SULLIVAN & CROMWELL LLP

August 27, 2018

United States v. *Hoskins*—Second Circuit Rejects DOJ's Attempt to Expand the Extraterritorial Reach of the FCPA Through Conspiracy and Complicity Doctrines

U.S. Court of Appeals for the Second Circuit Holds that the Government May Not Employ Theories of Conspiracy or Complicity to Charge Foreign National with FCPA Violations Where the Defendant is Not Otherwise Covered by the Statute

SUMMARY

On August 24, 2018, in *United States* v. *Hoskins*, the United States Court of Appeals for the Second Circuit affirmed in part and reversed in part a district court decision dismissing portions of a count of conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"). The Department of Justice ("DOJ") alleged that Lawrence Hoskins, an employee of the U.K. subsidiary of power and transportation company Alstom S.A. ("Alstom"), directed and authorized corrupt payments by a U.S. subsidiary of Alstom ("Alstom U.S.") to Indonesian officials. The court affirmed the lower court's ruling that Hoskins, a foreign national, could not be liable for conspiring to violate, or violating the FCPA, without a showing that he was acting as an employee, officer, director, or agent of Alstom U.S. when he engaged in the prohibited conduct, or that he took action in furtherance of the violation while in the United States. In reaching this decision, the court relied on the text of the FCPA, Supreme Court and Second Circuit precedent regarding conspiracy theory liability, the FCPA's legislative history and purpose, and the presumption against extraterritoriality. The Second Circuit, however, reversed the portion of the lower court's ruling that prohibited the government from attempting to establish that Hoskins was liable as an agent of Alstom U.S. for conspiring with foreign nationals who committed relevant acts while in the United States, concluding that, if the government could establish that Hoskins acted as an agent of Alstom U.S., neither the legislative intent

behind the statute nor the presumption against extraterritoriality precluded prosecution of Hoskins for conspiring with foreign nationals to violate the FCPA, even if Hoskins never entered the U.S.

BACKGROUND

According to the indictment, Alstom U.S. retained consultants to bribe Indonesian officials to secure a $118 million power supply contract with the Indonesian government for Alstom and its subsidiaries. Hoskins was an employee of an Alstom U.K. subsidiary, not Alstom U.S., during the relevant period of 2002-2009. The indictment alleged that, although he did not travel to the United States, Hoskins was responsible for approving and authorizing the payments to the consultants, and called and emailed U.S.-based co-conspirators in furtherance of the scheme.[1]

The indictment asserted 12 counts against Hoskins, including counts under the FCPA, alleging that Hoskins was an agent of Alstom U.S. and conspired with Alstom U.S. and its employees to violate the FCPA.[2] Count One charged Hoskins with conspiracy to violate the FCPA, while Counts Two through Seven concerned "substantive" FCPA violations, including violations relating to wire transfers from Alstom U.S. to the consultants.[3] The district court struck portions of Count One, in relevant part, on the grounds that Hoskins could not be held liable for conspiracy to violate the FCPA if he could not have been prosecuted for a direct violation of the statute.

THE *HOSKINS* DECISION

In an opinion issued almost one and a half years after the Second Circuit heard oral argument in the appeal and three years from the date of the lower court's decision, Judge Pooler, writing for a panel including Chief Judge Katzmann and Judge Lynch,[4] resolved a much debated question on the proper interpretation of the FCPA: "whether the government may employ theories of conspiracy or complicity to charge a defendant with violating the Foreign Corrupt Practices Act ('FCPA'), even if he is not in the category of persons directly covered by the statute."[5] The *Hoskins* court concluded that such a theory is not permissible under the FCPA.

The Second Circuit explained that there are three categories of persons subject to the FCPA[6]: (1) issuers of securities on a U.S. stock exchange or any officer, director, employee, or agent of an issuer, or a stockholder acting on the issuer's behalf; (2) U.S. companies and persons using interstate commerce in connection with the payment of bribes; and (3) foreign persons or businesses engaged in acts to further corrupt schemes, including causing the payment of bribes, while in the United States.[7]

Judge Pooler began the court's analysis by framing the question as follows: "whether Hoskins, a foreign national who never set foot in the United States or worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and

shareholders, and persons physically present within the United States."[8] In short, the court asked: "[C]an a person be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?"[9]

In answering this question, the court acknowledged the general rule that a defendant does not have to be subject to liability for committing a crime directly to be liable for conspiracy to commit that crime. Based on a review of relevant precedent, however, the court observed that certain statutes present exceptions to this general rule when the legislative scheme "evinces an affirmative legislative policy to leave the category of defendants omitted from the statutory framework unpunished."[10] Among other cases cited in support of this proposition, the court pointed to *United States* v. *Castle*, in which the Fifth Circuit held that foreign officials could not be liable for conspiracy to violate the FCPA because the text of the statute and its legislative history indicates that Congress intended to exclude that group of individuals from prosecution.[11]

The court then examined the text and legislative history of the FCPA to determine whether the FCPA presents such a statutory framework, ultimately concluding that the FCPA's "omission of the class of persons under discussion was not accidental, but instead was a limitation created with surgical precision to limit its jurisdictional reach."[12] In reaching this conclusion, the court relied on both the text of the statute itself and the FCPA's legislative history. With respect to the former, the court observed that the FCPA's framework sets out every "possible combination of nationality, location, and agency relation," and "excluded only nonresident foreign nationals outside American territory without an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies."[13] As to the latter, the court noted that, although preliminary drafts of the statute did not create explicit liability for individuals and instead relied "on the use of conspiracy and complicity principles," the final bill explicitly states which categories of individuals could be held liable.[14]

The court also held that the presumption against the extraterritorial application of statutes independently bars the government from charging Hoskins with conspiracy to violate the FCPA. Under controlling precedent, the government must "establish[] a 'clearly expressed congressional intent to' allow conspiracy and complicity liability to broaden the extraterritorial reach of the statute."[15] The court concluded that, because the DOJ had not established that intent with respect to the FCPA, its extraterritorial reach must therefore be limited to its terms.

The court reversed the district court's order to the extent that it prohibited the government from attempting to make a showing that, despite not having entered U.S. territory, Hoskins could be liable for "conspiring with foreign nationals who conducted relevant acts while in the United States" if the government were able to establish that Hoskins was acting as an agent of Alstom U.S.[16] The court concluded that this theory of liability would be consistent with the underlying legislative policy of the FCPA and would not constitute an improper extraterritorial application of the FCPA.[17] The court reinstated that portion of the

indictment and the government will be permitted to pursue that theory of liability in further proceedings in the case.

IMPLICATIONS

Given the tendency of companies subject to FCPA-related allegations to enter into negotiated settlements with the DOJ and SEC, litigated decisions construing the FCPA have been rare and largely limited to claims against individuals, who have less incentive to settle. Given this scarcity of judicial opinions construing the FCPA, decisions such as *Hoskins* provide useful guidance as to the elements and scope of liability under the statute.

Like *Castle* before it, the *Hoskins* decision demonstrates an unwillingness on the part of certain courts to expand FCPA-related liability beyond the categories of persons explicitly subject to the statute. It potentially places a significant limitation on the application and extraterritorial reach of the FCPA and jeopardizes the government's ability to charge foreign companies and individuals who have conspired to violate the FCPA, but who are not agents, employees, directors, or officers of any company that issues stock on a U.S. exchange or any other U.S. company and have not taken any action in furtherance of the FCPA violation while in the United States. Several high-profile FCPA settlements in recent years, including in connection with the TSKJ joint venture, have appeared to rely on conspiracy and complicity theories invalidated by *Hoskins*.

The degree to which this limitation will prove meaningful, however, remains to be seen. As the *Hoskins* decision makes clear, the government frequently takes an expansive view of the doctrine of agency in making its charging decisions. It is therefore possible that the government will be able to avoid the practical effect of the decision's holding in many cases by using agency theories to charge foreign individuals and companies that otherwise would have been charged as conspirators or accomplices before *Hoskins*. The DOJ's continued pursuit of such a theory against Hoskins will provide some indication of the future viability of that path as an alternative to conspiracy liability in cases in which a defendant's agency relationship is unclear.

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ENDNOTES

[1] *United States* v. *Hoskins*, -- F.3d --, 2018 WL 4038192, at *1-2 (2d Cir. Aug. 24, 2018).

[2] *Id*. at *2.

[3] *Id*.

[4] Judge Lynch filed a separate concurring opinion, in which he described *Hoskins* "as a close and difficult case" (*id*. at *25) and noted that Congress "might want to revisit the statute with this case in mind, as the result we reach today seems to me questionable as a matter of policy." *Id*. at *29.

[5] *Id*. at *1.

[6] At several points in the opinion, the court describes the FCPA as imposing liability on foreign nationals only where they are employees, agents, directors, or officers of "American" companies or "American" issuers. *See, e.g.*, *id.* at *22. But the FCPA applies not only to companies organized under U.S. law, but to companies organized under the laws of foreign countries that have securities listed on a U.S. exchange.

[7] *Id*. at *1, 12-13. Although the language "while in the territory of the United States" appears to require the physical presence of the defendant (or his principal) in the United States (an interpretation adopted by the *Hoskins* court), the DOJ has implicitly taken the position in certain prior enforcement actions, including in connection with the JGC Corp. settlement, that merely "causing" an action to occur in the United States (*e.g.*, a payment effected through U.S. correspondent accounts) is sufficient to satisfy that requirement.

[8] *Id*. at *5.

[9] *Id*.

[10] *Id*. at *11.

[11] *Id.* (citing *United States* v. *Castle*, 925 F.2d 831 (5th Cir. 1991).

[12] *Id*. at *12.

[13] *Id*. at *12-13 ("The single, obvious omission is 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.").

[14] *Id*. at *16-17.

[15] *Id*. at *22-24 (quoting *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016)).

[16] *Id.* at *24. The lower court ruling appealed by the government permitted the government to proceed under an agency theory to charge Hoskins with conspiring with other agents and employees of Alstom U.S., but had precluded the government from pursuing a theory premised on Hoskins allegedly entering into a conspiracy with other foreign nationals, even if the government could establish that Hoskins did so as an agent of Alstom U.S. (on the basis that the latter theory required Hoskins to have been present in the U.S.).

[17] *Id*.

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