# Second Circuit Holds the FCPA Does Not Extend to Non-U.S. Persons Under Conspiracy and Accomplice Liability Theories Absent U.S. Nexus

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On August 24, 2018, the Second Circuit held in ***United States v. Hoskins*** that a nonresident foreign national cannot be found liable for violating the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA") under conspiracy or accomplice theories if that individual could not otherwise be held directly liable under the statute.[1] This question arose in the context of the Department of Justice's ("DOJ") criminal prosecution of Lawrence Hoskins, a U.K. national charged for his involvement in a corporate bribery scheme to secure a lucrative Indonesian construction contract. Even though the defendant is a foreign national who worked for a non-U.S. company and had not set foot in the United States as part of the bribery scheme, DOJ charged him with conspiring with a U.S. affiliate of his employer, and others, to violate the FCPA. The Second Circuit rejected this theory, finding that Congress had placed careful limits on extraterritorial liability under the FCPA, and that these limits cannot be breached through conspiracy or accomplice liability.

The *Hoskins* decision challenges DOJ's expansive interpretation of the FCPA's reach, but its impact remains to be seen. In response to *Hoskins*, DOJ may shift its focus away from conspiracy and aiding-and-abetting theories and focus more on charging foreign nationals and companies as agents of domestic U.S. companies or U.S. issuers. Agents are clearly covered by the FCPA, but an aggressive interpretation of agency to reach foreign defendants with a minimal U.S. nexus could also run into judicial headwinds in the future.

## Background

The anti-bribery provisions of the FCPA apply to three categories of persons or entities: (1) foreign and domestic issuers of U.S.-registered securities and their officers, directors, employees, or agents who make use of U.S. interstate commerce in furtherance of a corrupt payment; (2) "domestic concerns" (including U.S. nationals, U.S. residents, and companies organized or with their principal place of business in the United States) and their employees, agents, and other related persons if they make use of U.S. interstate commerce and, for certain U.S. persons, for conduct outside the United States regardless of whether they use U.S. interstate commerce; and (3) any other person or entity who, while in the United States, acts in furtherance of a corrupt payment.[2]

In July 2013, DOJ indicted Lawrence Hoskins, a British executive of Alstom U.K., a British subsidiary of French power and transportation company, Alstom S.A., for participating in a bribery scheme to win a $118 million contract to build power stations for the state electricity company in Indonesia. DOJ did not allege that Hoskins was an employee of Alstom's U.S. subsidiary, Alstom Power, Inc. ("Alstom U.S."), nor that Hoskins violated the FCPA while on U.S. soil. Instead, DOJ argued that Hoskins was "one of the people responsible for approving the selection of, and authorizing payments to," certain consultants,

[1] __ F.3d __ (2d Cir. 2018).

[2] 15 U.S.C. §§ 78dd-1–77dd-3.

knowing that a portion of the payments was actually intended for Indonesian officials in exchange for influence and assistance in obtaining contracts. DOJ further argued that although Hoskins did not travel to the United States, he communicated with U.S.-based co-conspirators regarding the alleged scheme.

In a 12-count indictment, DOJ charged Hoskins with conspiring with Alstom U.S., its employees, and foreign persons to violate the FCPA. DOJ alleged that he conspired both in his capacity as an "agent" of a domestic concern (Alstom U.S.) and independent of this alleged agency relationship. The indictment also charged Hoskins with substantive violations of the FCPA as an agent of a domestic concern and by aiding and abetting such violations. In December 2014, Alstom S.A. entered into a deferred prosecution agreement with DOJ for charges related to its own alleged misconduct.

In the lower court, Hoskins moved to dismiss certain counts against him on the theory that he could not be held liable for conspiring to violate the FCPA if he was not a member of any of the enumerated classes of defendants to whom the statute applied.[3] In analyzing DOJ's conspiracy theory, the district court, basing its analysis on the Supreme Court's ruling in *Gebardi v. United States*[4], found that because FCPA liability only attaches to three precisely articulated groups of persons, Congress intended to limit liability to only certain entities and individuals. The district court accordingly dismissed the charges based on conspiracy to violate the FCPA, reasoning that "where Congress chooses to exclude a class of individuals from liability under a statute, the Executive may not . . . override the Congressional intent not to prosecute that party by charging it with conspiring to violate a statute that it could not directly violate."

The district court also denied Hoskins's motion to dismiss the charge that he acted as an agent of Alstom U.S. in violating the FCPA, finding that Hoskins failed to show that the facts in the indictment were insufficient to establish an "agency" relationship between himself and Alstom U.S.[5] Although the district court acknowledged that an agency analysis is a highly factual one, it observed that Hoskins had certain responsibilities related to Alstom U.S.'s efforts.

After the district court denied DOJ's motion for reconsideration, DOJ filed an interlocutory appeal to the Second Circuit. The appeal addressed a single question: whether the district court correctly dismissed the conspiracy charges in the indictment to the extent that DOJ had charged Hoskins with conspiracy without demonstrating that Hoskins fell into one of the categories of persons to which the FCPA applies directly.

## Second Circuit Decision

With respect to conspiracy generally, the Second Circuit observed that under common law and federal conspiracy statutes, individuals who cannot be held liable for their own acts under a particular law may still be found guilty of conspiring to commit that crime or acting as an accomplice—for example, a getaway driver in a bank robbery may be prosecuted even though his own actions do not meet the statutory elements of the crime of bank robbery. An exception exists, however, where there is clear legislative intent to exclude certain individuals from the law's purview. For example, the Supreme Court held in *Gebardi v. United States* that a woman who had acquiesced to being transported across state lines in violation of the Mann Act could not be prosecuted for conspiracy, because Congress intended to exclude that class of people from prosecution under the Act.[6]

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[3] *See United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015).

[4] 287 U.S. 112 (1932).

[5] *See United States v. Hoskins*, No. 3:12-cr-238 (D. Conn. Dec. 29, 2015).

[6] 287 U.S. 112, 119 (1932).

To determine whether Congress possessed an intent to exclude certain foreign nationals from conspiracy liability in enacting the FCPA, the Second Circuit analyzed the text and structure of the statute. The court also considered the principle that U.S. law does not apply extraterritorially without clear congressional authorization. The Second Circuit found that the text and structure of the FCPA—which describes in detail the categories of people that are covered but fails to include any provision for liability of nonresident foreign nationals who act outside U.S. territory and are not employees or agents of domestic concerns or issuers—suggests that Congress did not intend to create such liability.

As part of its analysis, the Second Circuit engaged in a lengthy review of the legislative history of the FCPA. It found that during the original drafting process in the 1970s and the amendment process in 1998, Congress sought to craft the FCPA in a manner that would quell concerns about the scope of liability it created and the breadth of extraterritorial application of the anti-bribery provisions. The court noted that while the Senate initially planned to craft a bill that did not mention individual liability and relied on accomplice theories to connect individual action to corporate wrongdoing, it later rejected this approach in favor of a bill that listed "with great precision" explicit categories of individuals and entities covered by the law. In amending the law in 1998, Congress carefully delineated additional areas of liability, expanding the FCPA's reach to cover foreign nationals that committed acts within the United States and to U.S. companies and persons that committed acts wholly outside the United States. Based on this history, the Second Circuit found that the drafters of the FCPA made an "affirmative decision to exclude from liability" certain classes of people, and that the government could not "override that policy using the conspiracy and complicity rules." Accordingly, the Second Circuit held that the "FCPA clearly dictates that foreign nationals may only violate [the FCPA] outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern."

The Second Circuit also addressed conspiracy charges against Hoskins that stemmed from his alleged role as an agent for Alstom U.S. The Second Circuit determined that the district court erred in dismissing these charges, observing that the government could still seek to show that Hoskins "acted as an agent of a domestic concern"—Alstom U.S.—that was "liable as a principal for the substantive FCPA counts charged in the indictment." The court held that the government should be allowed to make a showing that Hoskins conspired with Alstom's U.S. employees and other foreign nationals *as an agent* of Alstom U.S. in violation of the FCPA.

## Limitations and Implications of the Decision

The Second Circuit's decision may have implications for foreign nationals and companies, in particular because the decision challenges DOJ's views concerning conspiracy and accomplice liability, as articulated in the widely relied-upon 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act*.[7] In reference to accomplice liability, the *Resource Guide* states: "A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States." The *Resource Guide* further notes: "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." *Hoskins* narrows both expansive interpretations such that foreign companies and individuals who have neither committed any act within the territory of the United States nor acted as an agent of a U.S. entity or person could potentially use *Hoskins* as a defense to liability under the anti-bribery provisions of the FCPA.

[7] U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012).

The Second Circuit's decision may also influence DOJ's anti-bribery enforcement strategy. Under the Second Circuit's decision, foreign companies and nationals may not be charged with conspiring to violate, or aiding and abetting violations of, the FCPA's anti-bribery provisions without a sufficient nexus to the U.S., but these entities and individuals may still face liability for causing violations of these same provisions as agents of a U.S. issuer or domestic concern. Accordingly, this narrowing of accomplice and conspiracy liability may prompt DOJ to rely more heavily on agency theories in future FCPA enforcement actions or, in certain limited circumstances, to rely on other statutes and theories that lack the FCPA's restrictions, such as the Money Laundering Control Act. We could also see further developments in the *Hoskins* case itself: the increased focus on agency theories may result in a more direct challenge to DOJ's assertions of agency and a more detailed analysis by the district court of agency theories under the FCPA.

Despite contradicting some of DOJ's broad pronouncements regarding the reach of the FCPA, the effect the Second Circuit's decision will have on FCPA enforcement is not yet clear and several factors may limit the impact of the Second Circuit's opinion. First, the decision may be overturned or limited by *en banc* review or a petition for certiorari to the U.S. Supreme Court. Second, other Circuit Courts, such as the D.C. Circuit, which often has concurrent jurisdiction over FCPA matters, may opt not to follow the Second Circuit's decision. Finally, while the government may emphasize agency theories of liability in the wake of the Second Circuit's decision, this might not have a significant effect on liability outcomes as many foreign nationals are already charged on agency theories in conjunction with aiding and abetting or conspiracy theories.

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