# Client Alert.

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# New FCPA Decision: The Battle Continues on the FCPA's Jurisdictional Reach

**By Paul T. Friedman, Ruti Smithline, and Adam J. Hunt**

Only two months into 2013, and another key FCPA decision has come out of the Southern District of New York. This fits with our view that we will have increasing judicial guidance in an area where such guidance has been sorely lacking. But it takes time for judicial precedents to provide clarity, and we are far from that point.

On February 19, Judge Shira Scheindlin dismissed a Securities and Exchange Commission (SEC) enforcement action against Herbert Steffen, the former CEO of Siemens S.A. Argentina, for lack of personal jurisdiction.[1] Applying a fact-based analysis, Judge Scheindlin found that Steffen did not have "minimum contacts" with the United States sufficient to subject him to personal jurisdiction in a U.S. court.

Although Judge Scheindlin focused on the specific facts before the court, her ruling is significant in that it conflicts with the expansive jurisdictional reach at the heart of the decision earlier this month by Judge Richard Sullivan in *SEC v. Straub.*[2] In *Straub*, Judge Sullivan disavowed the notion that he was creating a per se rule that employees of an issuer are subject to personal jurisdiction in the United States. Nonetheless, the *Straub* opinion may be viewed as stretching the reach of personal jurisdiction over foreign defendants who worked for companies listed on U.S. exchanges. In *Steffen*, Judge Scheindlin at least applied some limits.

## THE SEC'S ALLEGATIONS

In late 2011, the SEC filed an enforcement action against seven former Siemens executives, including Steffen, based on allegations that these officials "orchestrated a bribery scheme which paid millions of dollars in bribes to top government officials in Argentina."[3] Steffen was the CEO of Siemens's wholly-owned subsidiary, Siemens S.A. Argentina, from 1983 to 1989, and also in 1991. He was also the Group President of Siemens Transportation Systems from 1996 until he retired in 2003. Steffen is now 74 years old and lives in Germany.

The SEC alleged that in 2000 Steffen began negotiating a contract with the newly-elected Argentine Government, along with Uriel Sharef, another named defendant in the SEC enforcement action. Although Steffen and Sharef allegedly provided $27 million in bribes to Argentine officials through a sham consulting agreement, the government contract was nonetheless eventually canceled.

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[1] *SEC v. Sharef, et al.*, No. 1:11-cv-09073 (S.D.N.Y. February 19, 2013) (SAS) (the "*Steffen*" decision).

[2] For a detailed discussion of the DT and Magyar settlement, *see* Paul T. Friedman, Ruti Smithline, and Adam J. Hunt, New FCPA Decision: How Long is the FCPA's Reach? (February 14, 2013).

[3] To date, Department of Justice's (DOJ) and SEC's $800 million settlement with Siemens is still the largest FCPA settlement in the history of FCPA enforcement.


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Siemens initiated a dispute resolution proceeding with the World Bank seeking to recover "lost profits and costs resulting from the cancellation of the contract." Steffen allegedly "urged Siemens management to funnel more money to Argentine officials to ensure that" the bribes that originally secured the contract were not disclosed during the proceedings.

Steffen allegedly met with another Siemens executive, Bernd Regendantz, and "several times" "pressured" him to authorize bribes. According to the SEC's complaint, however, Regendantz paid the bribes only after seeking approval from his superiors, including the Siemens's Head of Compliance, Chief Financial Officer, and Chief Executive Officer. The SEC alleged that Regendantz "understood" their responses "to be instructions that he authorize the payments." Regendantz then "generated a series of fictitious documents to facilitate the payment and obscure the audit trail." Regendantz signed Siemens's required Sarbanes-Oxley Act disclosures. Steffen never signed any disclosures pursuant to U.S. securities laws, and was never responsible for making such disclosures.

## NO FACTS TO SUPPORT PERSONAL JURISDICTION

Judge Scheindlin rejected the SEC's theory that Steffen had the necessary "minimum contacts" with the United States due to his "role in encouraging Regendantz to authorize bribes to Argentine officials that ultimately resulted in falsified SEC filings." Based on the facts in the SEC's complaint, Judge Scheindlin determined that "Steffens' actions [were] far too attenuated from the resulting harm [i.e., false filings] to establish minimum contacts" and that "Steffen's alleged role was tangential at best." The key facts that swayed Judge Scheindlin were:

> "Steffen did not actually authorize the bribes";
>
> "The SEC d[id] not allege that he directed, ordered or even had awareness of the cover ups that occurred…much less that he had any involvement in the falsification of SEC filings in furtherance of these cover ups"; and
>
> The SEC did not allege that Steffen's official position "would have made him aware, let alone involved in falsification of these filings."

In addition, Judge Scheindlin found 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, all weigh against personal jurisdiction. Judge Scheindlin further emphasized that both the SEC and the DOJ "have already obtained comprehensive remedies against Siemens and Germany has resolved an action against Steffen individually." Accordingly, Judge Scheindlin did not think that, under these circumstances, it was reasonable to haul Steffen before a U.S. court.

## LIMITS TO THE FCPA'S JURISDICTIONAL REACH: NOT EVEN MINIMUM CONTACTS

In her "minimum contacts" analysis, Judge Scheindlin rejected the SEC's broad interpretation of personal jurisdiction and emphasized 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." According to Judge Scheindlin, the SEC's theory was so broad that it would claim personal jurisdiction over "*every* participant in [an] illegal action taken by a foreign company subject to U.S. securities laws…no matter how attenuated their connection with the falsified


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statements." But, "this would be akin to a tort-like feasibility requirement, which has long been held to be insufficient" for establishing minimum contacts. And, at the end of the day, the SEC's factual allegations "fell far short" of the minimum contacts requirements.

Importantly, Judge Scheindlin distinguished *Straub*, which denied an FCPA defendant's motion to dismiss for lack of personal jurisdiction. In *Straub*, Judge Scheindlin stressed there were minimum contacts because the defendants both "orchestrated a bribery scheme aimed at the Macedonian government, *and* as a part of the bribery scheme signed off on misleading management representations to the company's auditors and signed false SEC filings." The emphasis on the conjunctive term "*and*" is in the opinion itself. As emphasized by Judge Scheindlin, the facts alleged against Straub were distinguishable from the facts alleged against Steffen—the SEC did not provide any facts to suggest that Steffen was involved in, or even aware of, the submission of falsified SEC filings.

Thus, Judge Scheindlin appears to have articulated a possible limiting principle to the FCPA's jurisdictional reach: where an FCPA defendant both participates in the scheme *and* plays an active role in falsified SEC filings, there may be sufficient minimum contacts. However, without an active role in falsifying SEC filings, there may not be a sufficient basis to assert personal jurisdiction.

## CONCLUSION

Judge Scheindlin's analysis offers future defendants—particularly foreign nationals—a fighting chance against the expansive reach articulated in *Straub*. Judge Scheindlin made clear that the SEC cannot rely solely on vague allegations tangentially linking a foreign employee to falsified SEC filings. And her discussion of the *Straub* case suggests an implied limiting principle that turns on a more "active" involvement in the preparation of falsified securities documents.

But, aside from her analysis of the facts alleged by the SEC against Steffen and her efforts to distinguish those facts from what the SEC alleged against Straub, Judge Scheindlin provided little guidance on what "minimum contacts" are necessary to assert personal jurisdiction over a foreign national. Future defendants may prevail or lose at the pleading stage depending on how closely the facts alleged against them resemble the facts in *Steffen* or *Straub*.

And, of course, it remains to be seen what the Second Circuit will do with these two decisions as FCPA jurisprudence evolves. More to come.


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