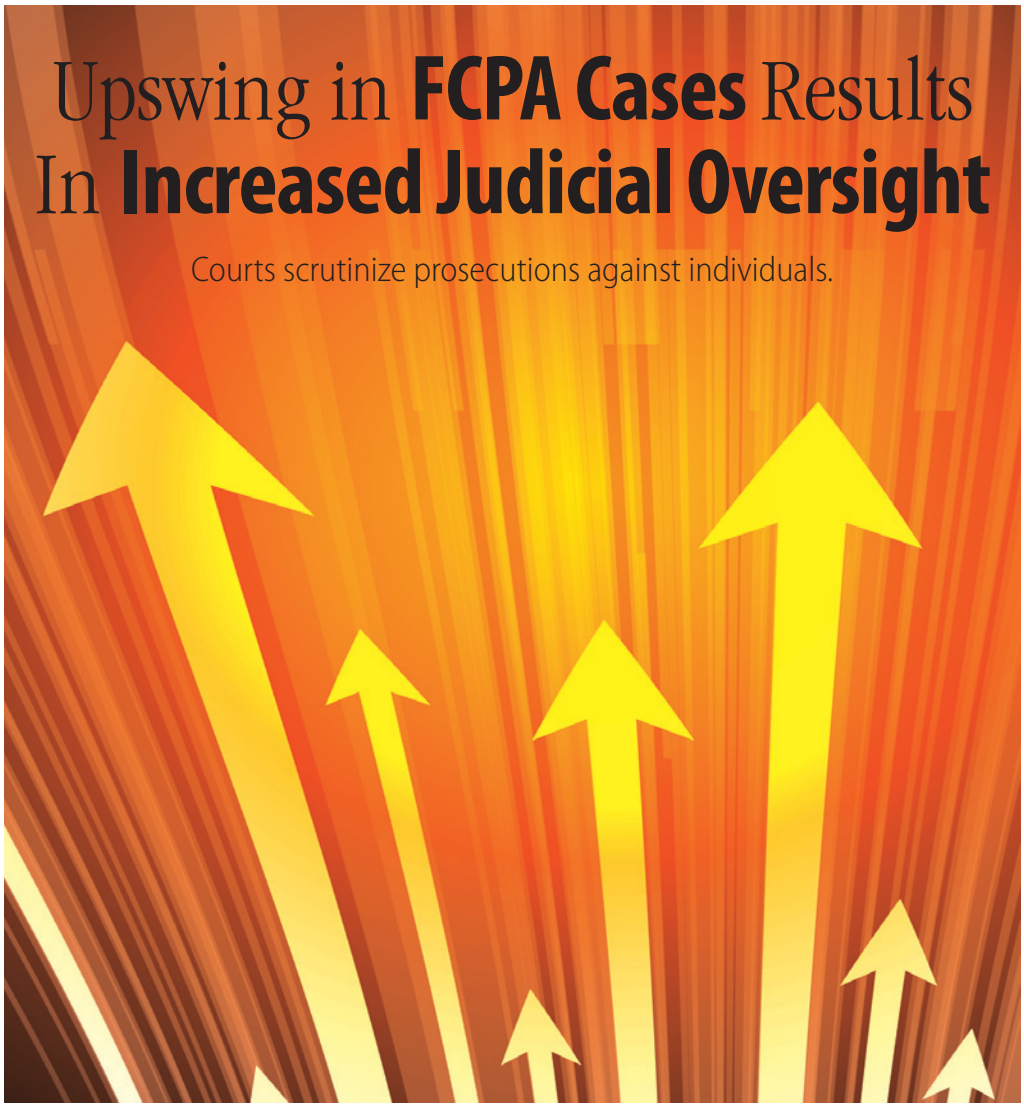
Upswing in FCPA Cases Results In Increased Judicial Oversight

Courts scrutinize prosecutions against individuals.



BIGSTOCK

BY BENJAMIN GRUENSTEIN

In recent years, there has been a significant uptick in the number of prosecutions of individuals under the Foreign Corrupt Practices Act (FCPA). From 2008 through May 2013, the Department of Justice (DOJ) charged over 80 individuals with violating the FCPA, over twice the number that was prosecuted in the 10 preceding years.[1] The increase has been viewed within the DOJ as a significant component of FCPA enforcement. Lanny Breuer, the Assistant Attorney General for the DOJ's Criminal Division who oversaw this rise in FCPA enforcement, remarked last year that the Criminal Division's single most important achievement during his tenure was that "corporate executives now actually believe—for good reason—that if they participate in a scheme to improperly influence a foreign official, they face the very real prospect of going to prison."[2]

During this period, political pressure to hold individual executives responsible for the crimes of their companies has also been strong. For example, in 2010, a subcommittee of the Senate Judiciary Committee held a hearing entitled "Examining Enforcement of the Foreign Corrupt Practices Act."[3] During that hearing, Sen. Arlen Specter expressed concern that, despite the successes that the DOJ had in corporate prosecutions under the FCPA, there were few examples of individuals being prosecuted and going to jail as part of those prosecutions. Among the examples Specter cited was the Siemens case, in which the DOJ and Securities and Exchange Commission (SEC) negotiated settlements with the company for approximately $800 million in fines and disgorgement but in which no individual executives were charged. The DOJ responded quickly and, in 2011, indicted eight former Siemens executives for conspiracy to violate the FCPA in connection with the case against the company.[4]

With the rise in prosecutions against individuals, there has been increased opportunity for courts to provide judicial oversight of FCPA enforcement. Whereas companies have overwhelming incentives to enter into uncontested settlements of FCPA charges, individuals who face possible jail sentences from criminal prosecution have stronger incentives to challenge the charges against them and raise whatever legal arguments are available to them (if not at trial, then during pretrial motions). Consider that out of nearly 70 corporate defendants who were criminally charged with FCPA violations between 1998 and 2010, not a single case went to trial (or even appears to have been litigated).[5] By contrast, at least eight individuals who were criminally charged under the FCPA took the government to trial in 2011.[6]

The reluctance of corporate defendants to fight FCPA charges has created limited opportunity for courts to issue guidance regarding the reach of the FCPA, the result being that the government's

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position has become the prevailing view. Questions as to the scope of the FCPA, however, have recently begun to receive attention from courts in government prosecutions against individuals, and will continue to be the subject of judicial scrutiny in the future. This article examines several of these questions and explores how courts have begun to examine them in the context of prosecutions and enforcement actions against individuals. These questions include: What constitutes a "foreign official" or an "instrumentality" of a foreign government for purposes of the FCPA? In what situations can the government reach beyond the FCPA's five-year statute of limitations to prosecute past conduct? And what is the reach of personal jurisdiction over foreign defendants in FCPA cases?

The Definition of 'Foreign Official'

The FCPA applies only to offers or payments made to "foreign officials," which the statute defines to include employees who work for an "instrumentality" of a foreign government.[7] Both the SEC and DOJ have consistently taken the position that employees of state-owned entities, including hospitals,[8] utility providers,[9] and airlines,[10] constitute "government officials." That position was formalized in the SEC and DOJ's recently published Resource Guide.[11] Nevertheless, despite this position having gone largely unchallenged in cases against corporate entities, its legitimacy is far from obvious. It is not clear from the language of the statute, or its purpose, that "foreign officials" should encompass low-level employees of entities that do not provide services that are routinely considered to be governmental. Indeed, the legislative history of the FCPA shows that Congress considered bills expressly covering the bribery of employees of state-owned enterprises and ultimately rejected those bills.[12] While the government's interpretation of "foreign official" has gone largely unchallenged in corporate prosecutions, the government is currently being put to its burden to defend its interpretation in a case that the DOJ has brought against corporate executives.

In *United States v. Esquenazi*, the DOJ charged executives of Terra Telecommunications (Terra) with paying bribes to executives of Telecommunications D'Haiti (Telco Haiti), an entity owned by the Haitian government.[13] Among the defendants in the case were Terra's President Joel Esquenazi and EVP Carlos Rodriguez. At trial, the government proceeded on the theory that Telco Haiti executives were "foreign officials" within the meaning of the FCPA because Telco Haiti was an "instrumentality" of the government. The defendants unsuccessfully challenged the government's position in a pretrial motion to dismiss the indictment and in their proposed jury instructions. The defendants sought a jury charge that limited the notion of a government "instrumentality" to those business entities that "exist[] for the sole and exclusive purpose of performing a public function traditionally carried out by the government."[14] The court refused to provide the requested jury charge, instead instructing the jury to consider a variety of non-dispositive factors to determine whether Telco Haiti was a government "instrumentality." Those factors included: whether the company provided services to the citizens of Haiti; whether its leadership was composed of or appointed by government officials; whether it was owned in significant part by the government; and whether the company was "widely perceived…to be performing…governmental functions."[15] Esquenazi was convicted after trial and sentenced to a term of imprisonment of 15 years for FCPA and related money-laundering charges—the longest sentence ever handed down in an FCPA case. His codefendant, Rodriguez, was sentenced to seven years.

The case is now pending before the Court of Appeals for the Eleventh Circuit, where the defense has argued that the FCPA was never meant to cover what is, in effect, commercial bribery and that, if a business does not perform any traditional governmental functions, it cannot properly be considered an "instrumentality" under the FCPA. Oral argument in *Esquenazi* is scheduled for early October, and when the Eleventh Circuit rules it will be the first court of appeals to weigh in on this question that has broad implications for FCPA enforcement.

The FCPA's Statute of Limitations

Another instance in which the government is being required to defend its interpretation of the FCPA in a case brought against individuals is *SEC v. Jackson*, which is currently pending in the Southern District of Texas. There, the SEC charged senior executives of an American company with having bribed Nigerian government customs officials.[16] The defendants moved to dismiss the charges insofar as they extended beyond the FCPA's five-year statute of limitations. The SEC responded by invoking the "continuing violations" doctrine, which allows for the prosecution of conduct outside a limitations period where the conduct is alleged to be part of a "continuing process" that extended into the limitations period.[17]

The defendants challenged this application of the continuing violations doctrine on the basis that it is not enough to charge "a series of discrete acts that are somehow factually related"—a test that could almost always be satisfied when charging discrete improper payments by a single defendant for related purposes. Rather, the defendants argued that the continuing violations doctrine could only be used "where the cumulative effect of a series of individual acts gives rise to a single claim."[18]

Ultimately, the court did not have an opportunity to provide guidance on this question, as the SEC voluntarily amended its complaint to exclude charges based on conduct outside the limitations period.[19] Nevertheless, the question will likely recur, especially in light of the Supreme Court's recent decision in *Gabelli v. SEC*, in which the Court held that the statute of limitations applicable when the SEC seeks penalties begins to run when the fraudulent activity "accrues" (i.e., when the government could potentially bring an action based on the conduct).[20] Guidance from the courts on the applicability of the "continuing violations" doctrine in FCPA cases will be welcomed by practitioners who advise both companies and individuals as to the applicable limitations period for FCPA prosecutions.

Personal Jurisdiction Under the FCPA

In recent cases against corporate executives, courts have also been called upon to adjudicate the government's application of the FCPA to foreign nationals whose conduct occurs entirely outside the United States. According to the DOJ and SEC's recently released Resource Guide, "[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."[21] That position is potentially broader than the text of the FCPA, which provides for jurisdiction over a foreign entity only where that entity engages in conduct "while in the territory of the United States."[22]

Earlier this year in an FCPA case brought by the SEC against individual executives, Judge Richard J. Sullivan of the Southern District of New York considered the government's extension of personal jurisdiction over foreign individuals for purposes of the FCPA. In *SEC v. Straub*, the SEC brought suit against executives of Magyar Telekom, a Hungarian telecommunications company whose ADRs are traded on the NYSE, for allegedly bribing government

officials in Macedonia and Montenegro.[23] The defendants were alleged to have bribed the officials and concealed the payments as marketing and consulting fees on Magyar's books.[24] The defendants then allegedly made false certifications to Magyar's auditors about these fees, after which the auditors submitted unqualified audit opinions to the SEC.[25] Significantly, there were no allegations that the defendants travelled to or took any action in the United States in connection with the scheme.

In opposition to a motion to dismiss for lack of personal jurisdiction, the SEC argued that the actions of the defendants to conceal their bribery scheme, although not conducted in the United States, were *directed* at the United States—a prerequisite for the exercise of personal jurisdiction.[26] Judge Sullivan agreed, finding that the defendants were alleged to have been personally involved in making representations and concealing information in connection with Magyar's SEC filings, which they knew "would be given to prospective American purchasers of [Magyar's] securities."[27] Sullivan made clear, however, that questions of personal jurisdiction would have to be resolved on a fact-specific basis and that his ruling did not "automatically imply" that officers, directors or employees would always be subject to personal jurisdiction under the FCPA.[28] The *Straub* defendants have contested Sullivan's ruling and moved to certify his order for interlocutory appeal to the Second Circuit.

Approximately two weeks after Judge Sullivan issued his ruling, Judge Shira A. Scheindlin issued an opinion in *SEC v. Sharef*, in which she found that the SEC failed to establish jurisdiction over a foreign defendant who engaged in no conduct within the United States.[29] In *Sharef*, the SEC alleged that the former CEO of Siemens Argentina had pressured the CFO of Siemens Business Services to authorize bribes to government officials, which were reported as legitimate business expenses in Siemens's financial statements.[30] As in *Straub*, the former CEO was not alleged to have engaged in any conduct in the United States, but unlike in *Straub*, he was not accused of personal involvement in falsifying the company's financial statements. Nevertheless, the SEC argued that the defendant had pressured the CFO to authorize the bribes, and thus it was foreseeable to him that the company's financial statements would be misstated in violation of the FCPA.[31] Scheindlin rejected the SEC's argument, noting that "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."[32] In arriving at her ruling, Judge Scheindlin stressed the need for a "limiting principle" in cases of personal jurisdiction where the allegation of jurisdiction is based on the effect of the defendant's conduct on SEC filings.[33]

Conclusion

As the above cases illustrate, the government's increased push to bring cases under the FCPA against individual corporate executives has resulted, and will continue to result, in additional judicial guidance on the FCPA. Unlike corporate prosecutions, which are typically settled out of court, corporate executives—facing both significant financial penalties and the possibility of jail sentences—have stronger incentives to put the government to its burden to defend its interpretation of the FCPA. The impact of future rulings on the government's initiative to strongly enforce the FCPA—including whether the rulings resulting from the increased prosecution of individuals ultimately curb government enforcement of the FCPA—remains to be seen.

1. U.S. Department of Justice, FCPA and Related Enforcement Actions, http://www.justice.gov/criminal/fraud/fcpa/cases/2013.html (last visited June 10, 2013) (listing FCPA prosecutions from 1977 to present); see also U.S. Department of Justice, FCPA Criminal Enforcement Statistics (1998-2010) Natural Persons—Appendix B—Chart 1A, http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf (last visited June 10, 2013) (providing data for 1998 through Sept. 30, 2010).
2. Lanny A. Breuer, Assistant Attorney General, Remarks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.
3. Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. 1 (2010), available at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.
4. Press Release, U.S. Department of Justice, Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme (Dec. 13, 2011), available at http://www.justice.gov/opa/pr/2011/December/11-crm-1626.html.
5. U.S. Department of Justice, FCPA Criminal Enforcement Statistics (1998-2010) Legal Persons—Appendix B—Chart 1B, http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf (last visited June 10, 2013) (providing data for 1998 through Sept. 30, 2010).
6. Richard L. Cassin, 2011 Enforcement Index, The FCPA Blog (Jan. 2, 2012, 7:18 AM), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html.
7. 5 U.S.C. §78dd-3(a); 5 U.S.C. §78dd-3(f)(2)(A).
8. See, e.g., Complaint, *SEC v. Biomet*, No. 12-cv-454 (D.D.C. March 26, 2012), available at http://www.sec.gov/litigation/complaints/2012/comp22306.pdf.
9. See, e.g., Non-Prosecution Agreement, U.S. Department of Justice—Tyco International Ltd., Sept. 20, 2012, available at http://www.justice.gov/criminal/fraud/fcpa/cases/tyco-intl/2012-09-20-tyco-intl-npa-sof.pdf.
10. See, e.g., Non-Prosecution Agreement, U.S. Department of Justice—The NORDAM Group, July 6, 2012, available at http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group/2012-07-17-nordam-npa.pdf.
11. The Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act 20-21 (2012) [hereinafter Resource Guide], available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
12. Declaration of Prof. Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment at ¶16, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011).
13. Indictment at 2, 8-11, *United States v. Esquenazi*, No. 1:09-cr-21010-MGC (S.D. Fla. Dec. 8, 2009).
14. Defendant's Proposed Jury Instruction Regarding "Foreign Official" and "Instrumentality" Supporting Memorandum of Authorities at 7, *United States v. Esquenazi*, No. 1:09-cr-21010 (S.D. Fla. July 7, 2011).
15. Court's Final Instructions to the Jury at 24, *United States v. Esquenazi*, No. 1:09-cr-21010 (S.D. Fla. Aug. 5, 2011).
16. Complaint at 7-8, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. Feb. 24, 2012).
17. *Toussie v. United States*, 397 U.S. 112, 122 (1970).
18. Defendants' Joint Motion for Partial Dismissal of the SEC's Amended Complaint at 15, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. Feb. 22, 2013).
19. Joint Stipulation and Motion at 2, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. March 22, 2013).
20. *Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21, 1223 (2013).
21. Resource Guide, supra note 11, at 12.
22. 15 U.S.C. §78dd-3(a).
23. Complaint at 1-2, *SEC v. Straub*, No. 11-cv-9645 (RJS) (S.D.N.Y. Dec. 29, 2011).
24. Id. at 11-13.
25. Id. at 19-20.
26. Plaintiff SEC's Memorandum in Opposition to the Defendants' Joint Motion to Dismiss the Complaint at 16, *SEC v. Straub*, No. 11-cv-9645 (RJS) (S.D.N.Y. Dec. 5, 2012).
27. *SEC v. Straub*, No. 11-cv-9645 (RJS), at 8-9 (S.D.N.Y. Feb. 8, 2013).
28. Id. at 10.
29. *SEC v. Sharef*, No. 11-civ-9073 (SAS), at 21 (S.D.N.Y. Feb. 19, 2013).
30. Complaint at 2-3, 14, *SEC v. Sharef*, No. 11-cv-9073 (SAS) (S.D.N.Y. Dec. 19, 2011).
31. Plaintiff SEC's Memorandum in Opposition to Defendant Steffen's Motion to Dismiss the Complaint at 13, *SEC v. Sharef*, No. 11-civ-9073 (SAS) (S.D.N.Y. Nov. 13, 2012).
32. *Sharef*, No. 11-civ-9073 (SAS), at 18-19 (emphasis in original).
33. Id. at 18.