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CLIENT ALERT

Texas Court Dismisses DOJ's FCPA and Money Laundering Claims Finding DOJ's Agency Theory of Liability Unconstitutional

November 17, 2021

In an order filed on November 10, 2021, the District Court for the Southern District of Texas granted a motion to dismiss an indictment finding that it lacked jurisdiction over Foreign Corrupt Practices Act ("FCPA") and money laundering claims brought against Swiss resident and citizen Daisy T. Rafoi-Bleuler. Moreover, the court concluded that the FCPA and money laundering claims were unconstitutionally vague as applied. See United States v. Rafoi-Bleuler, Case No. 4:17-CR-0514-7, Dkt. No. 255 (Nov. 10, 2021).

Ms. Rafoi-Bleuler is a resident and citizen of Switzerland who owns a wealth management company. The government alleged that a state owned and controlled Venezuelan oil company ("PDVSA") with a wholly-owned affiliate in Houston ("PDVSA-US") awarded bids to vendors in exchange for kickbacks. According to the government, PDVSA, PDVSA-US and persons working on their behalf, engaged Ms. Rafoi-Bleuler to set up bank accounts in Switzerland and other foreign locations to launder the ill-gotten monies. This, the government alleged, made Ms. Rafoi-Bleuler an agent for PDVSA-US, a domestic concern, and therefore subject to the strictures of the FCPA. The same facts, the government contended, supported the money laundering charges.

The court found otherwise, granting Ms. Rafoi-Bleuler's Federal Rule of Criminal Procedure 12 motion to dismiss. The court noted that the FCPA's jurisdictional reach over Ms. Rafoi-Bleuler was limited to acts committed in the United States or acts committed by a domestic concern, its officers, directors, employees or agents.

And, while the indictment alleged that Ms. Rafoi-Bleuler was an agent, the court held that that alone was not enough. Finding that the existence of an agency relationship presents a question of law, the court concluded that "agency does not exist simply because the government alleges . . . that the defendant committed certain acts." Id. at 14. And what was alleged concerning agency was found wanting by the court. Ms. Rafoi-Bleuler's alleged communications in interstate commerce with the alleged co-conspirators was not enough, and otherwise, there was no evidence that the principals controlled her efforts. Notably, none of the conduct alleged to have occurred in the United States was committed by Ms. Rafoi-Bleuler. Ultimately, the court went even further, holding that the term "agent" under the FCPA was unconstitutionally vague as applied to Ms. Rafoi-Bleuler. The court noted that an agency theory as applied to Ms. Rafoi-Bleuler's conduct was "such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term may be applied to establish jurisdiction." The court concluded "[t]hat fact alone establishes the vagueness of the term." Id. at 22.

On money laundering, the court concluded that there was no allegation that Ms. Rafoi-Bleuler committed any relevant act while in the United States, which would permit jurisdiction over her under the Money Laundering Control Act. She also did not live in the United States or commit any acts of money laundering in the United States. Furthermore, the financial transactions at issue involved Ms. Rafoi-Bleuler's codefendants and various financial institutions, not Ms. Rafoi-Bleuler herself.

This is the second time in recent years that the DOJ's attempt to extend the scope of agency liability under the FCPA has been rejected. In the United States v. Hoskins, 2020 WL 914302 (D. Conn. Feb. 26, 2020), the District of Connecticut set aside

defendant's conviction on FCPA charges and granted his motion for acquittal. Much as the court found in dismissing the charges against Ms. Rafoi-Bleuler, the Hoskins court concluded that the evidence failed to show that there was an agency relationship between the domestic concern charged with violating the FCPA and the defendant claimed to be its agent. Specifically, the court concluded that there was no evidence that the domestic concern had the right to control defendant's actions necessary to satisfying the legal requirements of an agency relationship. The matter is on appeal to the Second Circuit. It was argued in August 2021. See United States v. Pierucci, Case No. 20-842.

As with Hoskins, we anticipate that the DOJ will ask the court to reconsider, or appeal the decision in Rafoi-Bleuler.

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