KIRKLAND ALERT

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Second Circuit Draws a Line in the Sand: DOJ Cannot Use the Conspiracy and Complicity Statutes to Expand the FCPA's Extraterritorial Reach

Overview

On August 24, 2018, in a closely followed case, the U.S. Court of Appeals for the Second Circuit issued an opinion that clarified the application of the Foreign Corrupt Practices Act ("FCPA") to non-U.S. persons. The case centers on the U.S. Department of Justice's ("DOJ") prosecution of Lawrence Hoskins for conspiring to violate the FCPA and aiding and abetting the violation. Hoskins is a British national based in Paris who worked for the U.K. subsidiary of French company Alstom S.A., and therefore did not fall into one of the jurisdictional hooks set forth in the FCPA. The DOJ attempted to bypass a jurisdictional requirement — that non-U.S. persons need to be physically present in the U.S. to commit a principal violation of the FCPA — by arguing that Hoskins could be held liable as an accomplice or co-conspirator to the FCPA violation. In a lengthy opinion that walks through the FCPA's legislative history, the Second Circuit rejected the DOJ's approach, concluding that the FCPA defines precisely which categories of defendants can be liable for violating its provisions, and that these explicit categories necessarily restrict the application of the conspiracy or complicity statutes. However, the court held that the DOJ could still pursue its case against Hoskins as an agent of a U.S. company, leaving open a significant exposure avenue for foreign nationals who are not directly employed by U.S. companies.

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What Happened?

Hoskins concerns an alleged scheme whereby several employees and executives of Alstom S.A., a multinational transportation and infrastructure development company based in France, bribed Indonesian officials to secure a $118 million contract from the Indonesian government. The alleged bribery largely took place through Alstom's U.S. subsidiary, Alstom Power, Inc. ("Alstom U.S."), which retained two consultants who bribed the officials. The DOJ alleged that Hoskins, who worked for Alstom's U.K. subsidiary, was one of the people who approved the selection of — and payment to — the consultants, knowing that a portion of these payments would go to the Indonesian officials. However, Hoskins never worked for Alstom U.S. and did not enter the U.S. while the alleged bribery was taking place, though he did email and call the Alstom U.S. employees who were involved. Hoskins was

arrested in 2014 while visiting the U.S. Virgin Islands, and was subsequently charged with conspiracy to violate and aiding and abetting violations of the FCPA.

The Resolution

Relying heavily on the FCPA's legislative history, the Second Circuit held that a person could not be guilty as an accomplice or a co-conspirator for an FCPA crime that he is incapable of committing as a principal. The FCPA imposes liability on (1) U.S. companies, U.S. persons, and issuers of U.S. securities, and their executives, officers, employees, and agents that make use of interstate commerce in furtherance of a corrupt payment, and (2) foreign businesses or persons taking acts to further corrupt schemes while in the U.S.[1] The statute's carefully worded text — combined with the well-established precept that U.S. laws do not apply extraterritorially without express congressional authorization — led the court to conclude that Congress did not intend for defendants outside of these specifically enumerated categories to be subject to conspiracy or complicity liability. However, the Second Circuit overruled the lower court's ruling striking down the DOJ's theory that Hoskins violated the FCPA by acting as an agent of Alstom U.S. Thus, Hoskins still faces potential liability for an FCPA violation as an agent of a U.S. company.

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Key Takeaways

Limited Availability of Secondary Theories of Liability: The DOJ and the U.S. Securities and Exchange Commission ("SEC") have historically taken an aggressive approach to jurisdiction, particularly through secondary liability theories such as conspiracy and aiding and abetting. In fact, the DOJ and SEC's FCPA Resource Guide states that "[a] foreign national or company may also be liable under the FCPA if it aids and abets, conspires with . . . an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States," a statement that is seemingly at odds with the Second Circuit's decision. The *Hoskins* decision may limit the U.S. government's ability to continue to pursue foreign nationals under conspiracy or complicity charges.

Hoskins Can Still Be Liable as an Agent: The Second Circuit revived the DOJ's theory that Hoskins violated the FCPA by acting as an agent of Alstom U.S. The existence of an agency relationship between Hoskins and a U.S. "domestic concern" (Alstom U.S.) would enable the DOJ to exercise jurisdiction over Hoskins despite the fact that Hoskins' misconduct occurred outside the U.S. Going forward, the government is more likely to use an agency theory of liability to pursue conduct against defendants with weaker connections to the U.S., such as non-U.S. residents. Indeed, the definition of "domestic concern" is broad enough to capture all U.S. citizens and residents, not just U.S. businesses. Thus, arguably, the government could charge a foreign national with an FCPA violation if that national was simply acting on behalf of a U.S. resident.

Other Theories Unaffected: Despite the *Hoskins* ruling, defendants still have exposure for other fraud theories, including mail or wire fraud (e.g., through the use of U.S. banks or U.S.-based email servers), even if they are not physically present in the U.S. In fact, Hoskins is facing money-laundering charges as part of the same underlying indictment.

Potential for Increased International Cooperation: Even if the U.S. may not be able to bring an action against an individual, other foreign enforcement authorities may still be able to do so, depending on the particular facts and circumstances of the case. Given the increased level of cooperation between the U.S. and international enforcement authorities, we might see more coordination with respect to criminal charges against foreign individuals.

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1 15 U.S.C. § 78dd-1 et seq.

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