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

第二巡回法院拒绝运用共谋或共犯责任理论扩大 FCPA 的管辖范围

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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.

2018 年 8 月 24 日，第二巡回法院就美国政府诉 Hoskins 一案发布了广受关注的裁决。[4]该法院多次强调，美国国会"以外科手术式的精度"规定了在美国《反海外腐败法》（"FCPA"）反贿赂规定下谁有可能承担责任，并认为，政府不可运用共谋或共犯责任理论对不属于法规明确规定的所涵盖人范围的外国被告人提起指控。[5]换言之，审理 Hoskins 案的法院拒绝接受下列论点：一个人可"作为一起其不能作为主犯实施的 FCPA 犯罪的共犯或共谋获罪。"[6]第二巡回法院因此取

[1] 2018 WL 4038192 (2d Cir. Aug. 24, 2018).
[2] *E.g.*, *id.* at *12, 15.
[3] *Id.* at *5.
[4] 2018 WL 4038192（第二巡回法院，2018 年 8 月 24 日）
[5] 如，同上，第 12,15 页。
[6] 同上，第 5 页。

消了一项政府机制，即对于未在美国境内实施足以支持美国法典第 15 篇第 78dd-3 节下指控的外国国民和实体追究责任。

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.[7]

尽管如此，Hoskins 案意见涵盖的范围显然是很狭窄的。在海外从事腐败行为的外国被告人如属于 FCPA 许多涵盖人的类别之一（如美国发行人或国内法人的"代理人"），则仍有可能被起诉。实际上，法院让下述情形的发生具有可能性：当 Hoskins 被指控与 Alstom S.A.子公司的其他雇员共谋贿赂印度尼西亚官员以获得政府合同时，其可能会基于其"担任国内法人的代理人"的理由而被认定负有责任（这是法规中明确规定的一种责任理论）。[8]

Background

背景

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 on agency and accomplice liability theories.[9] 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.[10] 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.[11]

被告人 Lawrence Hoskins 是一名英国人，是法国运输和电力公司阿尔斯通（Alstom S.A.）驻英国子公司的前高管。2015 年 4 月，基于代理和共犯责任理论，Hoskins 被控共谋违反 FCPA 和实质性的 FCPA 违法行为。[12]政府指称，Hoskins 与他人共同为下列行为负责：聘请两个顾问，指示其向印度尼西亚官员支付贿赂，以帮助阿尔斯通取得向印度尼西亚国有电力公司 Perusahaan

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[7] *Id.* at *24.
[8] 同上，第 24 页。
[9] 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.
[10] *Id.* 5–8.
[11] *Id.* 3, 8, 13.
[12]第三替代起诉书（下称"起诉书"）第 1-111 页，美国诉 Hoskins 案，No. 3:12-cr-238 (康涅狄格州，2015 年 4 月 15 日)。对 Hoskins 的第一起诉书于 2013 年 7 月下发。Hoskins 还被控共谋实施洗钱和实质性洗钱违法行为。同上第 103-113 页。

Listrik Negara 提供锅炉相关服务的、价值数百万美元的合同。[13]Hoskins 还被控监督了 Alstonm 在亚洲的运营，并且“为及代表”阿尔斯通美国子公司“履行职能及提供支持服务”，这些都发生在他被派往阿尔斯通在法国的一家子公司期间。[14]

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."[15] The government ultimately conceded on appeal that Hoskins "did not travel" to the United States while the scheme was ongoing.[16]

起诉书并未指控，Hoskins 是阿尔斯通美国子公司的雇员，或他在身处美国境内期间从事了任何促进贿赂图谋的行为——这些指控可能会让他分别受到 FCPA 第 78dd-2 条（适用于国内个人及法人）和第 78dd-3 条（领土管辖权）的管辖。但是，政府声称，Hoskins“亲自或通过电话和电邮与他人（可能是阿尔斯通美国高管）讨论了向印度尼西亚政府官员支付贿赂款项一事”，当时他们在“康涅狄格州和其他地方。”[17]政府最终在上诉时承认，在计划进行时，Hoskins“并未去往”美国。[18]

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."[19] It also dismissed the conspiracy charge premised on Section 78dd-3 because Hoskins "never entered the United States during the relevant period."[20] The district court allowed the government to proceed, however, in prosecuting Hoskins as an agent of a domestic concern.[21]

2015 年，美国康涅狄格州联邦地区法院部分批准及部分拒绝了 Hoskins 驳回起诉书的诉求。该地区法院驳回了对 Hoskins 的共谋指控，“因为其试图指控 Hoskins 共谋违反第 78dd-2 条……而未证明 Hoskins 属于 FCPA 列明的类别。”[22]地区法院还驳回了基于第 78dd-3 条的共谋指控，因

[13] 同上，第 5-8 页。
[14] 同上，第 3，8，13 页。
[15] Indictment ¶ 30.
[16] *Hoskins*, 2018 WL 4038192, at *2 (citing Appellant's Br. at 7).
[17] 起诉书第 30 页。
[18] Hoskins, 2018 WL 4038192，第 2 页（引述上诉人简报，第 7 页）。
[19] *Id.* at *3 (quoting *United States v. Hoskins*, 123 F. Supp. 3d 316, 327 (D. Conn. 2015)).
[20] *Id.* (quoting *Hoskins*, 123 F. Supp. 3d at 327 n. 14).
[21] *Id.* (quoting *Hoskins*, 123 F. Supp. 3d at 318 n. 1, 327).
[22] 同上，第 3 页（引用美国诉 Hoskins, 123 F. Supp. 3d 316, 327 (康涅狄格州 2015)）。

为 Hoskins“在相关期间从未进入美国。”[23]但是，地区法院允许政府继续起诉身为国内法人代理人的 Hoskins。

Analysis

分析

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 legislative policy … to limit criminal liability to the enumerated categories of defendants," which do not include foreign nationals whose conduct occurs wholly abroad.[24] 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]."[25] 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."[26]

在确认地区法院的主要裁定时，第二巡回法院首次依据“肯定性立法政策例外”推断，FCPA 不能根据共谋或共犯责任理论适用于 Hoskins 的行为。该法院推论，FCPA“仔细量身定制的”文本和结构以及反映国会对该法规管辖范围之顾虑的广泛立法历史表明了“将刑事责任限定为列明的被告人类别的……肯定性立法政策。”（这些被告人不包括其行为完全发生在国外的外国国民）。[27]该法院在调查了类似案件后得出这一结论，在这些类似案件中，法院拒绝将共谋和共犯责任理论适用于某些行为，因为当这么做时“会破坏仔细界定的法定[安排]”。[28]第二巡回法院最终将 FCPA 管辖范围总结为仅不包括“在美国境外且并不以高管、董事、雇员、代理人或股东身份代表美国人或公司行事的外国国民”。[29]

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.[30] 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.[31]

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[23] 同上（引用 *Hoskins*, 123 F. Supp. 3d at 327 n. 14）。
[24] *Id.* at *11, 22.
[25] *Id.* at *8 (citing *United States v. Amen*, 831 F.2d 373, 382 (2d Cir. 1987)).
[26] *Id.* at *13.
[27] 同上，第 11，22 页。
[28] 同上，第 8 页（引述美国诉 Amen，831 F.2d 373, 382 (2d Cir. 1987)）。
[29] 同上，第 13 页。
[30] *Id.* at *22–23 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016)) (internal quotation marks omitted).
[31] *Id.* at *23 (quoting *RJR Nabisco*, 136 S. Ct. at 2102 (internal quotation marks and brackets omitted)).

该法院强调，其意见也是基于缺少“明确表达的允许共谋和共犯责任扩大该法规域外范围的国会意图，”其认为该意见未能驳斥针对域外法权的公认推定。[32]虽然发现 FCPA 的某些规定明确有域外适用，但该法院指出，这些规定的范围必须“以其条款”为限，即该法规适用的人所列明的类别。[33]

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."[34]

尽管第二巡回法院支持地区法院裁定的大部分内容，但并不赞成地区法院驳回基于 FCPA 第 78dd-3 条的领土管辖权规定的所指控共谋这项的依据。第二巡回法院同意地区法院的下列观点：在所指控贿赂计划期间从未涉足美国的 Hoskins 不能被控直接犯有违反该规定之罪，尽管如此，第二巡回法院认定，政府应当可以主张，若 Hoskins 在担任国内法人代理人时“与在美国境内从事相关行为的外国官员共谋”，则 Hoskins 共谋违反了第 78dd-3 条。[35]

Key Takeaways

要点

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."[36] This expansive interpretation of the FCPA's jurisdictional reach was rejected in *Hoskins*.

司法部在 FCPA 案件中一直持有以下立场：“如果至少一名共谋者为发行人、国内个人或法人，或在美国境内从事了合理可预见的公然行为，则美国通常对所有共谋人具有管辖权。”[37]这种对 FCPA 管辖范围的宽泛解释在 Hoskins 案中并未得到支持。

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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[32] 同上，第 22-23 页（引用 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016)）（内引号略）。
[33] 同上，第 23 页（引用 RJR Nabisco, 136 S. Ct. at 2102（内引号和括号略）。
[34] *Id.* at *24.
[35] 同上，第 24 页。
[36] 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.
[37] 美国司法部和美国证券交易委员会，美国反海外腐败法信息指引第 34 页（2012）（以下简称“FCPA 信息指引”），参见 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.

虽然第二巡回法院可能削弱了司法部利用共谋和共犯责任理论扩大 FCPA 管辖范围的能力，司法部仍然有若干工具可供其使用，以推断构成外国公司和个人的行为。第二巡回法院对 FCPA 文本和立法历史的长篇分析表明，该法规中所描述的涵盖人的类别一直以来很宽泛，且仍然如此。而且，在推翻地区法院基于领土管辖权对共谋指控的驳回时，第二巡回法院认可政府使用代理人理论来推断构成外国人的完全境外行为。

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.

尽管如此，Hoskins 案有望对涉及发行人和国内个人及法人的外国、非控股合资企业以及外国合资伙伴的案件产生持久和重大的影响。在此类情形中，司法部可能在 Hoskins 案之后努力证明，由于对外国合资企业或合资伙伴缺乏控制权（任何代理人调查的关键因素），可能与涵盖人之间存在代理人关系。

Consider the Snamprogetti and JGC settlements from several years ago.[38] 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.

考虑下几年前的 Snamprogetti 和 JGC 和解。[39]在这些案件中，一家合资企业被指控聘用非美国代理人贿赂尼日利亚官员，以获得在尼日利亚 Bonny 岛上设计建造一个液化天然气工厂的数十亿美元的系列合同。鉴于这两家公司协助并教唆了以国内法人身份受第 dd-2 条管辖的美国境内合资

[38] 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).

[39] 暂缓起诉协议第 1, 6, 11 页, 美国诉 JGC Corp., No. 4:11-cr-00260 （得克萨斯州南区法院，2011 年 4 月 6 日）（对共谋违反 FCPA 的一项指控及一项协助和教唆违反 FCPA 的指控认罪）；暂缓起诉协议第 1, 6, 10 页，美国诉 Snamprogetti Netherlands B.V., No. 4:10-cr-00460 (得克萨斯州南区法院，2010 年 7 月 7 日) （同上）。

伙伴的 FCPA 违法行为的意见，两家公司均签订了暂缓起诉协议。这两家公司本身均非发行人或国内法人，和解协议也不包含公司雇员在美国境内采取过促进贿赂计划的行动的任何指控。鉴于第二巡回法院和其他选择效仿的法院不再支持共谋和共犯责任理论，可见，今后司法部将难以追查涉及类似事实模式的案件。

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.[40] 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.

Hoskins 案是否会对检察机关的指控决定产生重大影响尚不明确。在第二巡回法院之外的诉讼中，司法部已经持有 Hoskins 案在其他巡回法院中不具约束力且第二巡回法院对法规的解释不正确的立场。[41]但是，对于与美国公司或发行人做生意的外国公司而言，采用和保留有效的合规计划仍不失为明智之举，在业务关系的性质被美国监管机构解读为代理关系时尤为如此。

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.[42]

出于同样的原因，发行人以及拥有合资企业少数股权的国内个人及法人在签订非控股合资协议时需注意激进的代理关系观点。至少，美国发行人有义务尽"诚信"努力，促使其所拥有少数股权的合资企业保留充分的内部控制制度（这是得到美国证交会极宽泛解释的一个概念）。[43]

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[40] 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).
[41] 政府对被告人驳回诉求的第二次补充答复，第 4-18 页，美国诉 Dmitry Firstash，No. 1:13-cr-00515（N.D. Ill.，2018 年 9 月 22 日）。
[42] 15 U.S.C. § 78m(b)(6); *see* FCPA Resource Guide 43.
[43] 美国法典第 15 篇第 78m(b)(6)条；参见 FCPA 信息指引第 43 页。