FCPA Liability for Foreign Individuals – the Second Circuit Enforces Some Limits

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Introduction

In the recent, long-awaited decision in *United States v. Hoskins*[1], the U.S. Court of Appeals for the Second Circuit rejected the expansive interpretation of FCPA jurisdiction over foreign individuals put forward by the U.S. Department of Justice. Instead, the court engaged in a painstaking analysis of the legislative history of the FCPA and concluded that Congress intended to limit FCPA jurisdiction to cover only the specific categories of defendants listed in the statute, and that prosecutors cannot use generalized principles of criminal conspiracy or accomplice liability to reach foreign individuals not otherwise expressly covered.

By precluding conspiracy and accomplice liability, the decision represents an important check on the U.S. government's efforts to apply the FCPA to foreign individuals acting outside the U.S. However, the decision does not foreclose all liability. The government can still prosecute foreign individuals in circumstances where it is able to prove that the individual acted as an "agent" of a U.S. company in carrying out the bribery.

Background Allegations

The individual here – Lawrence Hoskins – is a UK citizen employed by a UK subsidiary of Alstom S.A. ("Alstom"). Alstom is a global company headquartered in France that provides, among other things, power services. The government alleged that Alstom's U.S. subsidiary at the time[2], Alstom Power, Inc. ("Alstom-US"), together with several individuals, retained two consultants to bribe Indonesian government officials in a scheme to help secure a $118 million power contract.

This Indonesian scheme was only one part of the conduct underlying Alstom's 2014 corporate $772 million plea deal (Alstom and a Swiss subsidiary each pled guilty to FCPA charges, and U.S. subsidiaries, including Alstom-US, entered into deferred prosecution agreements). The DOJ also brought criminal charges against a number of individuals connected with Alstom or its subsidiaries, including Hoskins.

The government alleged that Alstom-US and some of the individuals carried out activities within the U.S. For example, it alleged that one of the consultants kept a U.S. bank account, that Alstom-US paid some of the funds to the consultants from its bank accounts in the U.S., and that several Alstom-US executives discussed the bribery scheme in meetings in the U.S. and by phone and email while present in the U.S.

Hoskins, though, was in a separate category. The government alleged that Hoskins, while working in France for one of Alstom's French subsidiaries, was "one of the people responsible for approving the selection of, and authorizing payments to, [the consultants], knowing that a portion of the payments to [the consultants] was intended for Indonesian officials in exchange for their influence and assistance in awarding the [contract]." The government acknowledged, however, that Hoskins did not travel to the U.S. while the bribery scheme was ongoing, did not personally engage in any criminal conduct on U.S. soil, and only communicated with US-based conspirators by phone and email from France.

The Charges and the Appeal

The government charged Hoskins both with conspiracy and with six substantive violations of the FCPA. In a nutshell, the government based the charges against Hoskins on three independent theories of liability:

1. Hoskins allegedly acted as a "agent" of Alstom-US, and in that capacity, committed acts in violation of the FCPA (the "agency" theory);
2. Hoskins, independently of his agency relationship, allegedly conspired with Alstom-US, its employees and foreign consultants, to violate the FCPA (the "conspiracy" theory), and
3. Hoskins, independently of his agency relationship, allegedly aided and abetted the FCPA violations committed by Alstom-US, its employees and foreign consultants (the "accomplice" or "complicity" theory).

Hoskins challenged the legal basis for the conspiracy charge, and the district court dismissed a portion of that charge. The government took the unusual step of seeking an interlocutory appeal of this partial dismissal, arguing that it improperly limited the scope of the prosecution.

The Second Circuit framed the central question on appeal 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 person physically present in the United States. In 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 first theory (acting as an agent) was not part of this appeal, and the Second Circuit was careful to exclude it from the scope of this decision. Hoskins is still facing potential criminal liability on the theory that he acted as an "agent" of Alstom-US.

Conspiracy and Accomplice Liability Generally

Federal law imposes criminal liability on those who "conspire" with another to commit an offense. 18 U.S.C. § 371. Conspiracy merely requires proof of both an "agreement" to commit the offense and the taking of some step in furtherance of that agreement. Federal law also imposes criminal liability on a person as an accomplice if that person "aids, abets, counsels, commands, induces or procures" the commission of the offense by another person. 18 U.S.C. § 2(a). The Second Circuit noted the long-established principle that conspiracy and accomplice liability ordinarily apply even if the person could not have been held liable for committing the substantive crime. So, absent some exception to the usual rules, if Hoskins committed the conduct alleged in the indictment, he could be found guilty of conspiracy to violate the FCPA, and (as an accomplice) of the substantive FCPA violations charged.

The Second Circuit found such an exception in the affirmative legislative policy behind the enactment of the FCPA, reinforced by recent Supreme Court precedent emphasizing caution in the extraterritorial application of U.S. law.

The Second Circuit engaged in a comprehensive and detailed analysis of the legislative history of the FCPA, both its original enactment in 1977 and its amendment in 1998 to implement the OECD Convention. The 1998 amendments made clear that foreign nationals fit within the coverage of the FCPA in one of three ways: (1) those who acted on American soil; (2) those who were officers, directors, employees or shareholders of US companies; and (3) those who were agents of US companies. The court concluded that this legislative history demonstrated a conscious choice by Congress to include foreign nationals within the FCPA's jurisdiction only when they are in one of these three particular categories, and to exclude foreign nationals from jurisdiction when they are not. It went on to conclude that generalized conspiracy and accessory liability principles could not be used to circumvent that congressional intent.

The Second Circuit emphasized "a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world."[3] This presumption against extraterritorial application can only be overcome by a "clearly expressed congressional intent" to do so. Because the text and legislative history of the FCPA does not contain such clearly expressed congressional intent, the court concluded that it would be improper to allow the general conspiracy and accomplice liability statutes to circumvent the presumption.

One member of the panel, writing separately to emphasize his view of the closeness of this case, suggested that Congress might want to revisit the FCPA in light of this decision. This particular judge noted the "perverse result" that Hoskins maybe convicted if the government establishes that he functioned as the "agent" of the U.S. company, but he will avoid conviction if he "directed the actions of the American company in the interests of its French parent company" (which would seem to be much more culpable behavior).

Conclusion

In Hoskins, the Second Circuit has now made clear that there is no FCPA jurisdiction over a foreign national who acts outside the United States so long as the individual is not acting on behalf of an American company as an officer, director, employee, agent or shareholder. Instead, the FCPA provides for jurisdiction ONLY over the following four categories of persons:

1. American citizens, nationals or residents, regardless of whether their conduct occurred in the U.S. or abroad;
2. American companies, regardless of whether their conduct occurred in the U.S. or abroad;
3. Agents, employees, officers, directors and shareholders of American companies, including both U.S. and foreign persons, when they act on the company's behalf, regardless of whether their conduct occurred in the U.S. or abroad; and
4. Foreign persons (including foreign nationals and foreign companies) who violate the FCPA while present in the U.S.

By precluding conspiracy and accomplice liability, the decision represents an important check on the U.S. government's efforts to apply the FCPA to foreign individuals acting outside the U.S. However, the decision does not foreclose all liability. The government can still prosecute foreign individuals in circumstances where it is able to prove that the individual acted as an "agent" of a U.S. company in carrying out the bribery.

This case is at the confluence of several forces. First, the government has increasingly sought to prosecute individuals, not just their corporate employers. Most corporations choose to resolve FCPA investigations by some form of agreement to defer charges or plead guilty, and pay substantial financial penalties. Individuals, however, have been more willing to challenge the legal basis of FCPA charges, thus leading to decisions such as this one. Second, in recent years the U.S. Supreme Court has repeatedly signaled caution in the extraterritorial application of U.S. law. This decision fits into that overall trend. Third, the government continues to seek to prosecute foreign actors in U.S. courts for FCPA violations, even while it is also working more cooperatively with prosecutors in other countries on parallel investigations. This decision may lead to a further rebalancing of prosecution efforts between the DOJ and its foreign counterparts, in which foreign prosecutors take more of the lead in bringing charges against foreign individuals.

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1. *United States v. Hoskins*, No. 16-1010-CR (2d Cir. Aug. 24, 2018).

2. Subsequently, Alstom sold its Alstom-US subsidiary, so it is now no longer a part of Alstom.

3. *RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090, 2100 (2016).

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