
foreign corrupt practices act lawflash

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District Court Decision Limits the Extraterritorial Reach of the FCPA

Judge in Siemens case seeks “limiting principle” for the exercise of personal jurisdiction over foreign defendants and concludes that mere support for a bribery scheme by a foreign defendant is insufficient to establish minimum contacts.

On February 19, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York issued an order granting a motion to dismiss by a former Siemens AG executive challenging the extraterritorial reach of the Foreign Corrupt Practices Act (FCPA).¹

The action stems from charges brought in December 2011 by the U.S. Securities and Exchange Commission (SEC), accusing Herbert Steffen of helping pay \$100 million in bribes to foreign officials in Argentina during his tenure at Siemens.² Steffen, a German citizen, served as the chief executive officer of Siemens’s Argentine subsidiary, Siemens S.A. Argentina, from 1983 to 1989. In October 2012, Steffen moved to dismiss the case arguing, *inter alia*, that the court lacked personal jurisdiction over him because “he had virtually no contact with the United States.”³ Judge Scheindlin agreed with Steffen, concluding that he lacked the minimum contacts necessary to subject him to personal jurisdiction.

Judge Scheindlin’s order in *SEC v. Sharef*, which calls for limitations on the exercise of personal jurisdiction over foreign defendants, contrasts—but does not appear to conflict—with a decision issued earlier in February by Judge Richard J. Sullivan of the Southern District of New York in *SEC v. Straub*, also known as the *Magyar Telekom* case.⁴ Similar to Steffen, the defendants in *Magyar Telekom* are foreign citizens who claimed that the court lacked personal jurisdiction over them due to their foreign citizenship and the fact that the alleged violations were committed overseas. Judge Sullivan rejected these arguments and concluded that the SEC “met its burden . . . of establishing a prima facie case of personal jurisdiction over [the d]efendants” by demonstrating that the defendants had “minimum contacts with the United States and that the exercise of personal jurisdiction over [them] would not be unreasonable.”⁵ Judge Sullivan based his “minimal contacts” finding on the fact that the defendants were “engaged in conduct that was designed to violate United States securities regulations and was thus necessarily directed toward the United States, even if not principally directed there.”⁶

Judge Scheindlin appears to have distinguished her ruling in *Sharef* from that of Judge Sullivan in *Magyar Telekom* by explaining that, in the latter case, the court exercised jurisdiction over foreign defendants who not

1. *U.S. Sec. & Exch. Comm’n v. Sharef*, No. 11 Civ. 9073 (SAS) (S.D.N.Y. Feb. 19, 2013) [hereinafter *Sharef Order*] (order granting motion to dismiss), available at http://www.morganlewis.com/documents/Sharef_DistrictCourtDecision.pdf.

2. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina (Dec. 13, 2011), available at <http://www.sec.gov/news/press/2011/2011-263.htm>.

3. *U.S. Sec. & Exch. Comm’n v. Sharef*, No. 11 Civ. 9073 (SAS), at 3 (S.D.N.Y. Oct. 12, 2012) [hereinafter *Sharef Motion to Dismiss*] (memorandum in support of motion to dismiss), available at http://www.morganlewis.com/documents/Sharef_MotiontoDismiss.pdf.

4. *Sec. & Exch. Comm’n v. Straub (Magyar Telekom)*, No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2011) (order denying defendants’ motion to dismiss), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=263>. For more information on *Magyar Telekom*, view our February 13 LawFlash, “District Court Reinforces Broad Territorial Reach of the FCPA,” available at http://www.morganlewis.com/pubs/FCPA_LF_CourtReinforcesTerritorialReachofFCPA_13feb13.

5. *Id.* at 12.

6. *Id.* at 8.

only “orchestrated a bribery scheme” but also “signed off on misleading management representations to the company’s auditors and signed false SEC filings.”⁷

SEC Allegations

In December 2011, the SEC filed a complaint against seven former Siemens executives, alleging violations of the FCPA “for their involvement in the company’s decade-long bribery scheme to retain a \$1 billion government contract to produce national identity cards for Argentine citizens.”⁸ The SEC claimed that “Siemens paid more than \$100 million in bribes to such high-ranking officials as two former Argentine presidents and former cabinet members” in order to “secure a \$1 billion contract to produce national identity cards known as Documentos Nacionales de Identidad (DNI) for every Argentine citizen.”⁹ It alleged that additional bribes were paid “[a]fter a change in Argentine political administrations resulted in the DNI contract being suspended and then canceled,” including monies paid during arbitration proceedings “to suppress evidence that the contract originally had been obtained through corruption.”¹⁰ The allegations against Steffen were summarized by Judge Scheindlin as follows:

The Complaint alleged that [co-defendant] Sharef recruited Steffen “to facilitate the payment of bribes” to officials in Argentina because of his longstanding connections in Argentina, which he acquired during his tenure at Siemens Argentina. Following the cancellation of the contract, beginning in December 2000, Steffen and Sharef began renegotiating with the Argentine government, including the newly elected President, which demanded that Siemens paid it bribes in order to reinstate the contract.

In order to facilitate payment of bribes to the Argentine officials, Steffen met several times with [co-defendant] Regendantz, who became the Chief Financial Officer of [Siemens Business Services (SBS)] in February 2002, and “pressured” Regendantz to authorize bribes from SBS to Argentine officials. In April 2002, Steffen told Regendantz 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.

Once Regendantz authorized the bribes, the allegations against Steffen are limited to participation in a phone call initiated by Sharef from the United States in connection with the bribery scheme, and that in the first half of 2003, defendants including Steffen “urged Sharef to meet the demands [of Argentine officials] and make the additional payments.”¹¹

In his motion, Steffen argued that the court lacked personal jurisdiction over him because, with the exception of two “isolated and remote” events, “he had virtually no contact with the United States.”¹² As explained by Steffen: “The complaint’s only mention of the United States with respect to Mr. Steffen is (i) his status as an officer of a foreign company that, in 2001, registered certain securities pursuant to the Exchange Act, which then traded on the New York Stock Exchange . . . and (ii) Mr. Steffen’s receipt of ‘one or more’ telephone calls from the defendant Sharef, who allegedly ‘called him from the United States.’”¹³

The SEC argued, *inter alia*, that Steffen was subject to personal jurisdiction “because his conduct caused foreseeable consequences in the United States.”¹⁴ According to the SEC, Steffen “caused Siemens to report . . . illegal payments as legitimate business expenses” by pressuring co-defendant Regendantz to authorize bribes

7. *Sharef Order*, No. 11 Civ. 9073 (SAS), at 17.

8. Press Release, U.S. Sec. & Exch. Comm’n, *supra* note 2.

9. *Id.*

10. *Id.*

11. *Sharef Order*, No. 11 Civ. 9073 (SAS), at 6–7 (citations omitted) (fourth alteration in original).

12. *Sharef Motion to Dismiss*, No. 11 Civ. 9073 (SAS), at 3–4.

13. *Id.*

14. *U.S. Sec. & Exch. Comm’n v. Sharef*, No. 11 Civ. 9073 (SAS), at 1 (S.D.N.Y. Nov. 13, 2012) (memorandum in opposition to defendant’s motion to dismiss), available at http://www.morganlewis.com/documents/Sharef_SECResponsetoMTD.pdf.

from SBS to Argentine officials.¹⁵

District Court Order

Judge Scheindlin explained that, while “there is ample (and growing) support in case law for the exercise of jurisdiction over individuals who played a role in falsifying or manipulating financial statements relied upon by U.S. investors in order to cover up illegal actions directed entirely at a foreign jurisdiction,” Steffen was not alleged to have engaged in such conduct.¹⁶ Judge Scheindlin found that Steffen did not authorize the alleged bribes, direct the alleged cover up, or play any role in the allegedly falsified filings. As a result, the judge concluded the following:

The allegations against Steffen fall far short of the requirement that he “follow[] a course of conduct directed at . . . the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.” 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.¹⁷

In granting the motion, Judge Scheindlin rejected the SEC’s position that a court can exercise personal jurisdiction over foreign defendants based merely “on the effect of their conduct on SEC filings.”¹⁸ She explained that, under the SEC’s minimum contacts theory for foreign defendants, “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.”¹⁹ As a result, Judge Scheindlin called for a “limiting principle” that restricts the exercise of personal jurisdiction over foreign defendants “[a]bsent any alleged role in the cover up[] . . . let alone any role in preparing false financial statements.”²⁰

Implications

Judge Scheindlin’s decision in *Sharef*, while not binding on other courts, suggests that a foreign defendant must do more than participate in a foreign bribery scheme in order to trigger personal jurisdiction for FCPA offenses.

Contacts

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- Securities fraud/SEC enforcement
- Tax

15. *Id.* at 13.

16. *Sharef Order*, No. 11 Civ. 9073 (SAS), at 17 (citation omitted).

17. *Id.* at 19 (citations omitted) (alterations in original).

18. *Id.* at 18

19. *Id.* at 18–19 (emphasis in original).

20. *Id.* at 19 (citation omitted).

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If you have any questions regarding this LawFlash, or require assistance with any issue relating to the defense of a government enforcement matter, please contact the authors, George J. Terwilliger III (202.739.5988; gterwilliger@morganlewis.com) and Benjamin D. Klein (202.739.5394; bklein@morganlewis.com), or any of our white collar practitioners:

Houston

Ryan D. McConnell 713.890.5755 rmcconnell@morganlewis.com

New York

Leslie R. Caldwell 212.309.6260 lcaldwell@morganlewis.com
Kelly A. Moore 212.309.6612 kelly.moore@morganlewis.com
Martha B. Stolley 212.309.6858 mstolley@morganlewis.com

Philadelphia

Eric W. Sitarchuk 215.963.5840 esitarchuk@morganlewis.com
John C. Dodds 215.963.4942 jdodds@morganlewis.com
Eric Kraeutler 215.963.4840 ekraeutler@morganlewis.com
Matthew J. Siembieda 215.963.4854 msiembieda@morganlewis.com
Lisa C. Dykstra 215.963.5699 ldykstra@morganlewis.com
Nathan J. Andrisani 215.963.5362 nandrisani@morganlewis.com
Meredith S. Auten 215.963.5860 mauten@morganlewis.com
Alison Tanchyk 215.963.5847 atanchyk@morganlewis.com

San Francisco

Susan D. Resley 415.442.1351 sresley@morganlewis.com

Washington, D.C.

George J. Terwilliger III 202.739.5988 gterwilliger@morganlewis.com
Robert J. Bittman 202.739.5989 rbittman@morganlewis.com
Fred F. Fielding 202.739.5560 ffielding@morganlewis.com
Margaret M. Gatti 202.739.5409 mgatti@morganlewis.com
Daniel Levin 202.739.5986 dlevin@morganlewis.com
Matthew S. Miner 202.739.5987 mminer@morganlewis.com
Ronald J. Tenpas 202.739.5435 rtenpas@morganlewis.com
Kathleen McDermott 202.739.5458 kmcdermott@morganlewis.com
Scott A. Memmott 202.739.5098 smemmott@morganlewis.com

Wilmington

Colm F. Connolly 302.574.7290 cconnolly@morganlewis.com

Frankfurt

Jürgen Beninca +49.69.714.007.19 jbeninca@morganlewis.com

London

Nick Greenwood +44 (0)20 3201 5570 ngreenwood@morganlewis.com
David Waldron +44 (0)20 3201 5590 dwaldron@morganlewis.com
Iain Wright +44 (0)20 3201 5630 iwright@morganlewis.com

Moscow

Jonathan H. Hines +7 495 212 2552 jhhines@morganlewis.com
Vasilisa Strizh +7 495 212 2540 vstrizh@morganlewis.com
Nane Oganesyanyan +7 495 212 2575 noganesyan@morganlewis.com
Oleg I. Berger +7 495 212 2545 oberger@morganlewis.com

Almaty

Aset A. Shyngyssov +7 727 250 7575 ashyngyssov@morganlewis.com

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