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Second Circuit Rejects Expansive Use of Conspiracy for FCPA

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The Second Circuit issued its judgment on the case we have been monitoring, *U.S. v. Hoskins*. The court held that the "**government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes**."

DOJ Theory Rejected

The holding is of significant interest as it narrows the DOJ's jurisdictional reach over nonresident foreign nationals. Notably, this ruling directly contradicts the DOJ and SEC's FCPA Resource Guide, which states that the U.S. government may hold non-resident foreign nationals liable for conspiring to violate the FCPA "even if they are not, or could not be, independently charged with a substantive FCPA violation." The FCPA Resource Guide notes "the United States generally has jurisdiction over all conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States." The FCPA Resource Guide even provides a hypothetical to illustrate this point.

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Open Questions After *Hoskins*

The Second Circuit's *Hoskins* opinion leaves open multiple questions. First, will the DOJ continue to pursue the same Hoskins-style FCPA prosecutorial theory in other Circuits? Although *Hoskins* is binding on the DOJ in the Second Circuit, nothing precludes it from pursuing its theory in other Circuits, perhaps in the hopes of generating a Circuit split, which would enhance the odds of Supreme Court review.

Second, the Second Circuit's opinion does not dispose of all charges against Hoskins. He still faces counts including money laundering that he did not challenge on appeal. This is noteworthy because, in addition to its expansive jurisdictional theory of prosecution under the FCPA, the DOJ has been aggressive in using the Money Laundering Control Act ("MLCA") to reach conduct in international bribery cases that fall outside the FCPA. Will the Second Circuit's opinion prompt more challenges to the DOJ's theories of prosecution under the MCLA?

As always, we will update you as we closely monitor significant developments impacting the DOJ's ability to assert jurisdiction over foreign defendants for conduct outside U.S. territory.

Detailed information on the *Hoskins* case is below.

Background

Lawrence Hoskins is a U.K. national and former executive of the U.K. subsidiary of Alstom SA., who was charged with conspiracy to violate the FCPA for his role in bribery schemes involving the U.S. subsidiary, Alstom Power U.S. Hoskins is not employed by Alstom Power U.S. and was not physically in the U.S. during the alleged bribery scheme.

On August 13, 2015, the U.S. District Court for the District of Connecticut granted in part Hoskins's motion to

dismiss Count One of the Third Superseding Indictment on the grounds that it charges a legally invalid theory that Hoskins could be criminally liable for conspiracy to violate the FCPA even if the evidence fails to establish that he was subject to criminal liability as a principal, by being an agent of a domestic concern. The court concluded that where Congress chooses affirmatively to exclude certain classes of individuals from liability under a criminal statute, prosecutors may not circumvent that exclusion by charging such individuals with conspiracy to violate that statute. It was held that the government could not proceed to trial on the conspiracy theory, but instead would need to prove that Hoskins fell within the class of individuals subject to liability (i.e. that he was, in fact, an agent of a domestic concern or committed violations while in the U.S.).

Appeal

The Second Circuit presumed for purposes of appeal that Hoskins was a foreign national who never set foot in the U.S. or worked for a U.S. company during the alleged scheme. The court examined whether he may nonetheless be held liable under a conspiracy or complicity theory for violating the FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholder, and persons physically present within the U.S. "[C]an a person be guilty as an accomplice or co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?"

On August 24, 2018, the court determined that, because the FCPA defines precisely the categories of persons who may be charged for violating its provisions and also states clearly the extent of its extraterritorial application, the FCPA does not comport with the government's use of the complicity or conspiracy statutes, and affirmed the lower court in part. As to the second object of the conspiracy, however, the Second Circuit reversed the lower court. The government will be permitted to attempt to prove that Hoskins acted *as an agent of a domestic concern* when conspiring with employees and other agents of that domestic concern who took part in the scheme while in the U.S.

In reaching its decision, the court found that, similar to the Supreme Court's interpretation of the Mann Act in *U.S. v. Gebardi*, the FCPA contains no provision assigning liability to a nonresident foreign national, acting outside the U.S., and who is not an officer, employee, or agent of domestic concerns and issuers. The Second Circuit noted that courts will not apply a U.S. law extraterritorially unless the affirmative intention of Congress is clearly expressed. To the contrary, the FCPA's legislative history shows Congress explicitly recognized that a statute focusing on criminalization required a delicate touch where extraterritorial conduct and foreign nationals were concerned. "Protection of foreign nationals who may not be learned in American law is consistent with the central motivations for passing the legislation, particularly foreign policy and the public perception of the United States. And the desire to protect such persons is pressing when considering the conspiracy and complicity statutes: these provisions are among the broadest and most shapeless of the American law, and may ensnare persons with only a tenuous connection to a bribery scheme." The Second Circuit also looked to statutes with extraterritorial application, and concluded that the application is limited by the statute's terms. Furthermore, courts have repeatedly ruled that generally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute.

Limited Applicability

The concurrence emphasizes that the *Hoskins* opinion applies to a narrow group of statutes. The "baseline principle" is "universally held" that theories of conspiracy and aiding and abetting allow an individual to be held responsible even though not among the "particular types of people" who are enumerated in a statute. The exception to the general rule found to apply in this case was "construed narrowly."