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Straub/Steffen District Court Personal Jurisdiction and U.S.-Nexus Rulings: Good News and Bad News for Foreign Individual FCPA Defendants

I. Introduction

On February 8 and 19, two judges of the United States District Court for the Southern District of New York – Judge Richard J. Sullivan in *SEC v. Straub*,[1] and Judge Shira A. Scheindlin in *SEC v. Steffen*[2] – ruled on the recurring question of when foreign nationals residing continuously outside the United States, may, under the due process "fair play and substantial justice" requirements of *International Shoe v. Washington*, 326 U.S. 310 (1945), be prosecuted on civil FCPA charges by the Securities and Exchange Commission ("SEC").

The two rulings, both of which followed the resolution of FCPA charges against the defendants' employers, led to markedly different outcomes. In *Straub,* the individual defendants in the *Magyar Telekom* matter lost not only their motions to dismiss for lack of personal jurisdiction under *International Shoe*, but also for failure to state a claim because of a lack of sufficient U.S. nexus under the "interstate commerce" requirement of 15 U.S.C. § 78dd-1 and lack of timely commencement of suit. In *Steffen,* the moving defendant, who was charged following resolution of the *Siemens-Argentina* case, obtained a complete dismissal based on the "minimum contacts" and "reasonableness" requirements of *International Shoe*, obviating the court's need to address other issues. Notwithstanding these different outcomes, both Judges Sullivan and Scheindlin purported to apply similar standards to the due process issues before them, and Judge Scheindlin even drew on certain statements in Judge Sullivan's decision to place limits on broad assertions of jurisdiction over individual defendants.[3]

Of course, neither decision constitutes binding precedent, even in the Southern District of New York, and appeals by the losing parties remain possible, if not likely. But at least on

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1. *SEC v. Straub, et. al.,* 11-CV-9645 (RJS), 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013).
2. *SEC v. Steffen, et. al,* 11-CV-9073 (SAS), 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013).
3. *Compare* U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" at 11-12 (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter "FCPA Guidance"] *with Steffen*, 2013 WL 603135 at *5.

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the due process issue, the *Straub/Steffen* decisions, as discussed below, have the potential to affect in a variety of ways the government's ability to prosecute foreign individuals whose physical contact with the United States is limited, if not genuinely non-existent.

For those individual non-U.S. defendants who meet the standards for asserting personal jurisdiction, the *Straub* decision on the interstate commerce nexus and statute of limitations issues is particularly bad news and likely to stir debate. In denying the defense motion, Judge Sullivan endorsed the SEC's view that emails in furtherance of a bribe that both originate and are received outside the United States, 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 under 15 U.S.C. § 78dd-1. Together with the court's holding that the statute of limitations in an SEC penalty action does not run while a defendant is outside the United States,[4] *Straub's* rationale could subject non-U.S. officers of U.S. registrants or their consolidated subsidiaries to potential liability under the FCPA in perpetuity based on a single email sent and received abroad, but unwittingly routed through the United States, so long as they do not become available for service within this country – provided that their alleged conduct meets the *International Shoes* test.

II. The Decision in *Straub*

The SEC's complaint in *Straub* alleges that defendants – the former Chairman and CEO, former Director of Central and Strategic Organization, and former Director of Business Development and Organization of Magyar Telekom Plc. ("Magyar"), a subsidiary of Deutsche Telekom AG ("DT"), whose American Depositary Receipts each traded on U.S. exchanges, rendering Magyar and DT issuers under U.S. securities laws – 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 affected 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.[5]

The complaint 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 falsely certifying to the full and accurate disclosure of all material information from their areas of responsibility.[6] The complaint also alleges that the defendants concealed the true nature of their allegedly illicit payments by sending emails of certain draft contracts and other documents and that

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4. *Straub*, 2013 WL 603135 at *12.
5. *Straub*, 11-CV-9645, Complaint (S.D.N.Y. Dec. 29, 2011).
6. *Id.*

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these emails, though sent and received outside the United States, "were routed through and/or stored on network servers located within the United States."

The court 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 held it could exercise personal jurisdiction consistent with due process given that each defendant allegedly "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.[7] The court found significant the SEC's allegation that, in the course of allegedly covering up a bribery scheme aimed at obtaining Macedonian government actions, defendants signed either "false representation letters to Magyar's auditors" or "false management sub-representation letters for quarterly and annual reporting periods," and thus could be found to have had a sufficient "intent to cause a tangible injury in the United States."[8] In important language later cited by Judge Scheindlin, Judge Sullivan rejected defendants' contention that exercising jurisdiction over them would yield personal jurisdiction over *any* officer of any foreign-private issuer in any FCPA case, stating his 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.[9] In short, although defendants' alleged bribe-related activity took place outside the United States, "their concealment of those bribes, in conjunction with Magyar's SEC filings, was allegedly directed toward the United States."[10]

> "[T]he *Straub/Steffen* decisions…have the potential to affect in a variety of ways the government's ability to prosecute foreign individuals whose physical contact with the United States is limited, if not genuinely non-existent."

The *Straub* court also 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.[11] The defendants argued that, in light of the manner in which Congress placed the word "corruptly" in the FCPA, 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 ambiguous the FCPA's use of the adverb "corruptly." Although that term appeared to modify the verb "use," the court held that its delayed placement in the text appeared to reflect Congress's choice to modify the language concerning offers or payments that followed. The court in turn relied on legislative history to interpret the word "corruptly" as modifying offers and payments, not the use of interstate commerce, and thus held the SEC's allegations concerning the routing or storage of foreign emails through U.S. servers satisfied the FCPA's interstate commerce requirement.[12]

In addition to rejecting the defendants' personal jurisdiction and interstate nexus arguments, the court also rejected 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 United States.[13]

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7. *Straub*, 2013 WL 466600 at *6-7.
8. *Id.* at *7.
9. *Id.* at *9.
10. *Id.*
11. 15 U.S.C. § 77dd-1(a); *see Straub,* 2013 WL 466600 at *13-15.
12. *Straub*, 2013 WL 466600 at *13-15.
13. Id. at *11-13. The court also adopted the position, recently set forth by Judge Keith Ellison in *SEC v. Jackson*, 4:12-CV-00563, Memorandum and Order (S.D. Tex. Feb. 24, 2012), 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. Straub, 2013 WL 603135 at *15-16. In so holding, the court did not reference an earlier bench ruling granting a judgment of acquittal, in which Judge Lynn Hughes (who, like Judge Ellison, sits on the United States District Court for the Southern District of Texas) had criticized the government for its inability to trace particular payments to specific foreign officials. *See United States v. O'Shea*, 09-CR-629 (S.D. Tex. Jan. 16, 2012).

Straub/Steffen Rulings ■ Continued from page 3

III. The Decision in *Steffen*

The SEC's complaint in the *Steffen* matter alleged that, in connection with a tender let and then cancelled by the government of Argentina for the design and production of a national identity card, Herbert Steffen, a former Chief Executive Officer of Siemens Argentina S.A. ("Siemens-Argentina"), and later a Group President of Siemens Transportations Systems ("STS"), a division of Siemens AG, along with six other former senior executives at Siemens AG, violated or aided and abetted Siemens AG's violations of the primary anti-bribery provisions of 15 U.S.C. § 78dd-1, as well as the books and records and internal controls provisions of the FCPA set forth at 15 U.S.C. § 78m(b)(2)(A) and (B), as well as (b)(5).[14]

The SEC alleged that, in connection with the tender for the identity card project and then Siemens AG's efforts to obtain compensation from the Argentine government in arbitration before the World Bank's International Center for the Settlement of Investment Disputes ("ICSID"), Siemens AG paid roughly $100 million in bribes – more than $31 million of which was allegedly paid after Siemens AG became an issuer in 2001 – to win the tender and then to conceal the original bribery from the ICSID tribunal.[15] Although the SEC alleged that Steffen had "longstanding connections in Argentina, which he acquired during his tenure at Siemens-Argentina,"[16] as found by Judge Scheindlin the alleged misconduct by Steffen took place during or after his tenure as Group President at STS.[17]

> "The teaching of *Straub,* if it is upheld, is that a foreign defendant who loses on personal jurisdiction could be liable in perpetuity based on a single email that happens to pass through a U.S. server."

Parsing the allegations of the complaint, Judge Scheindlin noted that Steffen had allegedly been "recruited 'to facilitate the payment of bribes,'" and participated, starting in 2000 after the contract had been awarded and then cancelled, in "negotiating with the Argentine government, including with the newly elected president, which demanded that Siemens pay it bribes in order to reinstate the contract."[18] Judge Scheindlin noted that the SEC alleged that Steffen met with the CFO of another Siemens AG division, Siemens Business Services ("SBS"), and "pressured" the SBS CFO, including after Siemens AG became an issuer, to effect the bribery scheme; the SEC also alleged that Steffen told the SBS CFO, during the period in which Siemens AG was subject to the FCPA, "that SBS had a 'moral duty' to make at least an 'advance payment' of ten million dollars to the individuals who had previously handled the bribes because he and other individuals were being threatened as a result of the unpaid bribes."[19]

Judge Scheindlin concluded, however, that subsequent to when the SBS CFO allegedly authorized the bribes, "the allegations against Steffen are limited to participation in a phone call initiated by [a then Siemens AG Managing Board member] from the United States in connection with the bribery scheme," as well as another effort by Steffen, and other defendants, in the first half of 2003 to "urge" the then Managing Board member "to meet the demands [of Argentine officials] and make the additional payments."[20] Although the SBS CFO allegedly authorized certain payments thereafter, Judge Scheindlin noted that this occurred only after the SBS CFO sought "additional guidance from 'superiors' including Siemens' Head of Compliance, Chief Financial Officer, Chief Executive Officer, and two members of the Managing Board, including [the defendant Managing Board member], whose responses [the SBS CFO] 'understood . . . to be instructions that he authorize the bribe payments.'"[21]

The SEC's complaint, Judge Scheindlin found, alleged that the SBS CFO had made false statements and material omissions

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14. *Steffen*, 11-CV-9073, Complaint (S.D.N.Y. Dec. 13, 2011).
15. *Id.*
16. *Steffen*, 2013 WL 603135 at *2.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

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in Sarbanes-Oxley certifications. In summarizing the SEC's allegations against Steffen, Judge Scheindlin stressed Steffen's lack of alleged role with respect to the alleged books and records and internal control violations and the misconduct at SBS:

> While Steffen's actions may have been a proximate cause of the false filings – and even that is a matter of some doubt – Steffen's actions are far too attenuated from the resulting harm to establish minimum contacts. Steffen was brought into the alleged scheme based solely on his connections with Argentine officials. In furtherance of his negotiations with those officials, Steffen "urged" and "pressured" [the SBS CFO] to make certain bribes. However, [the SBS CFO] did not agree to make the bribes until he communicated with several "higher ups" whose responses he perceived to be instructions to make the bribes. Once [the SBS CFO] agreed to make the bribes-following receipt of instructions from Siemens' management rather than Steffen[,] Steffen's alleged role was tangential at best. Steffen did not actually authorize the bribes. The SEC does not allege that he directed, ordered or even had awareness of the cover ups that occurred at SBS much less that he had any involvement in the falsification of SEC filings in furtherance of those cover ups. Nor is it alleged that his position as Group President of Siemens Transportation Systems would have made him aware of, let alone involved in falsification of these filings.[22]

Citing Judge Sullivan's decision in *Straub* with approval, and addressing the SEC's argument that jurisdiction lies over "'an executive of a foreign securities issuer, wherever located, [who] participates in a fraud *directed* to deceiving United States shareholders,'" Judge Scheindlin held that "the exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle."[23] Thus, "[i]f this Court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless."[24] "Absent any alleged role in the cover ups themselves, let alone any role in preparing false financial statements the exercise of jurisdiction here exceeds the limits of due process, as articulated by the Supreme Court and the Second Circuit."[25] Judge Scheindlin then buttressed her ruling on "minimum contacts" by holding that "Steffen'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 [following the settlements of corporate actions against Siemens AG and Siemens-Argentina], all weigh against personal jurisdiction" under the requirement of "reasonableness."[26] Judge Scheindlin thus directed the complaint against Steffen be dismissed, finding no need to reach Steffen's alternative argument that the SEC's 2011 action against him was untimely.

IV. Conclusion

The due process analysis adopted by the court in *Straub* and *Steffen*, and particularly the latter's holding focusing on the impact of alleged individual misconduct on the alleged bribery-related falsity of financial statements filed with the SEC, and more generally on the alleged proximate role, *vel non*, a defendant plays with respect to primary anti-bribery charges, will likely give rise to renewed attention on personal jurisdiction as a defense to FCPA actions in civil cases, if not criminal cases as well.[27]

But while the court's effort in *Steffen* to distinguish *Straub* and similar cases on their facts, and the *Steffen* decision's emphasis on the role of SEC filings in the due process calculus, do not ignore entirely the alleged role of the defendant with regard to primary anti-bribery matters, its jurisdictional approach is in tension with

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22. *Steffen*, 2013 WL 603135 at *4. Judge Scheindlin stated, as well, that "it is not even clear that Steffen's actions were a proximate cause of the bribes being made, given [the SBS CFO's] perceived need for approval …" *Id.* at *6 n.62.
23. *Id.* at *5.
24. *Id.*
25. *Id.*
26. *Id.* at *6.
27. Although due process challenges to personal jurisdiction in the criminal arena are governed not by the *International Shoe* "minimum contacts" and "reasonableness" tests, but instead by the requirement of a sufficient U.S. nexus, defined in a manner that is "neither arbitrary nor unfair," the tests can significantly overlap. *See United States v. Angulo-Hernandez,* 576 F.3d 59, 60 (Toruella, J., dissenting from the denial of *en banc* review) (citing cases from the First and Ninth Circuits).

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decisions that broadly construe the SEC's and the Department of Justice's ("DOJ's") ability to prosecute aiding and abetting (as well as, in the case of the DOJ, conspiracy). Indeed, only last fall the Second Circuit rejected arguments that the SEC's statutory authority to prosecute aiders and abettors required proof that the defendant "proximately caused" the primary violator's misconduct.[28] That decision, however, did not arise in the context of extraterritorial application, or in the context of a personal jurisdiction challenge, and it is likely that only further appellate guidance will be able to settle whether *Steffen's* reasoning can be said to have legs that go beyond the unique alleged facts there at hand.

> "[B]y focusing on financial statements as the lynchpin of the personal jurisdiction analysis, the two Southern District decisions could well lead SEC investigators to focus even more intently on securing evidence relating to individuals' roles in certifying an issuer's books and records as reasonably accurate, and its internal controls as adequate."

More broadly, the ruling in *Steffen* and the general analysis in *Straub*, with its focus on SEC filings and their accuracy, raise questions how the DOJ could assert and sustain personal jurisdiction against non-citizen employees and agents in suits under 15 U.S.C. § 78dd-2, which does not depend on SEC financial statement nexus, not to mention the aider and abettor and conspiracy liability theories the DOJ has enunciated as applicable to those who aid, abet, or conspire with primary violators of the "in-the-territory" anti-bribery provisions of the FCPA set forth at 15 U.S.C. § 78dd-3, regardless where those alleged aiders and abettors or co-conspirators reside.[29]

Indeed, in this vein, a focus on SEC-related statements in the jurisdictional calculus might well be argued to construe the United States' interests under the "protective" theory of jurisdiction too narrowly, leaving on the judicial cutting room floor one of the important original purposes of the FCPA, specifically, the desire to reward U.S. (as well as other) businesses who conduct business honestly and transparently.

Finally, by focusing on financial-statements as the lynchpin of the personal jurisdiction analysis, the two Southern District decisions could well lead SEC investigators to focus even more intently on securing evidence relating to individuals' roles in certifying an issuer's books and records as reasonably accurate, and its internal controls as adequate. That scenario raises the question whether resources are better spent on such jurisdictional discovery as opposed to identifying primary anti-bribery violators and FCPA remediation.

Beyond the fact that, at some point, federal courts are prepared to refuse to entertain civil FCPA charges against foreign individuals with no or little physical contact with the United States, the important news coming from the recent Southern District decisions is not necessarily the SEC's loss in *Steffen* but its victory in *Straub*. The teaching of *Straub*, if it is upheld, is that a foreign defendant who loses on personal jurisdiction could be liable in perpetuity based on a single email that happens to pass through a U.S. server. That result is one that is likely to remain controversial until the appellate courts or Congress address that issue definitively. As of this date, the *Straub* defendants have sought leave to appeal to the Court of Appeals for the Second Circuit,[30] and with the SEC's deadline to appeal in *Steffen* extending until April of this year, the coming months could give rise to potentially significant FCPA-related appellate litigation.

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28. *SEC v. Apuzzo*, 689 F.3d 209 (2d Cir. 2012).
29. FCPA Guidance at 34-35, note 3, *supra*.
30. *Straub*, 11-CV-9645, Motion for Leave to Appeal (S.D.N.Y. Feb. 22, 2013).

Canada Cleans Up: Increased Enforcement and Proposed Amendments to the CFPOA

For the last six years, Canada has ranked among the ten least corrupt nations, according to Transparency International's Corruption Perceptions Index. So it came as a surprise to many when, in a March 2011 report, the Organization of Economic Development's Working Group on Bribery censured Canada for lackluster enforcement of its foreign anti-corruption law, the Corruption of Foreign Public Officials Act ("CFPOA"). The report also cited four major weaknesses in the law itself.[1] Just two months later, Transparency International ranked Canada's anti-bribery enforcement in the bottom tier of all countries surveyed – the worst of the G7 nations.[2]

Since then, the Canadian government has proposed amendments to the CFPOA to extend its reach and stiffen its penalties, has handed down the largest monetary penalty to date in the history of Canadian anti-corruption enforcement, and has increased the number of such investigations. Particularly given Canada's role as the United States' largest overall trading partner, and the potential for cross-border law enforcement cooperation, this new era of heightened Canadian anti-corruption enforcement is worth review.

1. The Impetus for Change: the March 2011 OECD Report & 2011 Transparency International Progress Report

The CFPOA makes it a Canadian federal crime to bribe, directly or through a third party, a foreign public official "in order to obtain or retain an advantage in the course of business."[3] As currently enacted and interpreted, the CFPOA applies only to for-profit corporations or entities, and only when the transaction itself is for-profit.[4] Unlike its U.S. counterpart, the FCPA, the CFPOA does not contain a books and records offense and its jurisdiction is limited to offenses in which "a significant portion of the activities constituting the offence … take place in Canada," such that there is a "real and substantial link" with Canada.[5] The law also contains an exception to liability for facilitation payments.[6]

In its 2011 Report, the OECD identified five major flaws in Canada's existing anti-corruption legislation and enforcement: (1) the limited jurisdictional reach of the CFPOA left Canada unable to prosecute its nationals for violations that took place abroad; (2) in practice, the maximum penalty imposed to date had been too low to be "effective, proportionate, or dissuasive";[7] (3) the law is unclear as to whether nonprofit entities are covered; (4) considerations of comity, national economic interest, and the identity of the individuals involved could be considered in the decision whether to prosecute entities under the CFPOA; and (5) Canada had yet to commit sufficient resources to enforcement.[8] Transparency International's 2011 Report echoed these themes and noted that, among signatories to the OECD Anti-Bribery Convention, Canada was the only one whose anti-bribery legislation did not provide for nationality jurisdiction.[9]

2. Recent Activity

In criticizing Canada's anti-corruption efforts, both the OECD and Transparency International reports cited the fact of only one conviction in the twelve years since the enactment of the CFPOA,[10] with only

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1. OECD Working Group on Bribery, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada at 5 (2011), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf [hereinafter "Canada Phase 3 Report"].
2. *See* Transparency International, Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention at 6-7 (2011), http://issuu.com/transparencyinternational/docs/oecd_report_2011?mode=window&backgroundColor=%23222222 [hereinafter "TI Progress Report 2011"].
3. Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34 (Can.) at SEC. 3(1) [hereinafter "CFPOA"].
4. Department of Justice Canada, The Corruption of Foreign Public Officials Act – A Guide at 5, 7-8 (May 1999), http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/guide.pdf.
5. *Id.* at 7.
6. CFPOA at Sec. 3(4).
7. Canada Phase 3 Report, note 1, *supra* at ¶ 10.
8. *Id.* at 5-6, ¶ 22.
9. TI Progress Report 2011, note 2, *supra* at 6.
10. Canada Phase 3 Report, note 1, *supra* at 5; *R. v. Watts* [2005] A.J. No. 568.

Canada Cleans Up ■ Continued from page 7

one additional prosecution working its way through the courts.[11] These criticisms did not fall on deaf ears. Since 2011, Canada has both proposed amendments to the CFPOA and beefed up its enforcement efforts.

> "[T]he Canadian government has proposed amendments to the CFPOA to extend its reach and stiffen its penalties, has handed down the largest monetary penalty to date in the history of Canadian anti-corruption enforcement, and has increased the number of such investigations."

a. Proposed Amendments to the CFPOA

On February 5, 2013, the Canadian Government introduced a bill, S-14,[12] to amend the CFPOA in significant respects. As presented to the Senate, these amendments include:

- Creation of a books and records offense punishable by a maximum of 14 years imprisonment and unlimited fines;
- Expansion of the scope of the CFPOA to reach conduct committed by nationals abroad (nationality jurisdiction), regardless of where the misconduct took place;
- Eventual elimination of the exception for facilitation payments;
- Centralization of enforcement activity with the Royal Canadian Mounted Police ("RCMP");
- Expansion of the application of the CFPOA to nonprofit entities and transactions (in addition to for-profit entities and transactions).

The Bill has already passed its first review by the Canadian Senate.[13] Once it has full Senate approval – which is expected – the bill will be presented for debate and amendment in the House of Commons, where its prospects for passage look bright.

b. Recent Cases & Investigations

Even before these potential amendments to the CFPOA were proposed, the RCMP, Canada's principal federal law enforcement agency, had already ramped up its enforcement activity.

Griffiths International Inc.

Most significantly, on January 22, 2013, Griffiths Energy International Inc., a Calgary-based junior oil and gas exploration firm, pleaded guilty to paying bribes in order to secure an oil and gas contract in Chad.[14] Griffiths admitted that, in 2009, it offered to pay CDN$2 million[15] to an entity wholly owned by the wife of the Chadian Ambassador to Canada, in the event Chad awarded Griffiths certain production sharing contracts in Chad.[16] Simultaneously with the offer, Griffiths also granted the Ambassador's wife and her nominees 4 million of Griffiths' shares.[17] Griffiths was subsequently awarded the contracts, and the CDN$2 million in cash was paid.[18]

As a result of its guilty plea, Griffiths will pay a penalty of CDN$10.35 million, the largest to date in a CFPOA case. Although this penalty is just eight percent greater than the penalty imposed on Niko Resources (discussed below) for a bribe payment ten times as large, Crown prosecutors credited Griffiths with conducting its own internal investigation into the matter and voluntarily bringing the bribery to the attention of the RCMP, despite no clear reward for doing so.[19] This may signal the government's

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11. Transparency International, Progress Report 2012: Enforcement of the OECD Anti-Bribery Convention at 16 (2012), http://files.transparency.org/content/download/510/2109/file/2012_ExportingCorruption_OECDProgress_EN.pdf [hereinafter "TI Progress Report 2012"].
12. *See* Senate of Canada, Bill S-14, "An Act to amend the Corruption of Foreign Public Officials Act," 1st Session, 41st Parliament, 60-61 Elizabeth II (2013), http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5960861&File=4.
13. *Id.*
14. Foreign Affairs and International Trade Canada Press Rel., Strengthening Canada's Fight Against Foreign Bribery (Feb. 5, 2013), http://www.international.gc.ca/media/aff/news-communiques/2013/02/05b.aspx?lang=eng&view=d.
15. The Canadian and United States dollars are approximately on par as of the date of publication.
16. Jen Gerson, "Judge approves $10.35M fine for Griffiths Energy in Chad bribery case," *Financial Post* (Jan. 25, 2013), http://business.financialpost.com/2013/01/25/judge-approves-10-35m-fine-for-griffiths-energy-in-chad-bribery-case/?__lsa=b458-c510.
17. *Id.*
18. *Id.*
19. Kelly Cryderman, "Judge approves $10.35-million fine for Griffiths Energy in bribery case," *The Globe and Mail* (Jan. 25, 2013), http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/judge-approves-1035-million-fine-for-griffiths-energy-in-bribery-case/article7858675.

Canada Cleans Up ■ Continued from page 8

willingness to offer reduced punishment for companies that self-report and cooperate.

SNC-Lavalin Group Inc.

In April 2012, the RCMP brought charges under the CFPOA against two former employees of engineering company SNC-Lavalin Group Inc., the culmination of an investigation into alleged payments by the company to a Bangladeshi official regarding a World Bank-funded bridge construction project in Bangladesh.[20] These charges followed the RCMP's March 2012 raid of the company's Montreal headquarters and its September 2011 raid on the company's Oakville, Ontario office.[21] This past month, the investigation of the company expanded to include a probe of SNC's operations in Algeria, where SNC agents are suspected of paying more than CDN$200 million in potential bribes to help secure over CDN$1 billion in contracts.[22]

Niko Resources

In June 2011, Calgary-based oil and natural gas exploration company Niko Resources pleaded guilty to a CFPOA bribery charge.[23] The company admitted that it gave gifts totaling CDN$205,000 to Mosharraf Hossain, Bangladesh's Minister for Energy and Mineral Resources, after an explosion at a Niko drilling site in Bangladesh was determined to be the result of negligence.[24] The government imposed a CDN$9.5 million fine and ordered Niko to adopt a detailed anti-corruption compliance program that would be reviewed annually by an independent auditor who would report to the court, the RCMP, and the Governor General of Alberta.[25]

As of 2012, Transparency International reported that the RCMP had in progress 34 investigations under the CFPOA, a number likely to increase if the amendments to the CFPOA pass. Between January 2011 and March 2012, the RCMP initiated at least 11 investigations, and possibly more.[26]

3. Conclusion

If the proposed amendments to the CFPOA are enacted, Canada will have brought its foreign anti-bribery laws closer in line with those of the United States and the United Kingdom (though there are also meaningful differences between these laws). To the extent that a company subject to the Canadian regime, as it exists today or as it may exist in the future, already has in place an appropriate compliance program to address risks under U.S. and U.K. law, enhancement of the CFPOA should not be a major cause for concern. Companies can take further comfort from the fact that Canadian authorities, much like their neighbors to the south, appear receptive to and inclined to reward self-reporting by companies that do uncover and report possible CFPOA violations.

Nevertheless, the regulatory landscape in Canada is shifting. At the very least, companies should expect greater scrutiny from Canadian regulators.

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20. Foreign Affairs and International Trade Canada, Thirteenth Annual Report to Parliament, Canada's Fight against Foreign Bribery (Dec. 17, 2012), http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/13-report-rapport.aspx?lang=eng&view=d; Samuel Rubenfeld, "Mounties Raid SNC-Lavalin Offices Again," *The Wall Street Journal* (Apr. 13, 2012), http://blogs.wsj.com/corruption-currents/2012/04/13/mounties-raid-snc-lavalin-offices-again.
21. Rubenfeld, note 20, *supra*.
22. Greg MacArthur & Claudio Gatti, "SNC bribery probe widens to Algeria," *The Globe and Mail* (Feb. 21, 2013), http://www.theglobeandmail.com/report-on-business/snc-bribery-probe-widens-to-algeria/article8907906/.
23. TI Progress Report 2012, note 11, *supra* at 40.
24. *R. v. Niko Resources Ltd.*, [2012] A.W.L.D. 4565, ¶¶23-26., 35-37, 55.
25. TI Progress Report 2012, note 11, *supra* at 40.
26. Transparency International, "Canada: 2012 Questionnaire for National Expert Respondents" at 1 (Mar. 15, 2012), http://www.transparency.ca/9-Files/Older/2012-New/2012-OECD-Canada.pdf.

NEWS FROM THE BRICs

Russian State Officials' Assets Abroad: Proposed Ban on Foreign Accounts, Deposits and Securities

On December 12, 2012, during the annual Presidential Address to the Federal Assembly,[1] Russian President Vladimir Putin proposed to reduce public corruption by establishing various methods of control over the actions of public officials. He questioned "how can the public have confidence in an official or politician who says high-sounding words about the national good but at the same time tries to take his money and assets out of the country," and he sought support for a legislative proposal limiting the rights of state officials and politicians to hold foreign accounts and foreign securities.[2]

Mr. Putin advocated that this requirement apply to all officials who make key decisions: the top leaders of state and federal government, senior staff in the Presidential Executive Office, members of the Federation Council and State Duma deputies and their immediate families. He also made note of foreign real estate owned by state officials and said that it must be declared in accordance with the law, including a report on the value of the property and sources of the funds used to purchase it.[3]

Two months later these anti-corruption initiatives of the President were developed further when, on February 12, 2013, Mr. Putin submitted to the State Duma[4] Bill No. 220675-6 on the Prohibition for Certain Categories of Persons to Open and Maintain Accounts/Deposits and Cash in Foreign Banks Located Abroad and Hold Securities of Foreign Issuers (the "Bill")[5] and Bill No. 220666-6 on Amendments to Article 11 of the Federal Constitutional Law on the Government of the Russian Federation ("Bill No. 220666-6").[6]

The Bill prohibits[7] Officials – as defined in Russian law and the proposal[8] – and their spouses and minor children from:[9]

(i) opening and operating accounts/deposits with foreign banks located outside Russia;

(ii) keeping cash in foreign banks located outside Russia; and

(iii) holding state securities of other foreign states, or bonds and shares of foreign issuers (jointly referred to as "foreign securities").[10]

In addition to these prohibitions, when reporting information on income, property, and property obligations in accordance with legal requirements,[11] the Bill requires that Officials provide information on immovable property located abroad which they, their spouses, or minor children own; the sources of financing of the acquisition

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1. "Address to the Federal Assembly," President of Russia (Dec. 12, 2012), http://eng.kremlin.ru/news/4739.
2. *Id.*
3. *Id.*
4. The Bill will become law if adopted by the State Duma in three separate readings, approved by the Federation Council, signed by President Putin, and then officially published.
5. On the prohibition of certain categories of persons to open and maintain accounts (deposits), to store cash in foreign banks located outside the territory of the Russian Federation, and to have foreign securities, Bill No. 220675-6 (2013), http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=220675-6&02 [Russian].
6. On Amending Article 11 of the Federal Constitutional Law "On the Government of the Russian Federation," Bill No. 220666-6 (2013), http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=220666-6&02 [Russian].
7. The prohibition on opening and operating accounts/deposits with foreign banks located outside Russia does not apply to state officials working in diplomatic missions, consulates, and other representative offices of the Russian Federation or its federal executive bodies located abroad or their spouses and minor children. *See* Bill No. 220675-6, note 5, *supra*.
8. State officials of the Russian Federation, first deputies and deputies of the General Prosecutor of the Russian Federation, members of the Board of Directors of the Central Bank of the Russian Federation, state officials of constituent entities of the Russian Federation, officials of federal governmental authorities appointed and dismissed by the President of the Russian Federation, the Government of the Russian Federation or the General Prosecutor of the Russian Federation; officials of state corporations/companies, foundations, funds and other organizations established on the basis of federal laws whose appointees are appointed and dismissed by the President of the Russian Federation or the Government of the Russian Federation are jointly referred to as "Officials." *Id.* at Art. 2.
9. *Id.*
10. Bill No. 220666-6 establishes similar prohibitions on members of the Russian Government, their spouses and minor children and indicates that control over their compliance with this prohibition will be controlled in accordance with a procedure established by the orders of the Russian President. *See* Bill No. 220666-6, note 5, *supra*.
11. On the Measures of Counteracting Corruption, Federal Law No. 273-FZ (Dec. 25, 2008).

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of such immovable property; and their, their spouses', and minor children's property obligations abroad.[12]

According to the Bill, these prohibitions are being introduced to ensure the national security of the Russian Federation, regulate lobbying activity, increase investments in the national economy, and improve efficiency in counteracting corruption.[13]

> The President "made note of foreign real estate owned by state officials and said that it must be declared in accordance with the law, including a report on the value of the property and sources of the funds used to purchase it."

If adopted, the Bill will also require:

(i) current Officials, their spouses, and minor children to close their bank accounts with foreign banks located abroad, discontinue keeping cash in foreign banks located abroad, and/or dispose of their foreign securities within three months following the coming into force of the Bill;

(ii) persons who wish to become Officials to disclose information on their, their spouses', and minor children's bank accounts/deposits and cash in foreign banks located abroad and foreign securities; and

(iii) elected/appointed Officials, their spouses, and minor children to close the relevant accounts, withdraw cash, and dispose of any foreign securities within three months following election/appointment.[14]

Violation of the prohibitions established by the Bill will result in the termination of the Official's employment/service.

Verification of an Official's compliance with the requirements established by the Bill may be initiated based on information provided by law enforcement and other state authorities of the Russian Federation, political parties and public organizations, the Public Chamber of the Russian Federation, or the national media. However, the information that forms a basis for action cannot be based on an anonymous source.

It is worth noting that this Bill is not the first to address the issue of Officials' assets abroad. On August 1, 2012, Bill No. 120809-6 on Amendments to Certain Legislative Acts prohibiting Officials from having accounts/deposits with foreign banks abroad and /or owning immovable property abroad and /or holding securities of foreign companies had been submitted for the review of the State Duma and considered by it in the first reading[15] on December 21, 2012.[16] These two bills – although aimed at regulation of the same matter – differ from each other.[17] The principal differences between Bill No. 120809-6 and the Bill submitted recently by President Putin are:

(i) Bill No. 120809-6 extends the prohibitions to ownership of immovable property abroad,[18] rather than merely requiring that it be declared and information provided on the sources of income used to acquire it, as Mr. Putin's Bill does; and

(ii) Bill No. 120809-6 establishes criminal liability[19] for violation of the prohibitions on having accounts, deposits, securities, and

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12. Bill No. 220675-6, note 5, *supra* at Art. 4.
13. *Id.* at Art. 1.
14. *Id.* at Art. 3-4.
15. Deputies of the State Duma who were included as authors of Bill No. 120809-6 were quoted in public sources as stating that they were planning to propose amendments to their bill which in addition to the already existing prohibitions would require children of state officials to return to Russia following the end of their studies abroad. "Children of officials obliged to return home after studying abroad," *RBC* (Dec. 27, 2012), http://top.rbc.ru/politics/27/12/2012/838683.shtml.
16. On Amendments to Certain Legislative Acts of the Russian Federation, Bill No. 120809-6 (2013), http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=120809-6&02.
17. *Inter alia*, they differ in the definition of officials, foreign securities, timing of the closing of bank accounts / disposal of other prohibited assets abroad.
18. Bill No. 120809-6, note 16, *supra* at Art. 1.
19. *Id.* at Art. 2.

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immovable property abroad, ranging from administrative liability up to imprisonment, and not merely termination of employment/service as Mr. Putin's Bill does.

In the explanatory note to his Bill, Mr. Putin specified that his Bill must be considered and adopted in conjunction with Bill No. 120809-6. Given that these bills regulate the same matter, it is not yet clear how these two bills will be reconciled. Given that Mr. Putin is the sponsor of one of the bills and State Duma representatives are already presenting his bill as the more fundamental one addressing not only corruption, but other important issues including national security, there are good chances that it will be the one ultimately adopted, with or without taking into consideration the proposals included in Bill No. 120809-6.[20]

> "Given that Mr. Putin is the sponsor of one of the bills and State Duma representatives are already presenting…"

The Bill was considered recently by the State Duma upon its first reading on February 22, 2013.[21] The next action on the Bill is scheduled to occur on March 11, 2013, when Amendments to the Bill are to be provided.

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20. Eugene Levishchenko, "State Duma Security Committee recommended a bill to ban the foreign bank accounts of officials," *Parliament Gazette* (Feb. 18, 2013), http://www.pnp.ru/news/detail/12178 [Russian].

21. "Committee of the State Duma approved a ban on foreign accounts of state officials," *Grani.ru* (Feb. 18, 2013), http://grani.ru/Politics/Russia/Parliament/Duma/m.211746.html [Russian].

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