The Second Circuit rules against DOJ's aggressive assertion of extraterritorial FCPA jurisdiction over foreign accessories

White Collar Alert

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Dealing a significant blow to US prosecutors, the US Court of Appeals for the Second Circuit has ruled that a non-resident foreign national, operating entirely outside the physical territory of the United States, cannot be liable for violations of the Foreign Corrupt Practices Act (FCPA) under aiding-and-abetting or conspiracy theories unless he was directly liable under the statute as an employee, director, or "agent" of a US company. *United States v. Hoskins*, Docket No. 16-1010-cr (2d Cir. Aug. 24, 2018). The "central question" on appeal was whether "a foreign national who never set foot in the United States or worked for an American company" – and who hence could not be guilty as a principal – could nonetheless be guilty as an accomplice or co-conspirator. Rejecting long-standing US Department of Justice (DOJ) policy, the Second Circuit held that the answer was "No."

In a lengthy opinion, the Second Circuit held that Congress deliberately intended to exclude such foreign nationals from the FCPA's reach so long as they did not act while physically present in the US or did not fall into an enumerated class of persons with sufficient ties to a US company or issuer. The ruling stands to limit DOJ's ability to bring FCPA charges against foreign nationals who do not travel to the US.

Background

The FCPA empowers the United States to punish bribery of foreign government officials when one of three jurisdictional bases is present:

1. Where a "domestic [US] concern" (*eg*, an entity organized under US law or with "its principal place of business" in the US, or the like) or "issuer" of US securities or any officer, employee or agent thereof (including, as the Second Circuit put it, "executives, janitors, and travel agents," regardless of nationality or physical location) makes use of US interstate commerce in furtherance of a corrupt payment
2. where a US person (citizen, national, or resident, as well as US corporations and other entities) acts outside the US in furtherance of a corrupt payment (whether or not US interstate commerce was used) and
3. where any person while inside the US acts in furtherance of a corrupt payment (regardless of nationality and whether interstate commerce was used). 15 U.S.C. §§ 78dd-1; 78dd-2, 78dd-3.

In *Hoskins*, DOJ took the position that even if the defendant did not fall within one of the three classes of persons over whom FCPA jurisdiction exists, he could still be prosecuted for violating the FCPA if he conspired with or aided and abetted an FCPA violation by a person who is a member of one of those classes. As the district court articulated it, the question was:

> Whether a non-resident foreign national could be subject to criminal liability under the FCPA, even where he is not an agent of a domestic concern and does not commit acts while physically present in the territory of the United States, under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute's reach.

*United States v. Lawrence Hoskin*s, 2015 WL 11018863, at * 2 (D. Conn. Aug. 13, 2015).

The unusual procedural history of *Hoskins* underscores the importance, in some cases and for some classes of putative defendants, of the answer to the court's question. The case involved allegations of bribery to Indonesian government officials on behalf of a Connecticut-based company (Alstom Power U.S.) to secure contracts to build power stations. Hoskins did not work for the US company but for a non-US subsidiary of the non-US corporate parent, a sister company of the US company. He was not a US citizen, was never in the US in connection with the alleged scheme, and was never employed by any of the charged entities. The government emphasized to no avail that Hoskins '"repeatedly emailed and called . . . U.S.-based co-conspirators' regarding the scheme 'while they were in the United States,'" and that he played a very significant role (albeit while outside the US) in authorizing the alleged bribe payments. The government initially charged him only as an "agent" of a US concern (the US company). Hoskins moved to dismiss on the ground that the allegation that he was an "agent" of the US company could not survive because it was simultaneously alleged in the same original indictment that he worked not for the US company but for the non-US parent. In other words, if anything, Hoskins exercised agency-like control over the US company, and not vice versa. The district court denied that motion, holding that the existence of an agency relationship was a highly factual jury question.

Shortly thereafter, seemingly in reaction to the argument that it would be unable to prove the agency that it had alleged, the government brought a superseding indictment, altering the charging language in the FCPA conspiracy count to replace the original allegations ("being … an employee and agent" of the US company) with the new allegation that Hoskins conspired by acting "together with" a domestic concern (the US company). The government also made a pre-trial motion to preclude Hoskins from arguing to the jury that it must prove that he was an agent of a domestic concern before the jury could convict him under the theories of accomplice liability.

This squarely raised the question of whether a defendant can be convicted under an accomplice liability theory even if his agency is not proven, or he is not otherwise within the class of persons that the FCPA explicitly reaches. By the government's lights, long-standing law made clear that even where someone lacked capacity to commit the underlying crime directly he or she can still face aiding-and-abetting and conspiracy charges.

Hoskins did not dispute that general case law or that Congress *could* have extended such liability to the FCPA context – his argument was solely one of legislative intent, focusing on the language of the statute and the history of its enactment and amendments. As articulated to the district court, Hoskins relied on the principle that:

> where Congress has crafted a criminal statute to effect an affirmative legislative policy to exclude certain classes of persons from liability, the government cannot nullify that intent by charging such individuals with conspiracy to violate that statute or aiding and abetting a violation of that statute.

(Defendant Hoskins's Opposition to Government's In Limine Motion, Case No. 3:12-cr-00238 [Doc. # 253] at 2 (June 3, 2015)). That general principle had been articulated in the Supreme Court's *Gebardi v. United States* decision, which considered whether a woman could be convicted of conspiracy to violate the Mann Act, which made it a crime to transport a woman across state lines for "immoral purposes." In proscribing such conspiracy charges, *Gebardi* established 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 statue that it could not directly violate." *Hoskins*, 2015 WL 11018863, at * 3 (quoting *United States v. Castle*, 925 F.2d 831, 833 5th Cir. 1991)).

After reviewing this law, the legislative history of the FCPA, and the statute's text and structure, **the district court concluded that Congress did not intend to impose accomplice liability on persons who did not fall under one of the three bases of jurisdiction** set forth above. The district court further ordered that the government could not argue that Hoskins could be liable even if he is not proved to be an agent of a domestic concern.

The DOJ promptly filed an interlocutory appeal, argument was held in March 2017, and the Second Circuit finally issued its decision on August 24, 2018. Although the government argued on appeal that the district court decision was "absurd," the Second Circuit adopted most of its reasoning and affirmed the core holding. **Key to the appellate decision** was the presumption that US laws do not apply extraterritorially without express congressional authorization, which the Second Circuit held was a wholly separate grounds for its decision. "In other words, [the] government may not expand the territorial reach of the FCPA by recourse to the conspiracy and complicity statutes."

Although in concurrence Judge Lynch characterized the appeal as "a close and difficult case," the majority opinion (which Judge Lynch joined) evinced no such concerns. Relying (as did the district court) largely on the structure and legislative history of the FCPA, the Second Circuit concluded that Congress carefully crafted the classes of persons to whom the FCPA applied and that its omission of reference to persons like Hoskins – namely, "nonresident foreign nationals, acting outside American territory, who lack an agency relationship with a U.S. person [or company]" – was "not accidental, but instead was a limitation created with surgical precision to limit [the FCPA's] jurisdictional reach." According to the Second Circuit, this sufficiently demonstrated a conscious choice by Congress, such that DOJ could not do an end-run around that limitation by a conspiracy or aiding-and-abetting charge. The Second Circuit opined that a contrary ruling would "transform the FCPA into a law that purports to rule the world."

A significant decision for those in comparable circumstances

Although at first blush the Second Circuit's decision would appear to apply to a narrow subset of potential defendants, for individuals in comparable circumstances the decision is a significant one. The importance of the issue to DOJ is clear from its decision to take an unusual interlocutory appeal. The clear defeat represents a rare court consideration of the DOJ's customary aggressive approach to FCPA enforcement.

For executives at corporate parents of, or even sister corporations of, US companies, who commit no acts in the US, the decision puts real hurdles in DOJ's path (although such executives could – like Hoskins himself – face charges under other statutes, like money laundering). Furthermore, in certain cases the inability to charge such executives could significantly impact the dynamic of negotiating with the government on behalf of corporate entities.

Find out more about the ramifications of this decision by contacting any of the authors.

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