Second Circuit Curtails Use of Conspiracy and Complicity Statutes in FCPA Actions

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In a decision with implications for the extraterritorial reach of the Foreign Corrupt Practices Act (FCPA), the U.S. Court of Appeals for the Second Circuit held in *United States v. Hoskins* that a person may not "be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as principal."[1] In doing so, the court rejected an avenue that the Department of Justice (DOJ) has used to assert jurisdiction over foreign nationals with no other connection to the United States. However, the court allowed the government to argue that, provided he or she acted as an agent of a U.S. domestic concern, such a person also could be liable of "conspiring with foreign nationals who conducted relevant acts while in the United States."[2]

Background

In general, the anti-bribery provisions of the FCPA prohibit U.S. persons and businesses (U.S. domestic concerns), issuers of U.S. securities (issuers) or any other person while in the territory of the U.S. from making corrupt payments to obtain or retain business.[3] It also applies to any officer, director, employee or agent thereof. A non-U.S. national who is not an agent of a U.S. domestic concern or issuer and who never takes actions in furtherance of the alleged corrupt scheme within the territory of the U.S. falls outside of the substantive provisions of the statute.

The DOJ has long used conspiracy and aiding-and-abetting charges to extend the jurisdictional reach of the FCPA to such persons. Its position was clearly espoused in the 2012 Resource Guide to the FCPA, jointly issued with the Securities and Exchange Commission:

> Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA — *i.e.*, for agreeing to commit an FCPA violation — even if they are not, or could not be, independently charged with a substantive FCPA violation.[4]

In doing so, the government asserted it was following the well-established rule in federal criminal law that "[a] person ... may be liable for conspiracy even though he was incapable of committing the substantive offense."[5]

In *Hoskins*, the government charged Lawrence Hoskins, a non-U.S. citizen who worked for a U.K. subsidiary of the French company Alstom S.A. (Alstom), with conspiracy to violate the FCPA and aiding and abetting others in doing so. Alstom's U.S. subsidiary allegedly "retained two consultants to bribe Indonesian officials who could help secure a $118 million power contract."[6] The government alleged that although Hoskins never traveled to the U.S. during the scheme, he was one of the persons responsible for approving the selection of the consultants and authorizing payments to them with knowledge that portions of the payments were intended as bribes.

The district court dismissed portions of the indictment, in relevant part, finding that Hoskins could not be liable for conspiracy if he could not be liable for a direct violation of the statute.[7]

[1] *United States v. Hoskins*, 16-1010-CR, 2018 WL 4038192, at 18 (2d Cir. Aug. 24, 2018).
[2] *Id.* at 72.
[3] 15 U.S.C. § 78dd-1;-2;-3.
[4] A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) at 34.
[5] *Hoskins* at 19 (quoting *Salinas v. United States*, 522 U.S. 52, 64 (1998).
[6] *Hoskins* at 6.
[7] *United States v. Hoskins*, 123 F. Supp. 3d 316, 327 (D. Conn. 2015).

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Second Circuit Analysis

Assuming for the purposes of its analysis that Hoskins was neither an employee nor agent of Alstom's U.S. subsidiary, the court examined whether he could nonetheless be liable, under a conspiracy or complicity theory, for violating the FCPA. In finding he could not, the court applied an exception, derived from *Gebardi v. United States*, providing that "conspiracy and accomplice liability will not lie when Congress demonstrates an affirmative legislative policy to leave some type of participant in a criminal transaction unpunished."[8]

In *Gebardi*, the U.S. Supreme Court concluded that a woman could not be charged with conspiracy to transport a woman (herself) across state lines for the purpose of prostitution because the text of the statute showed that Congress intended to leave unpunished women who merely consented to their transport.[9] Hoskins argued that similarly, Congress did not intend for the FCPA to apply to non-U.S. natural persons who "(1) do not act within the territory of the U.S., and (2) are not officers, directors, employees or agents of a U.S. domestic concern or U.S. issuer."[10]

The Second Circuit agreed, noting the "obvious omission" in the text for "jurisdiction over 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."[11] After reviewing the FCPA's text, structure and legislative history, the court held:

> The carefully tailored text of the statute, read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute, persuades us that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability.[12]

Other Potential Theories of Liability

Despite concluding that the government was barred from using conspiracy or complicity statutes to charge Hoskins with any offense not punishable under the FCPA itself, the court found that the government could potentially charge him as an agent of Alstom's U.S. subsidiary because there was no indication of a legislative policy against punishing that class of persons, nor would doing so involve an extraterritorial application of the FCPA. Therefore, the court ruled, the government is free to argue at the trial court that, as an agent of a U.S. domestic concern, Hoskins "conspir[ed] with employees and other agents of [Alstom's U.S. subsidiary]."[13] However, as Hoskins was not an employee of the entity that allegedly paid the bribe — and therefore may not be considered an agent of a U.S. domestic concern — it remains to be seen how useful this theory will be for the government against Hoskins and other similarly situated defendants.

Also not addressed by the opinion are other attenuated bases for jurisdiction that the DOJ has asserted in several past settlements such as wire transfers and emails transmitted through the U.S.[14] While the government alleged Hoskins "repeatedly e-mailed and called ... U.S.-based coconspirators ... while they were in the United States,"[15] it did not assert these as bases for jurisdiction in *Hoskins*, and such issues remain largely untested in court. Finally, the Second Circuit approved the government's theory charging Hoskins with "conspiring with foreign nationals who conducted relevant acts while in the United States."[16]

Taken together, these potential avenues of extending the FCPA's reach to foreign individuals even if they never entered the U.S. may diminish the practical implications of the *Hoskins* decision. If the DOJ continues to pursue at trial the theory that Hoskins was an agent of a U.S. domestic concern that participated in the bribery scheme, the FCPA's jurisdictional reach may be further clarified.

[8] *United States v. Hoskins*, 16-1010-CR, 2018 WL 4038192, at 28 (2d Cir. Aug. 24, 2018) (citing *Gebardi v. United States*, 287 U.S. 112 (1932).

[9] *Id.* at 25.

[10] Brief of Appellee at 6.

[11] *Hoskins* at 41.

[12] *Id.* at 36-37.

[13] *Hoskins* at 7.

[14] *See, e.g., U.S. v. JGC Corp.*, No. 11-cr-260, Information ¶¶ 20(e), 22 (S.D. Tex. Apr. 6, 2011); *U.S. v. Magyar Telekom, Plc.*, No. 1:11CR00597, Information ¶¶ 2, 24, 26(c), 47 (E.D. Va. Dec. 29, 2011).

[15] *Hoskins* at 7.

[16] *Id.* at 72.

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