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Criminal Procedure

The Long Arm of U.S. Law: What the Proposed Amendments to Federal Criminal Rule 4 Mean for International Companies

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Prosecutors may soon move one step closer to receiving broad new powers to serve criminal summonses on international companies that lack domestic agents or offices – a development with significant implications for international criminal enforcement, including anti-corruption enforcement. The Advisory Committee on the Rules of Criminal Procedure for federal courts will meet in April to consider a subcommittee's recommended changes to Federal Criminal Rule 4, which governs proper service of arrest warrants and criminal summonses.

Rule 4's Onerous Requirements

As a practical matter, Rule 4 makes it very difficult for prosecutors to properly serve a criminal summons on a defendant organization that has no agents, offices, or a principal place of business in the United States. Rule 4 currently requires prosecutors to jump through two distinct hoops to properly serve a criminal summons on an organization: the government must serve the summons "to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process," and the government must also mail a copy of the summons "to the organization's last known address within the district or to its principal place of business elsewhere in the United States."[1]

The Department of Justice first recommended changes to Rule 4 in 2012 after prosecutors had faced skepticism from several courts over the U.S. government's ability to comply with Rule 4 when an organization has neither a domestic agent nor a domestic mailing address. The Department of Justice, in recommending changes to Rule 4, noted that "the proposed amendments are necessary to ensure that organizations that commit domestic offenses are not able to avoid liability through the simple expedients of declining to maintain an agent, place of business and mailing address within the United States."[2]

In recommending changes to Rule 4, the Department of Justice pointed to several recent cases that illustrated the issues facing prosecutors who seek to show compliance with Rule 4. For example, in *United States v. Johnson Matthey Plc.*, the Utah district court quashed a criminal summons after determining that prosecutors had not complied with Rule 4 because they had not properly mailed a copy of the summons to the defendant organization's last known address within the district or to its principal place of business in the United States, even as the court acknowledged that "JM Plc has not been shown to be present in the District of Utah and does not now have, nor has it ever had, an address in the District, or a place of business within the United States."[3]

Closing a Loophole

In September 2013, a subcommittee of the Advisory Committee on the Rules of Criminal Procedure agreed with the Department of Justice and concluded that Rule 4 needed

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to be amended in several ways. The proposed amendments would give prosecutors broad new powers to serve criminal summonses on defendants located outside the United States, as well as permit courts to punish organizational defendants who fail to respond to such summonses. The recommended changes to Rule 4's service options would greatly enhance the ability of prosecutors to go after overseas companies who do not maintain a domestic presence.

The subcommittee noted that as a preliminary matter, it had identified a loophole in the language of existing Rule 4 that made it more difficult for a court to sanction an organizational defendant who fails to respond to a properly served criminal summons. Rule 4 currently permits a court to issue an arrest warrant if an individual defendant fails to appear in response to a criminal summons, but there is no corresponding language permitting a court to act against a similarly absent organizational defendant. The subcommittee proposed amending Rule 4 by adding the following language: "If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by law."[4] Citing the "paucity of available authority," the subcommittee deliberately refrained from articulating any specific actions a court *should* take, but after consulting with the Department of Justice, the subcommittee did identify a handful of possible actions a court *could* take. In particular, the subcommittee pointed out that a court could subject a non-appearing organizational defendant to fines or forfeitures, injunctive relief, appointment of counsel on the organization's behalf, or even imposing penalties in parallel civil actions. The subcommittee noted that it merely intended to provide "a framework for the courts to evaluate the scope of that authority if and when cases arise in which organizational defendants fail to appear after being served."[5]

Changes in the Service Requirements

The bulk of the subcommittee's work came in the context of the current service requirements in Rule 4. The subcommittee proposed two primary changes to Rule 4's service requirements: first, that the current mailing requirement in Rule 4 should be abandoned in favor of a limited mailing requirement that more closely tracks the mailing requirement in the Federal Rules of *Civil* Procedure, and second, that prosecutors should be given significant new powers to serve a criminal summons on an organizational defendant located outside the United States.

The subcommittee proposed essentially eliminating the existing mailing requirement, except to the extent that a criminal summons is being served on a statutorily appointed agent and the statute itself requires mailing as well. The proposed changes would therefore avoid the problem faced by the government when an organization had no last known address in the district or principal place of business in the U.S. The subcommittee acknowledged that eliminating that language would remove an "unnecessarily overbroad" requirement that currently serves as a "major impediment" to the prosecution of foreign organizations.[6]

The subcommittee – following the lead of the Department of Justice – also proposed that an entirely new section be added to Rule 4. The section would govern service on organizations located outside the United States. After noting that the Federal Rules of Civil Procedure permit plaintiffs to serve organizational defendants in foreign countries, the subcommittee concluded that it would be appropriate to provide similar means for prosecutors to serve criminal summonses on overseas organizations. The subcommittee noted that one of the guiding principles of the proposed changes was that service should be "reasonably calculated to give notice" to organizational defendants.

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The proposed changes would provide a few specific options for service of a criminal summons overseas. The first would permit service pursuant to the law of a foreign jurisdiction by delivery of a copy of the summons to "an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process" in the jurisdiction. The second would permit service by stipulation. The third would permit service undertaken by a foreign authority "in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement[.]" Service under the second and third options could be challenged if it failed to give actual notice to the organizational defendant.

The subcommittee also proposed including a catch-all provision that would permit service by any other means that both provides actual notice to the organizational defendant and is not prohibited by an applicable international agreement. As the subcommittee noted, this provision is actually more lenient than the corresponding provision of the Civil Rules, which limits such "other means" to those ordered by a court.

The subcommittee openly acknowledged that it wanted to avoid putting courts in the middle of disputes with prosecutors over service methods that might be contrary to a foreign country's law. The subcommittee also acknowledged that – as asserted by the Department of Justice – in cases where service of a foreign entity violates foreign law, federal courts "are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means."[7] The subcommittee expressed the desire that the Executive Branch – not the Judicial Branch – make such determinations, in particular because the "executive alone" would have to determine whether "this is the rare case in which the public interest in prosecution outweighs the costs of violating provisions of foreign law or general principles of international law."[8]

Implications of the Pending Changes for Foreign Entities

Given the subcommittee's and the Department of Justice's enthusiastic embrace of changes to Rule 4, it seems likely that the Advisory Committee will approve these amendments to Rule 4 at the April meeting. The Rule 4 revisions would then need to be approved by the standing Rules Committee and the Judicial Conference before they would be considered by the U.S. Supreme Court and the U.S. Congress.

As U.S. prosecutions increasingly become international, this change in rules has important implications for foreign entities. If the revisions to Rule 4 are approved, it will eliminate a procedural defense previously possessed by foreign entities and will allow foreign entities to be subject to sanctions independent of violations of which they are being accused. In some cases, such as some FCPA cases, foreign entities are likely to be in direct negotiations with enforcers, and cases are likely to be resolved by settlement, rendering the issue of service of process less important. See, e.g., "FCPA Corporate Settlements of 2013: Details, Trends and Compliance Takeaways," The FCPA Report, Vol. 2, No. 25 (Dec. 18, 2013).

In other cases, such as where a foreign entity has refused to negotiate with the U.S. government or is being sought as a secondary source of information or liability, the new Rule 4 amendments could change a case from being a dead end for the government to being a major prosecution of foreign entities. Foreign entities need to be aware that the long arm

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of the U.S. law may soon get longer, and that they will likely have to mount substantive, rather than procedural, defenses in the future.

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[1] Federal Rules of Criminal Procedure, Rule 4.

[2] 10.25.12 Letter from Assistant Attorney General Lanny A. Breuer to the Honorable Reena Raggi, Chair, Advisory Committee on the Criminal Rules, at 1.

[3] 2007 WL 2254676, No. 2:06-CR-169, at *2 (D. Utah Aug. 2, 2007). The *Johnson Matthey* court had also previously rejected prosecutors' attempts to show service on a proper general agent for the defendant organizations under Rule 4. The Department of Justice expressed concern that in the absence of revisions to Rule 4, other courts might adopt the *Johnson Matthey* approach to Rule 4. In particular, the Department of Justice noted that in *United States v. Pangang Group Co., Ltd.*, No. CR 11-00573 JSW, 2012 WL 3010958 (N.D. Cal. July 23, 2012), at *1-2, the Northern District of California (relying in part on *Johnson Matthey*) quashed a summons as to all of the Pangang defendants by finding that the government could not show it had met Rule 4's mailing requirement. The *Pangang* court also found separately that the government could not show that the U.S. recipient of the summons was actually a general agent, so the government was unable to meet either of Rule 4's requirements as to three of the four defendants. The Department of Justice noted that defendants in other cases – such as *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. 2012) – also have sought to quash subpoenas on similar grounds related to the defendants' lack of agents and mailing addresses in the United States. *See, e.g.,* Renewal of Specially Appearing Defendant MegaUpload Ltd.'s Request for Dismissal of the Indictment without Prejudice at 1, *United States v. Dotcom, et al.*, No. 1:12-CR-3 (E.D. Va. Nov. 19, 2012).

[4] September 24, 2013 Subcommittee Report at 1. NB: A version of the subcommittee's report dated September 20, 2013, is appended to the Agenda for the April 2014 meeting of the Advisory Committee on the Rules of Criminal Procedure. There are no substantive differences between the September 20, 2013 and September 24, 2013, versions of the report, and citations here are to the later version.

[5] September 24, 2013 Subcommittee Report at 3.

[6] September 24, 2013 Subcommittee Report at 4.

[7] Citing *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)

[8] September 24, 2013 Subcommittee Report at 8.

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