LJN LAW JOURNAL NEWSLETTERS

BUSINESS CRIMES BULLETIN

NOVEMBER 2013

Should the United States Be Doing This?

The Straub Decision Raises the Specter of Claims of U.S. Jurisdictional Overreach

By Stanley S. Arkin and Robert C. Angelillo

A decision earlier this year on a motion to dismiss the complaint filed by the defendants in the case entitled *Security and Exchange Commission v. Elek Straub et al*. sustains the global reach of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1. (*See* Andrew M. Levine et al.: *Strauss*/*Steffen*, District Court Personal Jurisdiction and U.S.-Nexus Rulings, *Business Crimes Bulletin*, September 2013, available at http://bit.ly/GRl0n8 (http://bit.ly/GRl0n8).)

The complaint at issue details that, in 2005, executives of a Hungarian telecommunications company conspired with a Greek intermediary to bribe officials of the Macedonian government. Where is this matter of international intrigue being heard? Budapest? Athens? Skopje? None of the above. Instead, the case is pending in our own backyard, in the United States District Court for the Southern District of New York.

Background

The FCPA was enacted by Congress in 1977. Its intent is to prohibit American companies from bribing foreign officials and governments, a practice that Congress believed tarnished the reputation of all American companies around the world. However, in 1998, Congress amended the FCPA to allow, *inter alia*, the Securities and Exchange Commission (SEC) to seek civil penalties, in American courts, against foreign individuals and entities accused of bribing foreign government officials, even if the alleged acts took place outside of the United States.

While the statute sets forth a legal mechanism for expanding America's global reach, it elides the political questions of how far the U.S. should go in "Americanizing" business practices worldwide. Inherent in the *Straub* decision is the specter of Uncle Sam asserting jurisdiction where United States interests are remote, but where offense to foreign governments for unwanted interference is likely. In the "post-Snowden" environment of international suspicion and resentment of U.S. meddling in other nation's affairs, this decision raises serious questions concerning the potential political impact of exercising this power and whether it is in the United States' interest to do so.

Personal Jurisdiction

The SEC's complaint in *Straub* outlines a multimillion dollar bribery scheme. It alleges that certain executives of a Hungarian telecommunications company, Magyar Telecom, PLC (Magyar) bribed the Macedonian government — through a Greek intermediary — in exchange for a commitment that the government would not enforce a new Macedonian telecommunications law that would adversely affect the company's business interests in Macedonia's telecommunications market. The complaint further asserts that the bribe payments were concealed by the defendants as "consulting" and "marketing service" expenses. The complaint states that these "consulting" and "marketing services" contracts were fictitious and part of the scheme.

In the decision denying their motion to dismiss, the court first addressed the Hungary-based defendants' challenge to personal jurisdiction. The court concluded that it could exercise personal jurisdiction over the defendants since their acts were directed at the American public, even though the American public was purportedly not the primary target of the alleged scheme.

Specifically, at the time that the events outlined in the case took place, Magyar's securities were publicly traded via American Depository Receipts (ADRs) on the New York Stock Exchange, which are registered with the SEC, as required under the Securities Exchange Act.

ADRs are intended to make it easier and more cost-effective for Americans to invest in foreign corporations; they are are stocks traded here in the United States. Each ADR denotes an identified number of shares of stock in a foreign corporation, such as Magyar. ADRs can be listed on an exchange or traded in the over the counter (OTC) market.

Since the Magyar ADRs were publicly traded, the defendants, as executives of Magyar, were required to certify to the company's auditors that Magyar's financial statements were true and accurate. The complaint goes on to claim that, by falsely certifying that the alleged bribe payments were instead for "consulting" and "marketing services," the defendants misrepresented to the auditors the financial position of the company. If proven, this was a violation of the securities regulations of the United States and it therefore was "directed" at the United States.

The court concluded that, although misleading United States investors may not have been the primary goal of the bribery scheme, it was clearly the defendants' intent to do so by certifying the false information. On that basis, due process requirements had been met and the court had personal jurisdiction over the defendants. This holding alone was remarkable, for this appears to be a remote basis for interfering in the internal affairs of foreign governments.

The Defendants' Alleged Violation of FCPA

After concluding that the case was properly heard in New York, the court went on to analyze whether the SEC had stated a claim under the FCPA. The court acknowledged an issue of "first impression," and thus broke new legal ground in concluding that the complaint did, in fact, state a claim and that the case could proceed.

The court first noted that FCPA claims in the complaint relied principally on § 78dd-1(a) of the law, which makes it a violation of the law to make use "of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of any money … to any foreign official." It then alleged that one of the defendants sent e-mails to, and received e-mails from, the Greek interlocutor, as well as other third parties, as part of the bribery scheme. While these e-mails were exchanged between foreign actors in foreign countries, they were "routed through

and/or stored on network servers located within the United States."

The defendants did not dispute that the Internet is an "instrumentality of interstate commerce," nor the allegation that the e-mails were routed through and/or stored in the United States. Instead, the defendants argued that, because the SEC did not allege that they personally knew that the e-mails would be routed through and/or stored on servers in the United States, it did not state a claim under the FCPA because the SEC did not show defendants' intent to use "an instrumentality of interstate commerce." In other words, the defendants argued that the unexpected incidental use of U.S. domiciled servers is hardly a circumstance with any reasonable capacity to harm this country.

The court noted that the proper question before it was whether the intent to use "an instrumentality of interstate commerce" was an element of an FCPA claim. After scrutinizing the statutory language and consulting with the legislative history of the FCPA, the court concluded that the "intent" requirement in the above-quoted section applied to the underlying bribery itself, not to the use of the instrumentalities of interstate commerce. In other words, the SEC's allegation that the e-mails had been routed through and/or stored on American servers was sufficient to sustain the claim standing alone. The SEC did not have to allege that the defendants intentionally used American servers. On these grounds, the court concluded that the case could proceed here in the United States.

The FCPA As an Instrument of Foreign Policy?

In *Straub*, the court had to tie together a number of disparate circumstances to find a legal basis for keeping the case here. Given the current dominance that the U.S. enjoys in terms of Internet infrastructure, it seems that almost any act offensive to U.S. business practices can be pursued in this country, no matter how minimal (even gossamer) the impact in this country, so long as the act involves stocks traded in the U.S. and the use of e-mails or other electronic communication. (On its face, the *Straub* decision is a testament to the global reach of the FCPA. However, the court's consideration of the physical location of the servers in this country foreshadows a common-sense basis by foreign business entities and persons to avoid the application of the statute as technology improvements and facilities spread across the globe. Make sure to use a server in a country other than the United States.)

However, while the decision sets out the legal mechanism for the assertion of U.S. jurisdiction, it does not address the philosophical question of whether the United States should be asserting jurisdiction over the foreign defendants in cases where there is limited demonstrable impact, if any, on this country.

First, the assertion of jurisdiction over cases that have no real bearing on this country may not be worthwhile politically, given the resentment and retribution it may harvest internationally. Consider that the *Straub* case does not exist in a vacuum. The company itself — Magyar — announced in its 2012 Annual Report that it had entered into settlements of investigations with the U.S. Department of Justice (DOJ) and the SEC concerning "certain consultancy contracts," which settlements required Magyar to pay penalties and fines of almost $91 million.

The annual report further reveals that, while the U.S. government has apparently already walked away with $91 million, as of the date of the annual report, investigations by the authorities in Macedonia, Montenegro, Greece and Hungary were "continuing," but that Magyar did not "expect any material financial impacts" from these investigations. How does that resonate in those countries most directly affected by the alleged scheme?

Second, will other countries retaliate by subjecting American companies to jurisdiction in their courts simply because shares of stock happen to be traded on one of the multitude of foreign exchanges worldwide? If so, what will the United States government do about it? Will it have any basis to object, since the United States is doing the same thing?

Conclusion

In light of the current international repercussions from the recently revealed American surveillance of foreign telephone and Internet traffic and the public rebuke of the U.S. government's request for extradition of NSA contractor Edward Snowden, only time will tell if there will be any political impact from the exercise of jurisdiction in the Straub case — and others like it — over and above the legal implications for a small group of foreign business executives.

Stanley S. Arkin, a member of this newsletter's Board of Editors, is a founding partner and the senior partner of New York's Arkin Solbakken LLP. **Robert C. Angelillo** is a partner in the firm.