The Federal Government’s Ability to Initiate Criminal Proceedings Against Foreign Corporations is About to Get Easier

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On April 28, 2016, the United States Supreme Court ("Supreme Court") submitted to Congress proposed amendments to Federal Rule of Criminal Procedure 4 ("Criminal Rule 4") which, if approved, would take effect on December 1, 2016. The amendments follow the U.S. Department of Justice’s ("DOJ") repeated, but unsuccessful, attempts to serve a federal criminal summons on foreign organizational defendants that lack a U.S. presence.

The amendments contemplate (i) the elimination of restrictions on foreign service, including Criminal Rule 4’s "mailing" provision that requires a summons to be mailed to a defendant’s last known address within the judicial district or its principal place of business elsewhere in the U.S., and (ii) the addition of express means of serving foreign defendants that do not maintain a domestic agent, principal place of business, or mailing address.

The DOJ has urged these "necessary" changes "to effectively prosecute foreign organizations that engage in violations of domestic criminal law." Otherwise, Criminal Rule 4 could be an "impediment to prosecution," thereby giving foreign corporations an "undue advantage" over the U.S. government with respect to service of a summons and, by extension, the exercise of jurisdiction over a putative defendant.

After consideration by the U.S. Judicial Conference’s Advisory Committee on the Federal Rules of Criminal Procedure (the "Advisory Committee"), a public comment period, litigation in district and appellate courts, and review by the Supreme Court, the DOJ may not have to wait much longer.

Background

Criminal Rule 9 governs service of a summons on an indictment, and requires compliance with Criminal Rule 4 when serving the summons on a criminal defendant. See Fed. R. Crim. P. 9(c)(1)(A). Criminal Rule 4, however, restricts the scope of extraterritorial service in significant respects.

First, Criminal Rule 4(c)(2) provides that a "warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest." Fed. R. Crim. P. 4(c)(2). The plain language of Criminal Rule 4(c)(2), therefore, limits service of a summons to the territorial jurisdiction of the United States, absent a "federal statute authoriz[ing] an arrest [abroad]."
Criminal Rule 4 contains additional requirements to perfect service upon organizational defendants. The U.S. government must (i) deliver the criminal summons “to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process” (the “Delivery Requirement”), and (ii) it “must also” mail a copy of the summons to the corporation’s “last known address within the district or to its principal place of business elsewhere in the United States” (the “Mailing Requirement”). Fed. R. Crim. P. 4(c)(3)(C).

Compliance with Criminal Rule 4 is critical because, without it, a defendant may argue that personal jurisdiction does not attach, that service of the summons should be quashed, and even that the indictment should be dismissed.

The Amended Criminal Rule 4

In addition to the above-referenced text (providing for service of a summons within the U.S. or where a federal statute authorizes arrest), the amended Criminal Rule 4(c)(2) states that “[a] summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.” The amended language of subsection 4(c)(3)(D) establishes the methods by which this service may occur:

A summons is served on an organization not within a judicial district of the United States:

1. by delivering a copy, in a manner authorized by the foreign jurisdiction’s law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

2. by any other means that gives notice, including one that is:

   a. stipulated by the parties;

   b. undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

   c. permitted by an applicable international agreement.

As evidenced, the amended rule provides for service of a summons by a variety of means, such as pursuant to the foreign jurisdiction’s law or another mechanism. That may include an agreement between the parties or an international agreement, such as a Mutual Legal Assistance Treaty (“MLAT”), or “any other means that gives notice.”

This list of means of service is non-exhaustive and thus gives the DOJ flexibility in cases in which the enumerated means may be prohibitively difficult to accomplish. The rule also does not require judicial approval of the “other means” before the DOJ serves a summons in a foreign country, though it appears to leave open the possibility of post hoc challenges to the sufficiency of unenumerated methods of service.

Additional changes to Criminal Rule 4 bear noting. The amendment to subsection 4(a), which previously made no provision for organizational defendants that fail to appear in response to a criminal summons, provides that “a judge may take any action authorized by United States law” if an organizational defendant fails to appear in response to a summons. This may include a default judgment, debarment, or other relief.
Finally, the Mailing Requirement for service of a summons on an organization with a U.S.-based agent, principal place of business, or mailing address has been amended to eliminate the need for a separate mailing to an organizational defendant when delivery has been made to an officer of the company or to a managing or general agent, unless a statute requires that a copy also be mailed to the organization. With this change, the Criminal Rule now parallels Federal Rule of Civil Procedure 4(h), which does not require a separate mailing to the organization.

Implications

The Advisory Committee and the Supreme Court have removed an impediment to the initiation of criminal proceedings against foreign corporations that are alleged to have committed violations of U.S. criminal law. The amendments, scheduled to take effect before the year-end, shall govern in all proceedings in criminal cases filed after December 1, 2016 and “insofar as just and practicable, all proceedings then pending.” Foreign companies facing the potential service of a federal criminal summons should consider these developments and case law concerning the same.

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2 Breuer Letter at 3 and 5.
3 This provision was added in 2002 to accommodate the then-recently enacted Military Extraterritorial Jurisdiction Act, which made certain criminal laws applicable to U.S. military personnel and contractors abroad and explicitly authorized overseas arrests for violations thereof. See Fed. R. Crim. P. 4, Adv. Comm. Notes (2002); 18 U.S.C. §§ 3661 & 3262(a).