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Second Circuit Declines to Expand FCPA's Jurisdictional Reach Using Conspiracy or Accomplice Liability Theories

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Anti-corruption/FCPA

On August 24, 2018, the Second Circuit issued its much-anticipated decision in *U.S. v. Hoskins*.[1] Emphasizing on multiple occasions that Congress defined "with surgical precision" who could be liable under the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA"), the court held that the government may not employ conspiracy or accomplice liability theories to bring charges against foreign defendants that do not fall within the statute's explicit categories of covered persons.[2] In other words, the *Hoskins* court rejected the argument that a person can be "guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal."[3] The Second Circuit thereby removed one of the government's mechanisms to pursue foreign nationals and entities in cases where such parties have not engaged in conduct in the territory of the United States sufficient to support charges under 15 U.S.C. § 78dd-3.

That said, the *Hoskins* opinion is decidedly narrow. Foreign defendants who commit corrupt acts abroad may still be prosecuted if they fall within one of the FCPA's many categories of covered persons, such as "agents" of U.S. issuers or domestic concerns. Indeed, the court left open the possibility that Hoskins could be held liable on the theory that he "acted as an agent of a domestic concern" – a theory of liability expressly provided for in the statute – when he allegedly conspired with other employees of Alstom S.A. subsidiaries to bribe Indonesian officials to win a government contract.[4]

Background

The defendant, Lawrence Hoskins, is a U.K. national and former executive of the U.K. subsidiary of French transportation and power company Alstom S.A. In April 2015, Hoskins was charged with conspiring to violate the FCPA as well as substantive FCPA violations premised

[1] 2018 WL 4038192 (2d Cir. Aug. 24, 2018).

[2] *E.g.*, *id.* at *12, 15.

[3] *Id.* at *5.

[4] *Id.* at *24.

on agency and accomplice liability theories.[5] The government alleged that Hoskins was responsible, along with others, for retaining two consultants tasked with paying bribes to Indonesian officials in exchange for helping Alstom secure a multi-million dollar contract to provide boiler-related services to Indonesia's state-owned electric company, Perusahaan Listrik Negara.[6] Hoskins was also alleged to have overseen Alstom's operations in Asia and "performed functions and support services for and on behalf of" Alstom's U.S. subsidiary, all while he was assigned to an Alstom subsidiary in France.[7]

The indictment does not allege that Hoskins was an employee of Alstom's U.S. subsidiary, or that he committed any act in furtherance of the bribery scheme while physically present in the United States – allegations that would have subjected him to jurisdiction under Sections 78dd-2 (applicable to domestic concerns) and 78dd-3 (territorial jurisdiction) of the FCPA, respectively. The government did allege, however, that Hoskins "discussed in person, via telephone, and via e-mail making bribe payments to government officials in Indonesia" with "others" – presumably Alstom U.S. executives – who were "in the District of Connecticut and elsewhere."[8] The government ultimately conceded on appeal that Hoskins "did not travel" to the United States while the scheme was ongoing.[9]

In 2015, the U.S. District Court for the District of Connecticut granted in part and denied in part Hoskins's motion to dismiss the indictment. The district court dismissed the conspiracy charge against Hoskins "to the extent that it sought to charge Hoskins with conspiring to violate Section 78dd-2 … without demonstrating that Hoskins fell into one of the FCPA's enumerated categories."[10] It also dismissed the conspiracy charge premised on Section 78dd-3 because Hoskins "never entered the United States during the relevant period."[11] The district court allowed the government to proceed, however, in prosecuting Hoskins as an agent of a domestic concern.[12]

Analysis

In affirming the principal holding of the district court, the Second Circuit first relied on the "affirmative legislative policy exception" to conclude that the FCPA could not reach Hoskins's conduct under conspiracy or accomplice liability theories. The court reasoned that the "carefully tailored" text and structure of the FCPA, combined with an extensive legislative history reflecting congressional concern over the jurisdictional reach of the statute, evinced "an affirmative

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[5] Third Superseding Indictment (hereinafter referred to as "Indictment") ¶¶ 1–111, *U.S. v. Hoskins*, No. 3:12-cr-238 (D. Conn. Apr. 15, 2015). The first indictment against Hoskins was handed down in July 2013. Hoskins was also charged with conspiracy to commit money laundering and substantive money laundering violations. *Id.* ¶¶ 103–113.

[6] *Id.* ¶ 5–8.

[7] *Id.* ¶¶ 3, 8, 13.

[8] Indictment ¶ 30.

[9] *Hoskins*, 2018 WL 4038192, at *2 (citing Appellant's Br. at 7).

[10] *Id.* at *3 (quoting *United States v. Hoskins*, 123 F. Supp. 3d 316, 327 (D. Conn. 2015)).

[11] *Id.* (quoting *Hoskins*, 123 F. Supp. 3d at 327 n. 14).

[12] *Id.* (quoting *Hoskins*, 123 F. Supp. 3d at 318 n. 1, 327).

legislative policy … to limit criminal liability to the enumerated categories of defendants," which do not include foreign nationals whose conduct occurs wholly abroad.[13] The court arrived at this conclusion after surveying analogous cases in which courts rejected the application of conspiracy and accomplice liability theories to certain conduct when doing so "would disrupt the carefully defined statutory [scheme]."[14] The Second Circuit ultimately summarized the jurisdictional scope of the FCPA as omitting only "a foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder."[15]

The court emphasized that its opinion also was based on the absence of "clearly expressed congressional intent to allow conspiracy and complicity liability to broaden the extraterritorial reach of the statute," which it held failed to rebut the well-established presumption against extraterritoriality.[16] While finding that certain provisions of the FCPA clearly had extraterritorial application, the court stated that the reach of these provisions must be limited "to their terms" – *i.e.*, the specifically enumerated categories of persons to whom the statute applies.[17]

Although the Second Circuit upheld most of the district court's ruling, it was not persuaded by the district court's rationale in dismissing the part of the alleged conspiracy premised on the territorial jurisdiction provision of the FCPA – Section 78dd-3. The Second Circuit agreed with the district court that Hoskins, who never set foot in the United States during the alleged bribery scheme, could not be guilty of violating this provision directly, but nevertheless concluded that the government should be free to argue that Hoskins conspired to violate Section 78dd-3 when, acting as an agent of a domestic concern, Hoskins "conspir[ed] with foreign nationals who conducted relevant acts while in the United States."[18]

Key Takeaways

DOJ has long taken the position in FCPA cases that the "United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States."[19] This expansive interpretation of the FCPA's jurisdictional reach was rejected in *Hoskins*.

While the Second Circuit may have curtailed DOJ's ability to leverage conspiracy and accomplice liability theories to extend the FCPA's jurisdictional reach, DOJ still has a number of tools at its disposal to reach conduct by foreign companies and individuals. As evidenced by

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[13] *Id.* at *11, 22.

[14] *Id.* at *8 (citing *United States v. Amen*, 831 F.2d 373, 382 (2d Cir. 1987)).

[15] *Id.* at *13.

[16] *Id.* at *22–23 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016)) (internal quotation marks omitted).

[1717] *Id.* at *23 (quoting *RJR Nabisco*, 136 S. Ct. at 2102 (internal quotation marks and brackets omitted)).

[18] *Id.* at *24.

[19] U.S. Dep't of Justice & U.S. Secs. & Exchange Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 34 (2012) (hereinafter referred to as "FCPA Resource Guide"), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

the court's lengthy analysis of the FCPA's text and legislative history, the categories of covered persons delineated in the statute have long been broad, and remain so. Moreover, in reversing the district court's dismissal of the conspiracy charge premised on territorial jurisdiction, the Second Circuit sanctioned the government's use of an agency theory to reach entirely foreign conduct by foreign persons.

That said, one area where *Hoskins* has the potential to make a lasting and significant impact is on cases involving foreign, non-controlled joint ventures of issuers and domestic concerns, and foreign joint-venture partners. In such cases, DOJ may struggle post-*Hoskins* to prove that an agency relationship existed with a covered person due to the absence of control over the foreign joint venture or joint-venture partner – a critical factor in any agency inquiry.

Consider the Snamprogetti and JGC settlements from several years ago.[20] These cases involved a joint venture alleged to have hired non-U.S. agents to bribe Nigerian officials in order to win a multi-billion dollar series of contracts to design and build a liquefied natural gas plant on Bonny Island, Nigeria. Both companies entered deferred prosecution agreements premised on the theory that they aided and abetted the FCPA violations of a U.S.-based joint-venture partner subject to jurisdiction under Section dd-2 as a domestic concern. Neither company was an issuer or a domestic concern itself, nor did the settlement agreements contain any allegations that company employees took acts in furtherance of the bribery scheme while in U.S. territory. With conspiracy and accomplice liability theories now off the table in the Second Circuit and other courts that choose to follow its lead, it may prove difficult for DOJ to pursue cases involving similar fact patterns moving forward.

Whether *Hoskins* will have a significant effect on prosecutorial charging decisions is unclear. In litigation outside the Second Circuit, DOJ has already taken the position that *Hoskins* is not binding in other circuits, and that the Second Circuit's interpretation of the statute was incorrect.[21] It remains prudent, however, for foreign companies engaged in dealings with U.S. companies or issuers to adopt and maintain effective compliance programs, particularly when the nature of the business relationship could be construed by U.S. regulators as one of agency.

By the same token, issuers and domestic concerns participating in minority-owned joint ventures need to be mindful of aggressive agency arguments as they enter into non-controlled joint-venture agreements. At a minimum, U.S. issuers are obligated to make "good faith" efforts to cause their minority-owned joint ventures to maintain an adequate system of internal controls – a concept interpreted very broadly by the SEC.[22]

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[20] Deferred Prosecution Agreement ¶¶ 1, 6, 11, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011) (pleaded guilty to one count of conspiracy to violate the FCPA and one count of aiding and abetting a violation of the FCPA); Deferred Prosecution Agreement ¶¶ 1, 6, 10, *United States v. Snamprogetti Netherlands B.V.*, No. 4:10-cr-00460 (S.D. Tex. July 7, 2010) (same).

[21] Government's Second Supplemental Response to Defendants' Motion to Dismiss at 4–18, *United States v. Dmitry Firstash*, No. 1:13-cr-00515 (N.D. Ill. Sept. 22, 2018).

[22] 15 U.S.C. § 78m(b)(6); *see* FCPA Resource Guide 43.

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