District Court Imposes Limits on the Extraterritorial Reach of the Foreign Corrupt Practices Act and the Money Laundering Control Act While Opening the Door to Future Constitutional Challenges

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In a rare court-room victory for a Foreign Corrupt Practices Act (FCPA)[1] defendant, on November 10, 2021, the United States District Court for the Southern District of Texas dismissed a three-count indictment against Daisy Rafoi-Bleuler, a Swiss citizen residing in Zurich.[2] The case indicates that there are in fact limits to the Department of Justice's (DOJ) expansive interpretation of its own jurisdiction over foreign nationals in white collar criminal cases, and it raises the specter of future due process constitutional challenges to prosecutions of so-called "agents" in corruption and money laundering cases.

The Allegations

Petróleos de Venezuela, S.A. (PdVSA) is a Venezuelan state-owned and state-controlled oil company. The indictment alleged that Rafoi-Bleuler's codefendants, six current or former PdVSA employees and citizens of Venezuela (the codefendants), corruptly awarded PdVSA contracts, including service agreements for two U.S.-based PdVSA subsidiaries (the PdVSA U.S. Subs), in exchange for illegal kickbacks and for preferential treatment in the order in which PdVSA paid invoices. To conceal the proceeds of the bribery scheme, the codefendants engaged the defendant and her wealth management company to set up bank accounts in Curaçao, Switzerland, the United Arab Emirates, and elsewhere.[3]

The government alleged that the defendant, by providing financial services through her wealth management firm to the codefendants, conspired to violate the Money Laundering Control Act of 1986[4] (MLCA) concerning funds derived in violation of the FCPA (Count 1), conspired to violate the FCPA (Count 2), and aided and abetted violations of the MLCA (Count 3). For the charge of conspiracy to violate the FCPA, the government asserted that the defendant was acting as an "agent"[5] of a "domestic concern"[6] and that she knowingly participated in financial transactions in "interstate commerce"[7] using the proceeds of the bribery scheme. For the charges of conspiracy to violate and to aid and abet violations of the MLCA, the government asserted that the defendant, while acting as an agent of domestic concerns, created false justifications for the deposit of bribery proceeds and used e-mail and other instruments of interstate commerce to communicate in order to carry out the money laundering offense.[8]

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[1] 15 U.S.C. §78dd-1 *et seq.*
[2] *See United States v. Daisy T. Rafoi-Bleuler,* 4:17-cr-00514 (S.D. Tex. Nov. 10, 2021) (Order Dismissing the Superseding Indictment) (the "Order").
[3] *See* Order at pages 3-5.
[4] 18 U.S.C. §§ 1956, 1957.
[5] *See* Order at footnote 6 ("The term 'agent' does not appear to be defined in either of the three sub-sections of Title 15, section 78dd. Courts have held that the term's common law meaning is intended by Congress. However, when the term is used to establish jurisdiction it becomes a question of law for the court.") (Citations omitted).
[6] *See* Order at footnote 7 ("The term 'domestic concern' means (a) any individual who is a citizen, national, or resident of the United States, and (b) any corporation, partnership, or other business entity which has its principal place of business in the United States, or which is organized under the laws of a state of the United States or its territory.") (Citations omitted).
[7] *See* Order at footnote 8 ("The term 'interstate commerce' includes, in relevant part, 'trade, commerce, transportation, or communication . . . between any foreign country and any State . . . and . . . includes the intrastate use of— (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.'") (Citations omitted).
[8] *See id.*

The Court's Dismissal and Rejection of DOJ's Expansive Assertion of Jurisdiction Over a Foreign Defendant With No Connection to the Underlying Misconduct or to the United States

The FCPA provides a limited basis for extraterritorial jurisdiction over foreign individuals and requires that the government establish that the individual was an "officer, director, employee, or agent" of a domestic concern—in this case, the PdVSA U.S. Subs. Where there is no allegation that an agent of a domestic concern acted unlawfully while in the U.S., "agency" requires direct evidence beyond that of a professional services relationship and "undisputed evidence of mutual assent and control over the details of the person and the agency, such that the principal controls the details over the assignment. Absent direct or undisputed evidence, agency does not exist."[9] Here, the defendant was a principal and owner of a Swiss wealth management firm that had no prior association or affiliation with the U.S. or the codefendants. The defendant asserted that she was not accused of any violation of Swiss law, that she conducted herself in "strict accordance" with applicable Swiss anti-money laundering laws and other regulations, and that the superseding indictment did not charge that she knowingly or intentionally involved herself in the underlying bribery scheme.[10] Indeed, the conduct cited by the government related to her codefendants' actions in the U.S. and Venezuela, not to any act committed by the defendant herself in either country. Specifically, the defendant received wire instructions and communicated with the codefendants over e-mail while she was in Switzerland and while her codefendants were in the U.S. or Venezuela.[11] The court concluded that the government did not establish that the defendant was an "agent" of a domestic concern and that the FCPA does not otherwise extend extraterritorially to foreign persons whose conduct is entirely outside of the U.S. and who otherwise does not have previously established ties to the U.S. Therefore, the court found that it lacked jurisdiction under Sections 78dd-2 and 78dd-3 of the FCPA.[12]

It is a violation of the MLCA to knowingly engage in a financial transaction involving the proceeds of illegal activity, to knowingly engage in a financial transaction designed to conceal or disguise the origins or ownership of criminally derived property, or to knowingly transfer or attempt to transfer money from, into, or through the U.S. with the intent to promote unlawful activity.[13] "A person who is a non-United States citizen commits the offense while outside the United States 'if the [prohibited] conduct occurs *in part* in the United States[.]' … In this instance, 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."[14] Here, the court found that the superseding indictment "does not state that the offense of money laundering occurred outside the United States by persons subject to the jurisdiction of the United States courts. It is noted that any transfer of alleged illegal proceeds was not *to* the defendant or made by the defendant, but instead, occurred *between* the codefendants and the financial institutions or banks." Accordingly, as was the case with the FCPA charges, it was not sufficiently alleged that the defendant was acting as an "agent" nor was it alleged that the defendant participated in the criminal conduct while in U.S. territory, and therefore the court dismissed the money laundering charges due to a lack of jurisdiction over the defendant.[15]

Setting the Stage for Future Due Process Challenges to the Constitutionality of Criminally Charging an "Agent" Under the FCPA and MLCA

After dismissing the indictment on jurisdictional grounds, the court stated that it found "merit in the defendant's claim that both the FCPA and MLCA are unconstitutionally vague as applied to her."[16] "Under the vagueness doctrine, courts are forbidden from enforcing a statute which either forbids or requires the doing of an act so vague that [a woman] of common intelligence must necessarily guess at its meaning [and where courts may] differ as to its application."[17] The court further noted that the vagueness doctrine may be particularly "relevant in instances where the accused's conduct is not prosecutable in the accused's own country."[18] Finally, the court found that "no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term ['agent'] may be applied to establish jurisdiction. That fact alone establishes the vagueness of the term."[19] This decision undoubtedly lays the ground work for future foreign defendants to challenge FCPA and MLCA indictments on due process grounds.

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[9] Order at page 15 (citations omitted).
[10] *See* Order at page 7 (citations omitted).
[11] *See* Order at pages 15-16, footnote16.
[12] *See* Order at pages 17-18.
[13] *See generally* 18 U.S.C. §1956.
[14] Order at page 19 (citing 18 U.S.C. § 1956(f)(1)).
[15] *See* Order at page 20 (emphasis in the original).
[16] Order at page 21.
[17] Order at page 22 (citations omitted).
[18] *Id.* (citations omitted).
[19] *Id.*

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