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The Second Circuit Rejects FCPA Liability for Foreign Persons under Accessory Liability Theories

On August 24, 2018, the Court of Appeals for the Second Circuit held in *United States v. Hoskins* that a foreign national who does not otherwise fall within the specific categories of defendants enumerated in the Foreign Corrupt Practices Act (“FCPA”) cannot be held liable for violating the FCPA under accomplice liability theories.¹ Stating that the FCPA does not “purport[] to rule the world,” the Second Circuit held that the Department of Justice (“DOJ”) cannot skirt the FCPA’s “carefully-drawn limitations” by relying on conspiracy and aiding and abetting theories of liability² to assert jurisdiction over foreign nationals who are solely acting abroad and otherwise fall outside the categories of persons liable under the FCPA. The Court reaffirmed, however, that a foreign national acting as an agent of a U.S. issuer or domestic concern—which is a specific category of defendants in the FCPA—may be liable even without engaging in criminal activity in the territory of the U.S. While *Hoskins* involved an individual foreign defendant, the Second Circuit’s decision has implications for foreign corporations, which are also covered by the FCPA.³ This case has been long-anticipated for its potential to proscribe the reach of the FCPA to foreign actors,⁴ and will provide greater clarity to foreign companies that are trying to determine whether to take advantage of the DOJ’s FCPA Corporate Enforcement Policy.⁵

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

² The conspiracy statute, 18 U.S.C. § 371, and aiding and abetting statute, 18 U.S.C. § 2, generally apply across the United States Code to impose accomplice liability on persons who conspire with or aid and abet in the commission of any “offense against the United States.”

³ 15 U.S.C. § 78c(a)(9) (“The term ‘person’ means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.”).

⁴ See, e.g., Paul, Weiss, Rifkind, Wharton & Garrison, LLP Client Memorandum, “FCPA Enforcement and Anti-Corruption Developments: 2016 Year In Review” (Jan. 20, 2017), available at https://www.paulweiss.com/media/3897243/19jan17_fcpa_year_end.pdf.

⁵ See Paul, Weiss Client Memoranda, “DOJ Issues New FCPA Corporate Enforcement Policy” (Nov. 30, 2017), available at <https://www.paulweiss.com/media/3977501/30nov17-doj.pdf> and “DOJ Announces a Pilot Program to Encourage Companies to Self-Report FCPA Violations” (Apr. 6, 2016), available at <https://www.paulweiss.com/media/3479613/fcpa6apr16.pdf>.

Background

The defendant in *Hoskins*, Lawrence Hoskins, was a U.K. citizen employed by the U.K.-based subsidiary of Alstom S.A., a French multinational company (“Alstom”),⁶ who worked at a French-based subsidiary of Alstom. The DOJ alleged that Hoskins participated in a scheme with three Alstom executives, some of whom worked for Alstom’s U.S.-based subsidiary, to bribe Indonesian officials⁷ to obtain for Alstom from the Indonesian government a \$118-million contract for an infrastructure project that lasted from 2002 to 2009. The DOJ alleged that several Alstom U.S. executives, while present on American soil, held meetings to further the bribery scheme and discussed the project by phone and email. Moreover, according to the DOJ, some funds used for the scheme were paid from Alstom U.S. to a consultant’s account in Maryland. Hoskins never worked for Alstom’s U.S. subsidiary in a direct capacity and never set foot in the U.S. while the scheme was ongoing, yet the DOJ charged Hoskins with conspiring and aiding and abetting to violate the FCPA, as well as substantive FCPA violations, among other things.⁸

Hoskins moved to dismiss the conspiracy count of the indictment, arguing that the DOJ could neither charge him with conspiring nor aiding and abetting to violate the FCPA as he did not fall within any of the statute’s several categories of putative defendants. By its terms, the FCPA imposes liability only on (i) “issuers” (and their officers, directors, employees, and agents) of securities listed on U.S. stock exchanges;⁹ (ii) “domestic concerns” and their officers, directors, employees, and agents (*i.e.*, American companies and persons);¹⁰ and (iii) foreign persons acting in the U.S. in furtherance of the corrupt scheme.¹¹

In opposition to Hoskins’s motion, the DOJ argued that although Hoskins worked for Alstom’s U.K.-based subsidiary, he was an agent of Alstom’s U.S.-based subsidiary based on his repeated emails and telephone

⁶ Alstom pleaded guilty to violations of the FCPA’s books and records provisions and internal controls provisions and paid a \$772 million fine. Plea Agreement ¶¶ 1, 18, *United States v. Alstom S.A.*, No. 14-cr-246-JBA (D. Conn. Dec. 22, 2014), ECF No. 5.

⁷ The three other Alstom executives—all domestic concerns—pleaded guilty to conspiring to violate or violating the FCPA. See Guilty Plea, *United States v. Pomponi*, No. 3:12-cr-238-JBA (D. Conn. July 17, 2014), ECF No. 138; Guilty Plea, *United States v. Pierucci*, No. 3:12-cr-238-JBA (D. Conn. July 29, 2013), ECF No. 46; Guilty Plea, *United States v. Rothschild*, No. 3:12-cr-223-WWE (D. Conn. Nov. 2, 2012), ECF No. 8.

⁸ DOJ also charged Hoskins with one count of conspiracy to commit money laundering and four counts of money laundering. The money laundering charges are pending and not affected by the Second Circuit’s decision.

⁹ 15 U.S.C. § 78dd-1; see also U.S. Dep’t of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 10–11 (2012) (hereinafter “FCPA Resource Guide”), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

¹⁰ 15 U.S.C. § 78dd-2.

¹¹ *Id.* § 78dd-3.

calls with the U.S.-based co-conspirators, and he could be convicted for violating the FCPA as an accessory to the corrupt scheme.

When ruling on Hoskins's motion, the District Court refused to dismiss the DOJ's claim that Hoskins was liable as an agent of a domestic concern,¹² but held that the FCPA cannot reach a non-resident foreign national who is not "an agent of a domestic concern" and who "does not commit acts while physically present in the territory of the United States."¹³

The Second Circuit Decision

The Second Circuit unanimously rejected the DOJ's expansive theory of extraterritorial jurisdiction under the FCPA, largely affirming the District Court's dismissal of the conspiracy and aiding and abetting charges against Hoskins.¹⁴ Relying on the plain text of the statute, and an extensive assessment of the legislative history and amendments to the Act,¹⁵ Judge Pooler, writing for the Court, found that Congress had affirmatively excluded from liability under the Act foreign individuals, such as Hoskins, unless they commit an act in furtherance of a crime within the territory of the U.S., and that adopting the government's overbroad view "would transform the FCPA into a law that purports to rule the world."¹⁶ Relying on a recent U.S. Supreme Court decision regarding the presumption against extraterritorial application of U.S. criminal laws, the Second Circuit held that "in general, United States law governs domestically,"¹⁷ and that the DOJ

¹² *United States v. Hoskins*, 123 F. Supp. 3d 316, 327 (D. Conn. 2015) ("Count One will not be dismissed in its entirety, however, because if the Government proceeds under the theory that Mr. Hoskins is an agent of a domestic concern and thus subject to direct liability under the FCPA . . . his criminal liability for conspiring to violate the FCPA" would not be precluded).

¹³ *Id.*

¹⁴ The DOJ sought interlocutory appeal after the District Court dismissed the conspiracy and aiding and abetting counts. Rejecting Hoskins's objection, the Second Circuit decided it had jurisdiction to consider the interlocutory appeal under 18 U.S.C. § 3731 even where a district court has dismissed portions of counts. *Hoskins*, 2018 WL 4038192, at *3–*5.

¹⁵ The Second Circuit reviewed the competing Senate and House versions of the draft bill, and final version agreed to in conference when the bill was passed in 1977. *Id.* at *13–*22. The Second Circuit noted that the final version agreed to in conference "did allow liability for agents, but restricted liability to an agent who was a United States citizen, national, or resident or [wa]s otherwise subject to the jurisdiction of the United States[.]" *Id.* at *16; *see also id.* at *17 ("The [1977] Conference Report emphasized that the statute drew deliberate lines regarding the liability of foreign persons, both corporate and natural[.]"). The Second Circuit also reviewed the 1998 amendments, noting that while "[t]he 1998 amendments surely extended the statute's jurisdictional reach," "Congress delineated as specifically as possible the persons who would be liable, and under what circumstances liability would lie." *Id.* at *21. The Second Circuit concluded that "[n]one of the [1998] changes included liability for the class of individuals involved in this case." *Id.*

¹⁶ *Hoskins*, 2018 WL 4038192, at *20.

¹⁷ *Id.* at *13 (citing *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016)).

could not use the accessorial liability statutes to circumvent such a presumption.¹⁸ Accordingly, Hoskins, who did not engage in acts “on American soil” in furtherance of the corrupt scheme, could not be directly liable under the FCPA.¹⁹

The Second Circuit found that Hoskins—even if he was never present in the U.S.—could have acted as an agent of a domestic concern, and if so, could have conspired with employees of the U.S. subsidiary or other foreign nationals who conducted acts while in the U.S., and remanded the question to the District Court.²⁰

Characterizing *Hoskins* as “a close and difficult case,”²¹ Judge Lynch in his concurrence counsels “special caution in applying normal principles of accessorial liability when Congress has delineated the particular circumstances in which the [FCPA] applies abroad,”²² but also questions whether as “a matter of policy” people like Hoskins—a foreign national who was “part of the team that reached into the United States to counsel and procure the commission of an American crime by an American company, and to assist that company in executing bribes in violation of American law”²³—should not be reached by U.S. laws of ancillary liability.²⁴ Noting that this may be one of those cases beyond the contemplation of Congress, the concurrence suggests that Congress may want to “revisit the statute with this case in mind[.]”²⁵

Implications

The Second Circuit’s opinion, which is among the few appellate decisions construing the FCPA,²⁶ limits the DOJ’s ability to prosecute foreign persons—either individuals or companies—for FCPA violations based

¹⁸ *Id.* at *22–*23.

¹⁹ *Id.* at *24 (“This Court agrees that Hoskins cannot be directly liable under [15 U.S.C.] Section 78dd-3.”).

²⁰ *Id.* (“[T]he government should be allowed to argue that, as an agent, Hoskins committed the first object by conspiring with employees and other agents of Alstom U.S. and committed the second object by conspiring with foreign nationals who conducted relevant acts while in the United States.”).

²¹ *Hoskins*, 2018 WL 4038192, at *25 (Lynch, J., concurring).

²² *Id.* at *28.

²³ *Id.* at *29.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See, e.g., United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014) (construing the meaning of “instrumentality” to determine who a “foreign official” was), *cert. denied*, 135 S. Ct. 293; *Republic of Iraq v. ABB AG*, 768 F.3d 145, 169–71 (2d Cir. 2014) (concluding that “there is no private right of action under the antibribery provisions of the FCPA”), *cert. denied*, 135 S. Ct. 2836 (2015); *United States v. Kozeny*, 667 F.3d 122, 130–36 (2d Cir. 2011) (reviewing jury instructions as to the elements of a substantive FCPA violation), *cert. denied sub nom. Bourke v. United States*, 569 U.S. 917 (2013); *United States v. Kay*, 513 F.3d 432, 451 (5th Cir. 2007) (construing “willfulness”); *United States v. Kay*, 359 F.3d 738, 742–61 (5th Cir. 2004) (construing the

solely on conspiracy or aiding and abetting theories of liability unless they travel to or engage in proscribed conduct in the territory of the U.S. The opinion flatly contradicts the DOJ and SEC’s FCPA Resource Guide issued in 2012, which sets forth the government’s view that a foreign national or company may also be liable under the FCPA based on aiding and abetting or conspiring with an issuer or domestic concern, but it leaves open the possibility that, where supported by the facts, the government may still prosecute foreign nationals as agents of U.S. issuers and domestic concerns.²⁷ Whether the DOJ now actually proceeds against Hoskins on this theory, and if so how it goes about establishing agency, will be instructive.

It also remains to be seen whether this decision undercuts the DOJ’s ability to bring charges against foreign persons based on a theory of directing or arranging U.S.-dollar payments that transit the U.S. banking system, but without any physical presence of the foreign persons in the U.S. The District Court’s opinion, which rejected Hoskins’s argument that the FCPA did not apply extraterritorially to non-U.S. persons, suggests that that Court may be of the view that causing activity in the U.S. from outside the U.S. may be sufficient to give rise to jurisdiction.²⁸ Although the Second Circuit’s decision does not address this point directly, it includes discussion of the FCPA’s language and legislative history that suggests that the Second Circuit may be hostile to such a view. This part of the Second Circuit’s decision, however, is not necessary to its holding, and we expect the DOJ to vigorously defend—including within the Second Circuit—its ability to prosecute foreign persons for using U.S. territory or causing U.S.-dollar payments to flow through the U.S. financial system in furtherance of a foreign bribery scheme.

The decision in *Hoskins* also may have important implications for foreign corporations, particularly those that conduct international business through joint ventures, consortia, and other teaming arrangements that involve American companies (“domestic concerns”) and/or U.S.-listed companies (U.S. or foreign “issuers”). Pre-*Hoskins*, the conspiracy and aiding and abetting theory, which the Second Circuit has now rejected, was the basis for settled actions involving Marubeni, JGC Corporation, and Snamprogetti Netherlands B.V. in connection with the TSKJ joint venture cases in which the DOJ charged foreign

FCPA’s “obtain or retain business” element); *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 327 F.3d 173, 181–83 (2d Cir. 2003) (construing the “corruptly” element); *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (determining whether foreign officials who receive bribes from domestic concerns can be prosecuted for conspiracy to violate the FCPA); *United States v. McLean*, 738 F.2d 655, 656–60 (5th Cir. 1984) (determining whether an employee can be prosecuted for a substantive offense under the FCPA if the employer has not and cannot be convicted of similarly violating the FCPA), *cert. denied*, 470 U.S. 1050 (1985).

²⁷ See FCPA Resource Guide at 12 (“A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.”).

²⁸ See Ruling on Defendant’s Motion to Dismiss the Second Indictment at 18–19, *United States v. Hoskins*, No. 3:12-cr-00238-JBA (D. Conn. Dec. 29, 2014), ECF No. 190 (“[P]hysical presence within the United States is not required when the Indictment alleges . . . [use of] domestic wire transfers to promote the conspiracy.”).

companies that were neither issuers nor domestic concerns, and based jurisdiction on aiding and abetting a domestic concern to execute a bribery scheme.²⁹ Post-*Hoskins*, foreign companies that find themselves subject to DOJ or SEC investigations solely because of their business association with a domestic concern or issuer may have stronger jurisdictional defenses.

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²⁹ Deferred Prosecution Agreement ¶¶ 1, 6, 12, *United States v. Marubeni Corp.*, No. 4:12-cr-00022 (S.D. Tex. Jan. 17, 2012), ECF No. 3 (pleaded guilty to one count for conspiracy to violate the FCPA's anti-bribery provisions in violation of 18 U.S.C. § 371, and one count for aiding and abetting a violation of the FCPA's anti-bribery provisions in violation of 15 U.S.C. § 78dd-2; paid fine of \$54.6 million); Deferred Prosecution Agreement ¶¶ 1, 6, 11, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), ECF No. 4 (same; paid fine of \$218.8 million); Deferred Prosecution Agreement ¶¶ 1, 6, 10, *United States v. Snamprogetti Netherlands B.V.*, No. 4:10-cr-00460 (S.D. Tex. July 7, 2010), ECF No. 3 (same; paid fine of \$240 million).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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