THE
NATIONAL LAW REVIEW

Second Circuit Rejects Government's Expansive Theory in Ruling that FCPA Does Not Extend to Foreign Nationals Without U.S. Ties

Friday, August 31, 2018

The Second Circuit ruled on August 24 in *United States v. Hoskins* that the Foreign Corrupt Practices Act (FCPA) does not apply to foreign nationals who do not have ties to United States entities for bribery crimes that take place outside of U.S. borders. In doing so, the court rejected the government's broadened theory of prosecution against Lawrence Hoskins, a U.K. citizen and former executive of the U.K.-based subsidiary of Alstom S.A., a global company headquartered in France that provides power and transportation services. *United States v. Hoskins*, No. 16-1010-CR, 2018 WL 4038192, at *1 (2d Cir. Aug. 24, 2018).

Drinker Biddle

Article By Jordan P. DiPinto
Mary P. Hansen Drinker Biddle & Reath LLP
Securities Law Perspectives

Corporate & Business Organizations
Litigation / Trial Practice
Criminal Law / Business Crimes
2nd Circuit (incl. bankruptcy)

The alleged bribery scheme centers on Alstom S.A.'s American subsidiary, Alstom Power, Inc. (Alstom U.S.), headquartered in Connecticut. Hoskins was one of four Alstom executives charged with facilitating bribes to Indonesian officials in order to help the company win a $118 million power plant contract in Indonesia between 2002 and 2009. In 2014, Alstom S.A. pled guilty to the charge and paid a then record-setting $772 million fine.

The FCPA prohibits American companies and American persons, as well as their agents, from using interstate commerce in connection with the certain payments, or bribes, of foreign officials. 15 U.S.C. § 78dd-2. The FCPA likewise prohibits foreign persons or businesses from taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States. 15 U.S.C. § 78dd-3. Hoskins never worked directly for Alstom U.S. or traveled to the U.S. while the alleged scheme was ongoing. However, he was a former executive of the U.K subsidiary of the Alstom S.A., the parent company of Alstom U.S. that allegedly paid bribes to Indonesian officials. Based on his position, the government indicted Hoskins as an *agent* of Alstom U.S. under multiple theories of liability including conspiring to violate the FCPA.

The Second Circuit was faced with deciding the issue of whether a foreign person who does not reside in the United States can be liable for conspiring or aiding and abetting a U.S. company to violate the FCPA if that individual is not in the categories of principal persons covered in the statute. As the court phrased it, "[i]n other words, can 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?" The Second Circuit held that such a person could not be liable.

In their analysis, the court noted that the FCPA defined precisely the categories of persons who may be charged and the statute clearly states the extent of its extraterritorial application. "The statute includes specific provisions covering every other possible combination of nationality, location, and agency relation, leaving 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."

While the government argued that U.S. law has historically allowed for individual liability of a crime even if that person was incapable of committing the substantive offense, the Second Circuit noted that FCPA legislation clearly did not intend that accomplice liability extend to persons known as the "affirmative-legislative-policy exception." The court explained that there is no specific provision in the FCPA which assigns liability to persons who are "nonresident foreign nationals, acting outside American territory, who lack an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies." The court

also noted that the legislative intent behind the language of the FCPA was to protect foreign nationals who may not know American law.

The impact of the Second Circuit's decision not to extend FCPA liability to Hoskins will have ongoing consequences, as recognized in the case's concurring opinion by Judge Gerard E. Lynch. "It is for Congress to decide whether there are sound policy reasons for limiting the punishment of foreign nationals abroad to those who are agents of American companies, rather than to those who make American companies their agents. Our only task is to enforce the laws as Congress has written them." But the impact of the decision in light of the current FCPA statute, as Judge Lynch notes, creates a pervasive result: "It makes little sense permit the prosecution of foreign affiliates of United States entities who are minor cogs in the crime, while immunizing foreign affiliates who control or induce such violations from a high perch in a foreign parent company. That is the equivalent of punishing the get-away driver who is paid a small sum to facilitate the bank robber's escape, but exempting the mastermind who plans the heist."

While the Second Circuit's decision in *Hoskins* may have limited the scope of foreign individuals in FCPA cases for now, it is likely that the DOJ will continue to prosecute similar cases that test the jurisdictional reach of the FCPA.