CLIENT UPDATE

COURT FINDS FCPA'S "INTERSTATE COMMERCE" REQUIREMENT MET BY FOREIGN EMAILS THAT TOUCHED U.S. SERVERS

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Last Friday, Judge Sullivan issued his much-awaited opinion in *SEC v. Straub*, a case in which the SEC accuses three non-U.S. former executives of Magyar Telekom, Plc. ("Magyar"), a Hungarian telecommunications company and U.S.-registered foreign-private issuer, of having violated the FCPA by causing Magyar to pay bribes to Macedonian officials. In denying the defendants' motion to dismiss, Judge Sullivan endorsed the SEC's position that emails in furtherance of a bribe that both originate and are received outside the U.S., but that travel through or are stored on U.S. network servers, satisfy the "interstate commerce" requirement for FCPA claims against foreign-private issuers and their non-U.S. officers and employees. The court also found that the defendants' alleged participation in a scheme to misrepresent the bribes in Magyar's financial statements created sufficient minimum contacts with the U.S. to establish personal jurisdiction over them. The court noted that because each defendant had signed allegedly misleading management representation or sub-representation letters in connection with the audits of Magyar's financial statements, it had "little trouble" finding jurisdiction. In combination with the court's additional holding that the statute of limitations on an SEC penalty action does not run while a defendant is outside the U.S., the decision could subject non-U.S. officers of U.S. registrants or their consolidated subsidiaries to potential U.S. liability in perpetuity

based on a single email sent and received abroad, but unwittingly routed through the U.S., so long as they do not become available for service within this country. The court's rulings cast a wide extra-territorial net for non-U.S. officers of foreign-private issuers whose overseas conduct in furtherance of corrupt payments has a minimal U.S. nexus.

The SEC's complaint in *Straub* alleges that the defendants arranged through a Greek intermediary for payments to be made by Magyar subsidiaries to Macedonian officials, pursuant to secret written contracts approved or signed by each of the defendants. The payments allegedly were made in exchange for relief from provisions of new telecommunications legislation in Macedonia that negatively impacted MakTel, a telecommunications service provider jointly owned by Magyar and the Macedonian government. As a result of the payments, the Macedonian government allegedly delayed the introduction of a new mobile telephone competitor to, and reduced certain tariffs imposed on, MakTel.

The complaint alleges that one of the defendants sent emails of draft contracts and other documents, that these emails were the means by which the defendants concealed the true nature of the payments, and that although these emails were sent and received outside the U.S., they "were routed through and/or stored on network servers located within the United States." The complaint further alleges that, to cover up the bribery scheme, one of the defendants signed a management representation letter to Magyar's auditors stating that he was unaware of any violations of law or improperly recorded transactions in Magyar's financial statements, and the other two defendants signed management sub-representation letters that falsely certified to the full and accurate disclosure of all material information from their areas of responsibility.

In denying the motion to dismiss, the court rejected the defendants' argument that the complaint failed to allege facts sufficient to show that they "ma[de] use of" an "instrumentality of interstate commerce corruptly in furtherance of" any offer or payment to a foreign official. The defendants argued that, in light of the FCPA's use and placement of the word "corruptly," the SEC was required to show that their use of interstate commerce – in this case, of U.S. servers in connection with their email communications – was knowing or intentional. In what it acknowledged was a case of first impression, the court found the FCPA's use of the adverb "corruptly" ambiguous; although that term appeared to modify the verb "use," the court found that its delayed placement in the text appeared to reflect a legislative choice to modify the statutory language concerning offers or payments that followed. In light of this perceived ambiguity (which, it appears, defense counsel acknowledged at oral argument), the court relied on legislative history to interpret the word "corruptly" to modify offers and payments, not the use of interstate commerce.

Accordingly, the court found the complaint's allegations concerning the routing or storage of foreign emails through U.S. servers sufficient to satisfy the FCPA's interstate commerce requirement.

The court also rejected the defendants' argument that the court lacked personal jurisdiction over them. Applying the nationwide service-of-process provision in § 27 of the Securities Exchange Act, the court found that it could exercise personal jurisdiction consistent with due process based on the defendants' alleged "minimum contacts" with the U.S. In particular, the court found that each defendant's alleged involvement in the bribery scheme was designed to violate U.S. securities regulations, and thus was sufficiently directed to the U.S. to support personal jurisdiction, because each defendant "knew or had reason to know" by reason of Magyar's status as a foreign-private issuer that any false or misleading financial reports would be given to U.S. investors. The court ruled that its finding of jurisdiction was further supported by the defendants' signing of allegedly misleading management representation and sub-representation letters in connection with Magyar's financial statement audits, which alleged conduct the court characterized as a "cover-up" made with knowledge that U.S. investors would likely be influenced by any false filings. The court dismissed as "overblown" the defendants' concern that exercising jurisdiction over them would imply personal jurisdiction over any officer of any foreign-private issuer in any FCPA case, stating that its ruling was based on the SEC's specific allegations regarding the bribery scheme, the falsification of Magyar's books and records, and the defendants' involvement in the representation and sub-representation process. In short, the court ruled that although the defendants' alleged bribes took place outside the U.S., "their concealment of those bribes, in conjunction with Magyar's SEC filings, was allegedly directed toward" the U.S.

Beyond these important rulings on the extra-territorial reach of the FCPA, the Straub decision is notable in at least two other respects. First, the court rejected the defendants' motion to dismiss the SEC's claims as time barred under 28 U.S.C. § 2462, even though it was undisputed that more than five years had passed since the SEC's claims had accrued, because "by its plain terms" § 2462's five-year statute of limitations does not run while a defendant is not physically present in the U.S. Second, the court agreed with and adopted the position, recently set forth by Judge Ellison in *SEC v. Jackson*, that the FCPA does not require a foreign official for whom alleged bribe payments are intended to be specifically identified in order to state a claim. In so holding, the court did not reference an earlier bench ruling of acquittal in *U.S. v. O'Shea*, in which Judge Hughes (like Judge Ellison, of the Southern District of Texas) had criticized the government for its inability to trace particular payments to specific foreign officials.

The *Straub* decision is likely to spark considerable debate. The court's "interstate commerce" clause analysis proceeds from the premise that FCPA's use of the word "corruptly" is ambiguous and requires resort to legislative history. This premise, however, is questionable. Under a commonsense reading of the FCPA, Congress appears unambiguously to have employed the term "corruptly" to qualify the type of use of interstate commerce that can support an FCPA violation, such that resort to legislative history is unnecessary and a defendant's unwitting use of U.S. network servers and other instrumentalities should not violate the law. Further, although the court took pains to state that it was not creating a *per se* rule of personal jurisdiction over non-U.S. officers of foreign-private issuers, portions of the opinion can be read to support the proposition that where a bribe is not properly recorded in a U.S. registrant's financial statements, the registrant's officers necessarily will have directed misleading financial statements to the U.S. in a way that supports jurisdiction over them. It remains to be seen whether other courts will interpret *Straub* this categorically, or instead treat it as a decision based on its own facts, including the defendants' alleged misstatements in management representation and sub-representation letters. Finally, the court's limitations ruling raises the specter of endless potential liability for non-U.S. officers of foreign private issuers who are not present and available for service in the U.S., based on a single email that traverses U.S. territory without their knowledge or intent.

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Please do not hesitate to contact us with any questions.

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