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Client Alert News Flash

Latham & Watkins White Collar Defense & Investigations Practice August 29, 2018 | Number 2373

Second Circuit Reinforces FCPA's Jurisdictional Limits

Ruling holds that the government cannot use conspiracy and accomplice liability theories to reach foreign nationals that lack US ties.

Key Points:

- Non-resident foreign nationals who are not otherwise subject to direct liability under the anti-bribery provisions of the FCPA cannot be charged with violating the statute under conspiracy or accomplice liability theories.
- This ruling runs counter to the DOJ and SEC's expansive view of the FCPA's jurisdiction, and serves as a check on the DOJ and SEC pursuing aggressive theories of liability under the FCPA.

On August 24, 2018, the United States Court of Appeals for the Second Circuit issued its long-awaited decision in *United States v. Hoskins*, rebuffing an attempt by the US Department of Justice (the Department, or DOJ) to expand the jurisdiction of the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) using the conspiracy and aiding-and-abetting statutes to reach individuals who otherwise cannot be prosecuted for violating the statute.

Background

The government alleged that Lawrence Hoskins, a non-US citizen employed by Alstom S.A.'s UK subsidiary, was part of a scheme to bribe Indonesian government officials to secure a US$118 million contract from the Indonesian government. The Department alleged that Hoskins was responsible for "approving the selection of, and authorizing payments to" two consultants, knowing that a portion of the consultants' payments were intended for Indonesian officials.[1] Although several parts of the scheme were alleged to have taken place in the United States, the Department conceded that Hoskins did not travel to the United States while the scheme was ongoing, and that his contact with the United States was limited to communicating with alleged US-based coconspirators while they were in the United States.

The indictment in question charged Hoskins with 12 violations, including conspiring to violate the FCPA and six substantive violations of the FCPA. Count One of the indictment alleged that Hoskins:

- Conspired to violate the FCPA as an agent of Alstom's US subsidiary
- Conspired with the US subsidiary and its employees and with other foreign persons to violate the FCPA, independent of his agency relationship with Alstom's US subsidiary
- Aided and abetted such violations[2]

The district court dismissed Count One of the indictment to the extent it sought to charge Hoskins with conspiring to violate the FCPA without demonstrating that he fell into one of categories of persons covered by the statute. DOJ appealed to the Second Circuit on an interlocutory basis.

Second Circuit Rejects Government's Jurisdictional Theory

In upholding the district court's dismissal of some of the FCPA charges against Hoskins, the Second Circuit held that a non-resident foreign national cannot be held liable under the FCPA as an accomplice or co-conspirator if the person neither undertakes any action "while in the territory of the United States"[3]; nor serves as an officer, director, employee, or agent of a US domestic concern or issuer.[4] In so doing, the Second Circuit acknowledged the general rule that the accomplice and conspiracy statutes extend criminal liability to persons who could not be charged as principals, but explained that the FCPA falls under an exception to this rule. The exception applies when it is clear from reviewing the statute's text, structure, and legislative history that Congress did not intend for such liability to extend to individuals not enumerated within the statute.

Based on its review, the Second Circuit explained that the FCPA does not contain any provision assigning liability to non-resident foreign nationals acting outside American territory who lack an agency relationship with a US person and who are not officers, directors, employees, or stockholders of an American company.[5] Furthermore, the Second Circuit held that the structure of the FCPA confirms that Congress intended to omit this class of individuals, primarily to limit the statute's jurisdictional reach. Moreover, the Second Circuit held that it was clear from the legislative history that the FCPA's enumeration of particular individuals subject to liability under the FCPA was a "conscious choice" by Congress to avoid creating individual liability through the use of the conspiracy and complicity statutes.[6]

Finally, the Second Circuit noted that it is a well-established principle that US law does not apply extraterritorially without express congressional authorization. Because the FCPA clearly dictates that foreign nationals may only violate the statute under two circumstances — while acting within the territory of the United States, or if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern — the Second Circuit held that the government could not "expand the extraterritorial reach of the FCPA" using conspiracy and accomplice liability.[7] The government could still prosecute a non-resident foreign national such as Hoskins for violations of the FCPA, but only if it can prove that he fell within one of the categories enumerated in the statute or acted illegally on American soil.

Implications

With this decision, the Second Circuit rejected two jurisdictional theories used by DOJ to enforce the FCPA. The agencies' joint 2012 Resource Guide to the FCPA outlined the government's view that individuals and companies can be charged with aiding and abetting an FCPA violation, and that such 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."[8] The Second Circuit's decision rejects this interpretation of the law and holds that such an individual or company can be liable *only* if the Department can independently charge a substantive FCPA violation.[9]

Importantly, the Second Circuit's decision does not disturb agency liability under the FCPA, which is a substantive offense under the statute, and would be a question for the trier of fact. A foreign national can be liable for violations of the FCPA if the government proves that the individual was an agent of a US issuer or domestic concern — that is, that the individual was acting on behalf of the company, and

committed FCPA violations within the scope of his or her agency relationship that were intended, at least in part, to benefit the US issuer or domestic concern.

Moreover, the *Hoskins* decision is an example of a court strictly construing the FCPA in a manner that does not align with DOJ's aggressive enforcement of the statute. Although the issue in *Hoskins* was the alleged violation of the anti-bribery provisions of the FCPA, the Second Circuit's analysis appears to run counter to other aggressive assertions of jurisdiction by DOJ. For example, such analysis seems to contradict DOJ's theory that foreign subsidiaries of US issuers can be held criminally liable for "causing" books and records violations based solely on extraterritorial conduct by the foreign subsidiary that lacks a specific nexus between the illicit conduct and the United States. This ruling suggests that these theories, along with other theories of individual liability that are largely untested in court, may be vulnerable to challenge under the right circumstances. More generally, the Second Circuit's decision raises the possibility that its narrow construction of the FCPA could apply to other areas in which the DOJ and SEC have staked out aggressive theories of the law, such as the requirements of the internal controls provisions, the definition of a "foreign official," and what constitutes an "instrumentality" of a foreign government.

How DOJ will react to this decision remains unclear. DOJ does not have an appeal as of right, and thus would need to file a petition for writ of certiorari with the US Supreme Court to obtain further review. Such a petition is not guaranteed to succeed, however, given that the Court grants exceedingly few of these petitions each term. In addition, DOJ may not want to risk the chance that the Court decides to hear the case and affirms the Second Circuit, thereby foreclosing the government's ability to advance conspiracy and accomplice theories outside of the Second Circuit. Even if DOJ does not seek review at the Supreme Court, it is unclear whether the government would abandon these theories altogether in future enforcement actions or simply choose to avoid the Second Circuit in future cases that rest on conspiracy or accomplice theories. Another possibility is that this decision prompts the government to refer more corruption cases involving non-resident foreign nationals to other jurisdictions for enforcement — or at a minimum, results in DOJ being more open to deferring to non-US enforcement authorities, if the circumstances allow.

Conclusion

The Second Circuit's decision does not eliminate the possibility that Hoskins ultimately may be convicted of violations of the FCPA, as the court allowed the case to go forward on the remaining counts. However, this decision will undoubtedly have implications for theories of both individual and corporate liability going forward. DOJ has brought past enforcement actions based on theories now foreclosed by the Second Circuit's decision in *Hoskins*; thus, this decision will likely have ramifications for the types of cases the Department chooses to pursue, or at the very least, the jurisdiction in which it pursues them.

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Endnotes

1 *United States v. Hoskins*, No 16-1010-cr, slip op. at 6-7. (2d Cir. Aug. 24, 2018).

2 Counts two through seven of the indictment charged Hoskins with substantive violations of the FCPA related to specific wire transfers from Alstom's US bank account to two consultants' accounts. These counts alleged that Hoskins violated 15 U.S.C. § 78dd-2 "as an 'agent' of an American company or person, and also by 'aiding and abetting' such a company or person.'" *Id.* at 9.

3 15 U.S.C. § 78dd-3.

4 15 U.S.C. § 78dd-2.

5 The authors note that the Second Circuit's analysis was not dependent on the citizenship of the defendant and applies equally to individuals regardless of where they are located outside of the United States.

6 *Id.* at 62.

7 *Id.* at 69.

8 A Resource Guide to the U.S. Foreign Corrupt Practices Act, p. 34 *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

9 The Second Circuit's decision does not directly impact the SEC in the same manner as DOJ because SEC generally cannot bring conspiracy or accomplice liability charges in any event, although it can pursue "causing" and "control person" liability that may be subject to a similar analysis.