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Recent Supreme Court cases could affect future FCPA enforcement

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From top, clockwise: Ron Cheng, Alexander Wyman, and Jeremy Maltby

Ronald Cheng, Jeremy Maltby and Alexander Wyman at O'Melveny & Myers argue that two recent US Supreme Court decisions provide the DOJ with additional tools to prosecute foreign corruption.

Two recent Supreme Court cases – *RJR Nabisco Inc v European Community and Ocasio v United States* – may affect the US government's extraterritorial anti-corruption enforcement programme. Although neither *RJR Nabisco* nor *Ocasio* concerned charges under the Foreign Corrupt Practices Act, *RJR Nabisco* gives the government an additional tool to address foreign corruption under other criminal statutes, and *Ocasio* may provide a basis for the government to continue to assert an expansive view of the FCPA's extraterritorial reach by using conspiracy charges to reach parties not punishable under the statute's substantive terms.

The government has made clear in recent years that cross-border enforcement of the FCPA is a priority, with eight of the top ten largest FCPA enforcement actions involving foreign companies. *RJR Nabisco* and *Ocasio* may bolster this trend by providing the government with additional justification for exercising jurisdiction over foreign companies not listed on a US exchange and foreign persons acting outside the United States. These cases suggest that when foreign parties engage in business transactions that touch the US system and US parties, they should pay close attention to US law, even when they do not act directly in the territory of the United States.

RJR Nabisco: overcoming the "presumption against extraterritoriality"

On 20 June, the Supreme Court held in *RJR Nabisco* that the federal Racketeer Influenced and Corrupt Organizations Act (RICO) can in some circumstances extend criminal liability to conduct outside of the United States. Although the court split on the issue of whether a civil plaintiff must show a domestic injury to sustain a private right of action under RICO, the court unanimously held that a criminal RICO violation "may be based on a pattern of racketeering that includes predicate offences committed abroad, provided that each of those offences violates a predicate statute that is itself extraterritorial." As the court reasoned, "short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect."

The cross-border implications of the opinion may be significant. Civil RICO claimants must now show a domestic injury to bring a private right of action. But while *RJR Nabisco* limits private civil actions, its holding reinforces the US government's ability to overcome the presumption against extraterritoriality to prosecute

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criminal violations committed abroad. To overcome the presumption, courts need to find that a statute includes a textual basis demonstrating that Congress intended its provisions to apply across international borders. Although the presumption can only be overcome by a clear indication of extraterritorial effect, an "express statement of extraterritoriality is not essential."

This broad view of RICO's extraterritorial reach, together with other federal statutes such as the FCPA, provides the government with additional leverage to prosecute foreign conduct that does not breach the US border. By its terms, the FCPA's anti-bribery provisions are limited to issuers, domestic concerns, and their agents, officers, directors, employees and shareholders. Although the statute also extends to certain foreign nationals or non-issuer entities that – either directly or through an agent – engage in any act in furtherance of a corrupt payment "while in the territory of the United States", the FCPA does not explicitly cover their conduct committed abroad when it does not reach US territory. Therefore, despite the government's programme of aggressive FCPA enforcement against foreign nationals and non-issuer entities, the language of the FCPA seems to foreclose the government's expansive view of the FCPA's extraterritorial reach.

After *RJR Nabisco*, however, practitioners will be attuned to whether regulators will alter their approach to enforcing violations abroad. And despite the limits *RJR Nabisco* places on private civil causes of action for overseas conduct, the boundaries of extraterritorial criminal enforcement are not subject to the same restrictions. Although *RJR Nabisco* does not directly support the government's aggressive use of the FCPA against foreign individuals and non-issuers, and can even be read to support a narrower view, the court's express approval of RICO's extraterritorial application for certain predicate acts such as international money laundering means that a comprehensive risk assessment should anticipate potential exposure under a wide variety of federal laws including the FCPA and RICO's predicate offences. If courts determine the FCPA does not reach particular acts of foreign bribery committed by non-US persons outside the territory of the United States, the government may invoke the RICO statute, laws prohibiting money laundering, and related laws to seek to prosecute conduct it regards as objectionable.

Ocasio v United States: conspiracy principles

One of the mechanisms by which the government exercises jurisdiction over foreign non-issuers under the FCPA is through a charge of conspiracy. A second case from this term, *Ocasio v United States*, may support its use of the conspiracy theory. On 2 May, the Supreme Court upheld the conviction of a police officer who entered into a consensual kickback scheme with two local car repair shop owners to obtain money from them under colour of official right. The essence of the alleged conspiracy was that the defendant solicited bribes from the shop owners in exchange for referring motorists in traffic accidents to their shop. Appealing his conspiracy conviction, the officer contended that the language of the Hobbs Act requires that a co-conspirator obtain property from someone outside of the conspiracy. Rejecting this argument, the court held – under "well-established" principles of conspiracy law – that a person "may be convicted of conspiring to commit a substantive offence that he or she cannot personally commit."

Relying on its reasoning from the 1932 case of *Gebardi v United States*, the court acknowledged that "something more than bare consent or acquiescence" may be necessary to convict an individual of conspiracy. In *Gebardi*, the court concluded – based on the text of the Mann Act – that the statute's failure to condemn mere consent to a conspiracy indicated "an affirmative legislative policy to leave acquiescence unpunished." As a result, a woman transported across state lines for forbidden purposes could not be charged with conspiracy to transport herself solely because she had consented to the transportation. By contrast, in *Ocasio*, the court held that it was "sufficient" to establish the existence of a conspiracy under the Hobbs Act – as long as "each conspirator" simply intended that "some conspirator" commit each element of the substantive offence. Thus, *Ocasio* clarified that each co-conspirator need not be capable of personally committing every element of the underlying offence to sustain a conviction.

The government may cite *Ocasio*'s view of *Gebardi* as a reflection of "basic principles of conspiracy law" to support future anti-bribery cases brought under the FCPA. Perhaps anticipating such a result, in dissent, Justice Sotomayor warned that the majority's "contortion" of conspiracy law "rais[es] the specter of potentially charging everybody with conspiracy . . . fitting whatever a prosecutor needs in a given case."

Extraterritorial implications for FCPA enforcement

The US Department of Justice and the Securities and Exchange Commission have broad jurisdiction over several categories of individuals and entities to enforce the FCPA's prohibition against bribing foreign governmental officials. Over the last decade, both agencies have asserted an expansive view of their jurisdiction under the FCPA by aggressively enforcing the statute against foreign companies, even when jurisdiction is based on only incidental contacts with the United States, such as a foreign wire transfer that passes through a US bank account or a facsimile or e-mail sent to this country. The DOJ and SEC's jointly published 2012 guidance on FCPA enforcement asserts that a foreign national or company may be liable if it "aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States."

Such an expansive jurisdictional view, however, is not without limits. Recently, various federal courts have criticised the government for its aggressive interpretation of extraterritorial jurisdiction. In the wake of *RJR Nabisco* and *Ocasio*, however, trial courts must wrestle with new precedent to determine the extent to which the FCPA, RICO, and other statutes may apply to individuals, entities, or activities situated overseas with minimal, if any, connection to the United States. These issues are more likely to arise should the government increase enforcement against individuals, as suggested in the September 2015 memorandum from Deputy Attorney General Sally Yates, as individual defendants will be more inclined to litigate these issues than corporate defendants historically have been. The facts underlying one recent district court decision in an FCPA prosecution against an individual – *United States v Hoskins* – provide a good illustration of how this issue might unfold on appeal in the aftermath of the Supreme Court's latest term.

Case Study: *United States v Hoskins*

In *Hoskins*, the government charged a non-resident foreign national with conspiracy by acting "together with" a US company to violate the FCPA. But because that conspiracy charge did not allege the defendant was an "agent" of the US corporate entity, the US District Court for the District of Connecticut held that *Hoskins*, a non-resident foreign national and former executive of French transportation company Alstom, could not be criminally liable for conspiracy under the FCPA where he was neither acting as an agent of domestic concern nor acting while physically present within the United States. Relying on the text, structure, and legislative history of the statute, the court concluded that Congress intended to exclude from criminal liability under the FCPA non-resident foreign nationals who were neither acting within the United States nor fell into one of the enumerated classes of persons with ties to domestic concerns or issuers. On 1 April 2016, the government filed a notice of appeal to the US Court of Appeals for the Second Circuit, which remains pending.

After *RJR Nabisco* and *Ocasio*, the question remains: Will the Second Circuit concur with *Hoskins*'s reading of the limited extraterritorial scope of the FCPA or will it instead conclude that the DOJ and SEC's more expansive construction comports with congressional intent? The Supreme Court emphasised in *RJR Nabisco* that the scope of an extraterritorial statute is subject only to "the limits Congress has (or has not) imposed on its foreign application." Since an "express statement of extraterritoriality is not essential," an appellate court reviewing the district court's decision in *Hoskins* need only find that Congress intended the FCPA's provisions to apply abroad to overcome the presumption against extraterritoriality. Given the statute's explicit requirement of an act "in the territory of the United States", it may be difficult for the government to make a credible case against the

presumption. But if the government is unable to overcome the presumption, it may also invoke *Ocasio* to claim that, although *Hoskins* could not have committed the substantive offence because he acted outside the United States, he could nevertheless have participated in a conspiracy to violate the FCPA that was otherwise connected with the United States. In comparison, the district court in *Hoskins* relied on the Fifth Circuit's prior ruling that Gebardi stood for the proposition that a conspiracy charge could not be brought against a third party based on an object offence that the third party could not commit. The extent to which the government relies on *RJR Nabisco* and *Ocasio* may provide guidance as to how the government will enforce the FCPA against foreign individuals and non-issuers for conduct entirely outside the territory of the United States.

Conclusion

Foreign entities and individuals must be aware that conduct beyond the border is not necessarily outside the reach of US anti-corruption law. If foreign authorities are investigating or prosecuting business entities or employees for alleged corruption, US authorities may also use the same evidence in a US prosecution given the US interest. After *RJR Nasbisco* and *Ocasio*, an unanswered question is how far courts will extend the extraterritorial reach of other federal statutes. As tensions brew over the government's broad jurisdictional view in an era of heightened enforcement, it remains to be seen whether and to what extent foreign conduct that ostensibly falls outside of the FCPA's ambit could be brought within the statute's reach or addressed through other statutes. In the meantime, companies should take remedial measures to safeguard themselves against the substantial risk of liability presented by FCPA enforcement. Essential steps include educating employees about the risks of such enforcement, instituting an effective compliance programme tailored to the specific needs of the company, and allocating responsibility for compliance mechanisms and rules.

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