Blogs
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As made clear in the DOJ and SEC's joint Resource Guide to the Foreign Corrupt Practices Act (FCPA), U.S. prosecutors view foreign nationals as liable under the FCPA, ***regardless of whether they have taken any action in the United States***, in cases where they aided and abetted, conspired or acted as an agent of an issuer or domestic concern.

However, the practical implications of enforcing the FCPA against individuals residing outside the U.S. raises a litany of questions about how, and when, foreign nationals can contest criminal allegations against them brought in U.S. courts. A recent denial of certiorari from the U.S. Supreme Court in *Kim v. USDC CD CA, et al.*, leaves muddled the question of whether a foreign national can challenge an indictment from abroad. Han Yong Kim, a South Korean national, was indicted under the FCPA, not based on any alleged direct contacts with the U.S., but

merely on the basis of an alleged conspiracy to violate the FCPA with a U.S. company. Kim, residing in Korea, was not extradited and sent his attorneys to the U.S. to file a motion to dismiss the indictment. Absent turning himself in to U.S. authorities, Kim was effectively trapped in Korea, subject to an Interpol "Red Notice" that required any member state to arrest him for the purpose of extraditing him to the U.S., should he attempt to leave. The district court denied Kim's motion to dismiss the indictment, holding that Kim was a fugitive who could not seek relief from the court until he appeared and was arraigned. The court held that Kim could not both ask the court to dismiss the indictment, yet avoid the risk of losing that motion by staying away. Despite Kim having never attempted to flee Korea after getting indicted, the district court deemed that Kim "constructively fled" by "deciding not to return" to the U.S. after "learn[ing] of charges while legally outside the jurisdiction." The Ninth Circuit declined to intervene, holding that the district court did not err, and the Supreme Court's denial of the petition for certiorari leaves the district court's order standing. In denying the petition for certiorari, the Supreme Court allowed a circuit split to stand. Previously, in 2009, the Seventh Circuit reached the opposite conclusion in *In re Ali Hijazi*. There, Ali Hijazi, a Lebanese national and resident of Kuwait, was indicted for fraud. The Seventh Circuit held that Hijazi could challenge the indictment, from abroad, through a motion to dismiss. Relying in part on the same Interpol "Red Notice" applicable to Kim, the Seventh Circuit wrote that "if Hijazi loses his challenge to the indictment, he faces a significant enough threat of prosecution in the United States" such that he would have to confront the adverse consequences of the indictment if he lost. This obviated the risk that Hijazi could take advantage of the court's jurisdiction while avoiding the risks of losing. For that reason, the Seventh Circuit ordered the trial court to consider Hijazi's motion to dismiss, even without Hijazi's physical appearance. In the absence of Supreme Court guidance, there is no uniform rule addressing when a foreign national can challenge an indictment from a location abroad. Given the prevailing uncertainty, foreign nationals will continue to face the unenviable choice of either traveling to the U.S. to face the charges, or remaining in their home country where, even if they avoid extradition, they will be subject to severe travel restrictions and the pall of a pending U.S. indictment.

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