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# 1 Year In, Money Laundering Law Tweak May Have Big Impact

By **Andrew Feldman** (December 4, 2023, 6:03 PM EST)

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Imagine this hypothetical scenario: Your client, a foreign national who has not visited the U.S. in five years, has no substantive connection to the U.S. and possesses no legal status in the U.S. other than visitor, is sitting in his office in downtown Buenos Aires on Dec. 27, 2017, to initiate a wire transfer of $10 million from his bank account at an Argentine bank to an account at a multinational bank in the U.K.

In its journey, the wire traveled through an intermediary bank in New York.

Today, five years and eight months later, the U.S. government insists that the transfer contained proceeds from a bribe intended to benefit a foreign public official and constitutes a violation of Argentine bribery laws.

Certain courts have held that the wire transfer was undeniably a financial transaction occurring, in part, in the U.S., because it passed through a corresponding bank account in New York.

Wait though — the five-year statute of limitations for any contemplated money laundering indictment expired on Dec. 27, 2022 — five years after the wire transfer.

But, at the tail end of last year, on Dec. 23, 2022 — four days before the five-year statute of limitations would have expired with respect to the wire transfer described above — Congress very quietly **extended** the statutes of limitations from five years to seven years for certain money laundering offenses, including the hypothetical money laundering offense described above.[1]

This means that, because this hypothetical client transferred that wire when he did, the government now has two more years to potentially prosecute the client for money laundering.

Indeed, Congress created a new provision extending the statute of limitations for certain money laundering offenses involving financial crimes or bribery against a foreign nation under Title 18 of the U.S. Code, Section 1956(c)(7)(B).

We are now approaching one year since the provision was enacted, and yet this consequential change seems to have received little notice. There have been no decisions thus far implicating the extended statute of limitations, but there certainly will be many in the years to come. It thus behooves defense attorneys to familiarize themselves with the new provision in order to anticipate its potential effects and prepare their pretrial motions accordingly.

The new provision, Title 18 of the U.S. Code, Section 1956(j), states:

> SEVEN-YEAR LIMITATION. — Notwithstanding section 3282, no person shall be prosecuted, tried, or punished for a violation of this section or section 1957 if the specified unlawful activity constituting the violation is the activity defined in subsection (c)(7)(B) of this section, unless the indictment is found or the information is instituted not later than seven years after the date on which the offense was committed.

To which specified unlawful activities does Section 1956(c)(7)(B) apply?

The quick answer is each of the offenses outlined in Section 1956(c)(7)(B). But the most significant white collar offenses to which this new seven-year statute of limitations applies are:

- Bribery of a public official, or the misappropriation, theft or embezzlement of public funds by or for the benefit of a public official;

- Fraud involving foreign banks; and

- Smuggling or export control violations involving items controlled on the U.S. Munitions List established under Section 38 of the Arms Export Control Act; or items controlled by regulations under the Export Administration Regulations.[2]

The language in Section 1956(c)(7)(B)(iii)-(v) — which has a unique syntactic structure and is far from a model of clarity — also qualifies this conduct by limiting it to conduct involving "with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation."[3]

How will this extension of the statute of limitations from five years to seven years affect future prosecutions of similar offenses?

The immediate and main consequence of this amendment to Section 1956 is that it will arm federal prosecutors with another powerful tool: more time to investigate and prosecute foreign bribery, foreign corruption and export control violations cases.

In fact, Section (j) furnishes federal prosecutors with a new two-year cushion, because the statute of limitations for most white collar crimes is five years.[4]

And, it authorizes the government to benefit from this extension in two broad circumstances — first, if the conduct occurred before Dec. 23, 2022, and at that time, the applicable statute of limitations had not expired; and second, if the conduct occurred on or after Dec. 23, 2022.[5]

That extra two-year cushion is critically relevant to any investigation where the underlying conduct occurs almost entirely extraterritorially — much like the conduct in the hypothetical here. In those circumstances, prosecutors can change, and statutes of limitations can run.

This is because the investigation will require cooperation and collaboration from foreign prosecutors and law enforcement.

Frequently, these investigations also involve requests for voluminous financial records from multiple financial institutions, despite foreign financial privacy laws; the management of local law enforcement customs; and hurdles to accessing key witnesses through diplomatic channels.

Understanding these challenges, the likely practical effect of this amendment is twofold.

First, federal prosecutors will increasingly rely on Section 1956(c)(7)(B) instead of the Foreign Corrupt Practices Act, or other similar statutes,[6] to prosecute foreign bribery offenses, for several reasons.

Violations of the FCPA are noticeably absent from the amendment extending the statute of limitations from five years to seven years. Instead, Section 1956(c)(7)(D) — not Section 1956(c)(7)(B) — proscribes those specified unlawful activities.[7]

In addition, federal appeals courts have continued to limit the application of the FCPA to a narrow subset of defined persons, making it more difficult for prosecutors to return indictments alleging conspiracies to violate the FCPA and substantive violations of the FCPA.[8]

Second, and relatedly, federal prosecutors will now have 10 years, not seven years, to prosecute foreign corruption and foreign bribery within the scope of Section 1956(c)(7)(B).

This is because prosecutors wield the power to seek an order under seal to suspend the statute of limitations.[9] And, the plain language of the new seven-year provision contains no qualifying language prohibiting extensions of that seven-year period for no more than three years through the application of Section 3292, which permits prosecutors to suspend the running of the statute of limitations for no more than three years.

In fact, prosecutors may obtain an order suspending the limitations while a mutual legal assistance treaty request,[10] letters rogatory or other similar official request is pending and it reasonably appears that there is evidence of the offense in the requested foreign country.[11]

Many countries have executed mutual legal assistance treaties with the U.S. A request is only pending until the requested country advises the U.S. that they have produced each of the requested records that they possess.[12] That, of course, can — and frequently does — take years.

In practice, the lawyers representing these foreign nationals will respond to these likely prosecutorial trends in several ways.

First, it is anticipated that there will be a spike in motions to dismiss based on the perceived expiration of the statute of limitations.

Second, there will be an uptick in litigation related to suspension orders obtained under Section 3292 and mutual legal assistance treaty requests, especially where the suspension request may extend the limitations period to a total of 10 years and begin to resemble a talisman to be used as "an affirmative benefit to prosecutors, suspending the limitations period, pending completion of an investigation, whenever evidence is located in a foreign land," in the words of the U.S. Court of Appeals for the Fifth Circuit in its 1995 U.S. v. Meador decision.[13]

Third, there will be an increase in motions to dismiss aimed at the application of Section 1956(c)(7)(B)(iv) offenses, which involve bribery of public officials in violation of foreign bribery laws.

Forcing the government to identify the foreign bribery laws upon which it intends to rely at the time the government seeks an indictment is a critical step in the pretrial process.

Likewise, challenges to extraterritorial jurisdiction may be appropriate, but will face significant obstacles because Section 1956(f) furnishes jurisdiction over a non-U.S. citizen where the conduct occurs in part in the U.S.

Courts might therefore conclude that any financial transaction — including the hypothetical transaction here — satisfies the baseline test in Section 1956(f).[14]

Fourth, where appropriate, counsel should fashion proper jury instructions months in advance of trial that specifically incorporate a foreign bribery law to ensure proper notice to the defense of the limitations of the particular foreign law.[15]

In sum, the collective powers granted by Section 1956(j) and Section 3292 might permit federal prosecutors to extend the statute of limitations for up to 10 years in money laundering prosecutions involving foreign bribery offenses. But, equally as critical, this likely prosecutorial trend should embolden defense lawyers to raise more pretrial challenges as described above.

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[1] James M Inhofe National Defense Authorization Act for Fiscal Year 2023. See Pub. L. 117-263,

div. E, title LIX, §5904(b), Dec. 23, 2022, 136 Stat. 3441.

[2] See 18 U.S.C. Section 1956(c)(7)(B)(iii)-(v). Section (j) also applies to controlled substance importation offenses and sex trafficking offenses, among others.

[3] Id; see also United States v. Real Property Known as 2291 Ferndown Lane Keswick Va , 2011 WL 2441254 at *4-5 (W.D. Va. June 14, 2011) (dismissing a forfeiture claim based on Section 1956(c)(7)(B)(iv) finding that there were insufficient facts describing a public official's involvement in the alleged bribery scheme); Banco de Chile v. Lavanchy , 2008 WL 10716345 at * 11-13 (S.D.N.Y. Nov. 6, 2008) (finding that plaintiff was not entitled to an award of damages because plaintiff failed to allege sufficient facts demonstrating a foreign corruption offense under Section 1956(c)(7)(B)(iv)).

[4] 18 U.S.C. Section 3282(a) states: "(a)IN GENERAL. -Except as otherwise expressly provided by law,no person shall be prosecuted, tried, or punished for any offense,not capital,unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." See 18 U.S.C. § 3282; But Compare 26 U.S.C Section 6531(1)-(8) (establishing a 6-year period for criminal tax offenses); 21 U.S.C. Section 2403 (establishing a 10-year statute of limitations for returning indictments in "major international sports doping conspiracies" as defined by 21 U.S.C. Section 2402).

[5] Section (j) was added as part of the James M Inhofe National Defense Authorization Act for Fiscal Year 2023. See Pub. L. 117-263, div. E, title LIX, §5904(b), Dec. 23, 2022, 136 Stat. 3441.

[6] See United States v. Full Play , No. 15-CR-252(S-3) (PKC) at *47 (E.D.N.Y. Sept. 1, 2023). Given this recent decision in the Eastern District of New York invalidating foreign commercial bribery offenses based on the honest services wire fraud statute, Section 1956(c)(7)(B) appears to be the leading, and most viable, candidate for forging ahead with these prosecutions.

[7] Noticeably absent from this amendment is any tie-in to violations of International Economic Emergency Powers Act (IEEPA).

[8] See United States v. Castle , 925 F.2d 831 (5th Cir. 1991) ("In this case, we are called upon to consider the Foreign Corrupt Practices Act of 1977 (hereinafter "FCPA"), 15 U.S.C. §§ 78dd- 1, 78dd-2, and determine whether "foreign officials," who are excluded from prosecution under the FCPA itself, may nevertheless be prosecuted under the general conspiracy statute, 18 U.S.C. § 371, for conspiring to violate the FCPA. We hold that foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA."); U.S. v. Hoskins , 902 F.3d 69, 85, 94-96 (2d Cir. 2018) (Hoskins II) ("the FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—unless that person commits a crime within the territory of the United States" and noting "it is clear that the FCPA's enumeration of the particular individuals who may be held liable under the Act demonstrated a conscious choice by Congress to avoid creating individual liability through use of the conspiracy and complicity statutes"); United States v. Hoskins, No. 20-842, at *1 (2d Cir. Aug. 12, 2022) (Hoskins III) (affirming reversal of FCPA conviction); United States v. Hoskins, 123 F.Supp.3d 316-17 (D. Conn. 2015)("where Congress chooses to exclude a class of individuals from liability under a statute, the Executive may not override the Congressional intent not to prosecute that party by charging it with conspiring to violate a statute that it could not directly violate.").

[9] 18 U.S.C. Section 3292(a)

[10] Treaties on Mutual Legal Assistance in Criminal Matters (MLATs) permit prosecutors to obtain evidence, information, and testimony abroad. An MLAT request is submitted by the Requesting State to the Requested State. MLATs require the Requested State to provide the Requesting State with certain kinds of assistance or evidence such as documents, records, and testimony, provided the requirements of the treaty are satisfied.

[11] 18 U.S.C. Section 3292(a) and (d) (defining official request).

[12] Id.

[13] United States vs. Meador , 138 F.3d 986, 994 (5th Cir. 1998)

[14] United States v. Ojedokun , 16 F.4th 1091, 1103 (4th Cir. 2021) (affirming money laundering conviction and analyzing language in Section 1956(f)); United States v. Firtash , 392 F. Supp. 3d 872, 886-87 (N.D. Ill. 2019) (resolving that charges alleging Austrian and Russian defendants conspired to transfer funds from abroad to U.S.-based financial institutions in contravention of § 1956(h) were within the extraterritorial reach of § 1956(f) ); United States v. Garcia , 533 F. App'x 967, 982 (11th Cir. 2013) (concluding that "the requirements for extraterritorial jurisdiction were met" under § 1956(f) in affirming defendant's § 1956(h) conviction).

[15] See Fed. R. Crim. P. 30 (permitting parties to request a hearing regarding specific jury instructions well in advance of trial).

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