LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What's At Stake In Court Split Over Foreign Bribery Charges

By **James Koukios and Heather Han** (September 26, 2022, 3:16 PM EDT)

James Koukios

Heather Han

The U.S. Department of Justice has long used federal anti-money laundering laws to combat foreign corruption, particularly when prosecuting individual defendants.

Money laundering charges carry a higher maximum term of imprisonment than charges brought under the Foreign Corrupt Practices Act, and may reach individuals who are, or who potentially are, outside the FCPA's jurisdictional limits. For example, the DOJ frequently brings money laundering charges against foreign officials and foreign nationals who do not have a clear nexus to the U.S.

Two recent Texas federal court decisions have called this practice into question. The decisions dismissed money laundering charges against non-U.S. financial professionals accused of helping to launder the proceeds of a Venezuelan bribery scheme. But a different federal court in Florida declined to follow these rulings in another Venezuela bribery case involving a foreign official.

White collar practitioners should monitor the outcome of these cases and look for opportunities to press jurisdictional challenges in foreign bribery cases.

The Interplay of Money Laundering and FCPA Charges in Foreign Bribery Cases

In its pursuit of global anti-corruption enforcement efforts, the DOJ has a long history of using charges brought under the Money Laundering Control Act to supplement the FCPA.

The MLCA, codified in Title 18 of the U.S. Code, Sections 1956 and 1957, prohibits certain financial transactions involving a specified unlawful activity, which is defined in the statute to cover a wide range of illegal activities, including violations of the FCPA and other countries' official bribery statutes.[1]

According to a DOJ resource guide on the FCPA, since paying bribes to a foreign official can constitute a specified unlawful activity, "[m]any FCPA cases also involve violations of anti-money laundering statutes."[2]

Charging money laundering independently or in conjunction with FCPA violations in corruption cases can benefit the DOJ in multiple ways. First, because the MLCA carries higher maximum prison terms than the FCPA, adding money laundering charges raises the stakes of bribery prosecutions for individuals.

Second, the MLCA provides an avenue for the DOJ to charge bribe recipients who are not punishable under the FCPA. The DOJ has long taken the position, to date unchallenged, that "although foreign officials cannot be prosecuted for FCPA violations, they can be prosecuted for money laundering violations where the specified unlawful activity is a violation of the FCPA," as articulated in its FCPA resource guide.[3]

Since the late 2000s, the DOJ has built a successful track record of convicting bribe-receiving foreign officials who have used the U.S. banking system to process or conceal bribe payments.

Third, because they have different jurisdictional requirements, money laundering charges can act as an insurance policy, or even as a substitute, when FCPA jurisdiction is in question.

This last benefit has taken on particular significance for the DOJ since the U.S. Court of Appeals for the Second Circuit's decision in U.S. v. Hoskins in 2018.[4] Among other things, Hoskins stands for the proposition that foreign nationals cannot be charged with violations of the FCPA's anti-bribery provisions under accomplice or conspirator liability theories unless they fall into one of the specifically enumerated categories of defendants specified in the FCPA.

In Hoskins, this meant that in order to obtain an FCPA conviction against Lawrence Hoskins, a foreign national who was working for a foreign corporation and did not travel to the U.S. at the time of the alleged offense, the DOJ had to prove that Hoskins had acted as an agent of the foreign corporation's U.S. subsidiary.

Although a jury concluded that the DOJ had made this showing, the U.S. District Court for the District of Connecticut disagreed and acquitted Hoskins on the FCPA charges post-trial.[5] The Second Circuit recently affirmed the district court's decision.[6]

Importantly, however, the district court denied Hoskins' motion for acquittal on related money laundering charges, since the DOJ proved that money had been wired from the U.S. to Indonesia in furtherance of the bribery scheme.

Thus, Hoskins has created an incentive for the DOJ to continue its strategy of bringing money laundering charges against foreign nationals involved in foreign bribery schemes that utilize the U.S. banking system.

Two Texas Decisions Question MLCA Extraterritoriality in Foreign Bribery Cases

In a pair of decisions issued in November 2021 and July 2022, U.S. District Court for the Southern District of Texas Judge Kenneth Hoyt called the DOJ's charging strategy into question by dismissing FCPA and money laundering charges against two foreign defendants in the same foreign bribery case, U.S. v. De Leon-Perez, for lack of jurisdiction.[7]

Both decisions are on appeal to the U.S. Court of Appeals for the Fifth Circuit and are currently scheduled for oral argument on Oct. 6.

The Texas case involves an alleged scheme by U.S. businesses to bribe officials of Venezuela's national oil company, Petróleos de Venezuela SA, in exchange for assistance in obtaining PDVSA contracts and receiving payment priority.

As pertinent here, two non-U.S. employees of Swiss wealth management firms, Daisy Rafoi-Bleuler and Paulo Casqueiro Murta, were charged with FCPA and money laundering violations for allegedly helping to facilitate and conceal the bribery scheme by opening bank accounts outside the U.S. to receive bribe payments and by creating false paperwork to justify the payments.

According to the indictment, bribe payments were wired either directly or indirectly from accounts in the U.S. to the accounts outside the U.S. that Rafoi and Murta helped open.

On Nov. 12, 2021, and July 11, 2022, respectively, Judge Hoyt granted Rafoi's and Murta's motions to dismiss the indictment. Judge Hoyt held, in essence, that the extraterritorial application of the MLCA requires proof that the non-U.S. defendant personally conducted part of the offense while physically present in the U.S.

Judge Hoyt found jurisdiction as to Rafoi lacking because, under his reading of the MLCA, "the Court has jurisdiction over a foreign person because of either her earlier presence in the United States, or her involvement in the crime while in the United States," and there was no evidence that Rafoi ever traveled to the U.S. in furtherance of the bribery scheme.

Judge Hoyt further held that the DOJ cannot use the aiding and abetting statute to circumvent this lack of jurisdiction, citing Hoskins, which addressed the extraterritorial reach of the FCPA, not the MLCA.

Judge Hoyt reached the same conclusion with respect to Murta. Even though the indictment alleged that Murta traveled to the U.S. to meet with his co-conspirators and later caused a wire transfer to be sent from a U.S. bank, Judge Hoyt nonetheless found jurisdiction lacking because there was no evidence that Murta was physically present "in the United States at the time the alleged transactions occurred or that he initiated, or attempted to initiate them, from within the United States."

It is not clear that all courts would agree with Judge Hoyt that the MLCA requires a foreign national to have been personally present in the U.S. at some point during the money laundering offense.

Some courts have found that the MLCA's extraterritorial jurisdiction requirement for a non-U.S. citizen[8] was satisfied simply when the underlying financial transaction began or ended in a U.S. account,[9] while other courts have found jurisdiction when the defendant's co-conspirator engaged in relevant conduct in the U.S.[10] Indeed, one court has already expressly declined to follow Judge Hoyt's holding.

Florida Judge "Not Necessarily Persuaded" by Texas Decisions

On July 12, U.S. District Court for the Southern District of Florida Judge William Dimitrouleas rejected a motion to dismiss money laundering charges in another Venezuelan bribery case.[11]

In that case, former Venezuelan National Treasurer Claudia Patricia Díaz Guillen was indicted on money laundering charges in connection with a scheme in which she allegedly received approximately $65 million in bribes in exchange for allowing a company to conduct foreign exchange transactions in Venezuela at favorable rates. At least some of the alleged bribe payments were wired from Switzerland to bank accounts located in the U.S.

Because Díaz was a foreign official, she could not be charged with violating the FCPA, but she was charged with conspiring to commit and aiding and abetting money laundering offenses.

Seizing on Judge Hoyt's opinions in the Texas case, Díaz moved to dismiss the money laundering counts on jurisdictional grounds, among others, because the indictment did not allege that she committed any relevant conduct while physically present in the U.S.

The DOJ conceded in response that it had no such evidence, but contended that the defendant's physical presence in the United States is not required to establish jurisdiction under the MLCA.

Judge Dimitrouleas denied the motion, finding sufficient allegations in the superseding indictment to establish extraterritorial jurisdiction for the money laundering charges.

Although the opinion does not include a detailed discussion of the Texas decisions, Judge Dimitrouleas stated that "[t]he Court is not necessarily persuaded by the opinions in" U.S. v. Rafoi-Bleuler and U.S. v. Murta.

Conclusion

The Florida and Texas decisions reach opposite conclusions on the DOJ's ability to prosecute foreign nationals who use the U.S. banking system in furtherance of a foreign bribery scheme from outside the U.S.

If the Fifth Circuit agrees with Judge Hoyt that a foreign national must have been physically present in the U.S. to be charged with money laundering, then the DOJ could lose a significant enforcement tool in the fight against foreign bribery.

The "physical presence" requirement could also be extended to other specified unlawful activities and could weaken the ability of the U.S. to police its banking system by creating an exception for remote money laundering by foreign nationals.

This is not unlike the dissenting opinion's concern in the second Hoskins decision that the majority opinion could motivate U.S. companies to avoid FCPA jurisdiction by exclusively using foreign affiliates to bribe foreign officials. But this might be a gap that Congress will need to fill.

In any event, defense attorneys in foreign bribery cases should continue to press jurisdictional issues and explore creative jurisdictional arguments. Even if ultimately reversed, Judge Hoyt's decisions in the Texas cases show that some judges, and potentially some juries, will find such arguments compelling.

James Koukios is a partner, co-chair of the securities litigation, enforcement and white collar defense group, and co-head of the FCPA and global anti-corruption practice at Morrison Foerster LLP.

Heather Han is an associate at the firm.

[1] 18 U.S.C. §§ 1956(c)(7)(B)(iv) and (D).

[2] U.S. Dep't of Justice, Criminal Div. and U.S. Sec. & Exch. Comm'n, Enf't Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition, at 48-49 (July 2020), https://www.justice.gov/criminal-fraud/fcpa-resource-guide [hereinafter, "FCPA Resource Guide"].

[3] FCPA Resource Guide at 49, supra note 2; see also United States v. Castle, 925 F.2d 831 (5th Cir. 1991).

[4] United States v. Hoskins, 902 F.3d 69, 76-97 (2d Cir. 2018).

[5] United States v. Hoskins, No. 3:12-CR-238 (JBA), 2020 WL 914302, at *9 (D. Conn. Feb. 26, 2020), aff'd, 44 F.4th 140 (2d Cir. 2022).

[6] United States v. Hoskins, 44 F.4th 140, 2022 WL 3330357, 150-52, 157-58 (2d Cir. Aug. 12, 2022).

[7] See Memorandum Opinion and Order, United States v. De Leon-Perez, et al., 17-CR-00514 KMH (S.D. Tex. Nov. 10, 2021), ECF No. 255; United States v. De Leon-Perez, et al., 17-CR-00514 KMH, 2022 WL 4002321, at *2 (S.D. Tex. July 11, 2022).

[8] 18 U.S.C. § 1956(f)(1).

[9] See, e.g., United States v. Stein, No. 93-375, 1994 WL 285020, at *4-5 (E.D. La. June 23, 1994).

[10] See, e.g., United States v. Iossifov, 45 F.4th 899 (6th Cir. 2022).

[11] Order, United States v. Claudia Patricia Díaz Guillen, 18-CR-80160 (S.D. Fla. July 12, 2022), ECF No. 96.