

## Two Recent Decisions Provide Rare Guidance on the FCPA's Reach Over Foreign Nationals

Two recent district court decisions have shed light on the reach and scope of the U.S. Foreign Corrupt Practices Act (FCPA) over foreign nationals: *SEC v. Straub* and *SEC v. Sharef*. For companies and individuals operating abroad, these cases provide rare judicial guidance on the reach of the FCPA's anti-bribery and record-keeping provisions. Together, they reaffirm U.S. regulators' long-standing position that the FCPA has broad applicability to foreign nationals, while also setting the outer limits of the civil scope of the FCPA.

In the first opinion, *SEC v. Straub*, No. 11 Civ. 9645 (RJS) (S.D.N.Y. Feb. 8, 2013), the court held that foreign nationals who signed false statements that were eventually incorporated into SEC filings were subject to the FCPA. Just as significantly, the court found that the FCPA's statute of limitations did not run while the foreign national defendants were not physically present in the United States.

Defendants in *Straub* were three executives of a Hungarian telecommunications company whose stock was traded on U.S. exchanges, Magyar Telekom. In 2005, defendants allegedly engaged in a scheme to bribe public officials in Macedonia. Defendants instructed company officials to record the bribes to Macedonian officials as sham fee-based contracts for consulting and marketing services. During the course of the scheme, defendants also certified to the company's auditors that the company's financial records were complete and accurate and that they were not aware of any violations of the law. These certifications were later used in filings with the SEC.

The *Straub* court held that while the executive defendants had not set foot within the U.S., they were still subject to the reach of the FCPA in U.S. courts. In reaching this conclusion, the court considered the defendants' role in the bribery scheme, emphasizing the foreign nationals' personal involvement in making false representations that were incorporated into SEC filings. The court found that the defendants knew (or should have known) that those false filings would be given to prospective American purchasers of Magyar Telekom's stock.

Importantly, the court also ruled that while the SEC had filed its suit more than five years since the defendants' conduct had occurred, the SEC could still proceed because the FCPA's statute of limitations period does not run while a defendant is not physically present in the U.S. This expansive ruling effectively negates the FCPA's civil statute of limitations period for many foreign nationals.

In the second opinion, *SEC v. Sharef*, No. 11 Civ. 9073 (SAS) (S.D.N.Y. Feb. 19, 2013), the court held that personal jurisdiction could not be exercised over a German citizen and Siemens employee who allegedly encouraged others to pay bribes to the Argentine government, but who had not himself authorized or paid the bribes and who did not have any involvement in the falsification of Siemens's SEC filings related to the bribery.

While the two cases diverge in outcome, the *Sharef* court positively cited *Straub* and distinguished its facts on the grounds that the defendant in *Sharef*, unlike the Magyar Telekom defendants in *Straub*, had no role in Siemens's falsified financial statements. The *Sharef* court held that the SEC's attempt to exercise jurisdiction based on the effect the defendant's attenuated role in the scheme had on Siemens's SEC filings "was in need of a limiting principle" or 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.

Despite their differing outcomes, both *Straub* and *Sharef* serve as reminders that the DOJ and SEC are continuing to aggressively pursue violations of the FCPA without regard to nationality. Indeed, most of the recent FCPA enforcement actions that the two government agencies have brought against individuals have targeted foreign nationals.

Against this backdrop of increasingly extra-national enforcement, written guidance from U.S. courts on the scope of the FCPA's application to non-U.S. citizens has been exceedingly rare. These recent opinions, however, continue to leave a great deal of uncertainty concerning the breadth of the FCPA, including exactly what constitutes minimum contacts sufficient to support personal jurisdiction under this U.S. statute. Moreover, the *Straub* court's expansive view of the statute of limitations appears to significantly limit potential defenses available to foreign nationals with minimal U.S. contacts. Indeed, these potentially expansive lower court holdings present complex constitutional questions about the scope and extra-territorial reach of the FCPA that may provide fertile ground for future litigation.

We will continue to monitor and evaluate the evolving guidance from U.S. courts on the extra-territorial reach of the FCPA. In the meantime, public companies operating abroad should continue to focus on developing and rolling out robust anti-corruption compliance programs. U.S. regulators have made clear that they place a premium on these programs in deciding whether to initiate and even resolve FCPA enforcement actions. Please see Ropes & Gray's [analysis](#) of the DOJ and SEC's recently issued joint Resource Guide for more information regarding the hallmarks of effective and adequate anti-corruption compliance programs.

If you have questions about these recent opinions or how to mitigate your FCPA risks, please contact the Ropes & Gray attorneys with whom you regularly work.