Legal Alert: Shortening the long arm of the law—the Second Circuit limits the extraterritorial reach of the Foreign Corrupt Practices Act

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On August 24, 2018, the US Court of Appeals for the Second Circuit in United States v. Hoskins rejected the government’s broad reading of the Foreign Corrupt Practices Act (FCPA) and ruled that a foreign national without ties to US entities cannot be tried as a conspirator or accomplice under the FCPA for bribery crimes that occur outside of the United States. This decision limits the prosecutorial reach of the most significant US law affecting foreign corporations and individuals.

In Hoskins, Lawrence Hoskins, a former executive of a British subsidiary of a global corporation headquartered in France, Alstom UK, was charged with facilitating bribes to help Alstom win a multi-million dollar power plant contract in Indonesia between 2002 and 2009. In 2014, Alstom pled guilty and agreed to pay $772 million, which at the time was the largest-ever resolution of foreign bribery charges.

In the instant case, the Department of Justice (DOJ) indicted Hoskins for conspiring to violate the FCPA, as well as other theories of liability, arguing that the former executive conspired with the US subsidiary of the global corporation to retain consultants to bribe the Indonesian officials to secure the power plant contract from the Indonesian government. While several aspects of the scheme had connections with the US that were sufficient to trigger FCPA jurisdiction against Alstom, including payments in and out of US bank accounts and meetings held in the US by US executives, Hoskins never traveled to the US while the alleged scheme was ongoing.

The FCPA establishes liability for three categories of persons in the act of paying bribes to government officials: (1) American citizens, residents, nationals or companies that violate the FCPA domestically or abroad; (2) agents, employees, officers, directors and shareholders of American companies acting on the company’s behalf that violate the FCPA domestically or abroad; and (3) foreign persons or businesses that violate the FCPA while present in the United States. Since Hoskins was never present in the US, the question for the court was whether an individual can be held liable for conspiring to violate the FCPA, if he could not be held primarily liable for any violation. The court held that Hoskins could not be held liable.

The government argued that it is a long-standing principle of US law that an individual can be held liable for a crime even if that person was incapable of committing the substantive offense, such as if that person conspired or otherwise was complicit in the criminal activity. The Second Circuit, however, noted that this principle is limited to circumstances where it is clear that the legislature did not intend that accomplice liability extend to certain persons, known as the “affirmative-legislative-policy exception.” The Second Circuit observed that there is no provision specifically assigning liability to persons who...
are “nonresident foreign nationals, acting outside American territory, who lack an agency relationship with a US person, and who are not officers, directors, employees, or stockholders of American companies.”

Further, the court noted that the legislative history of the FCPA indicates that Congress took particular care to craft the FCPA to avoid applying it extraterritorially except in certain limited instances. The legislative history repeatedly recognizes that the FCPA must tread lightly when exposing foreign nationals to criminal liability under US laws. The court found that one of the central motivations for the FCPA language was protecting foreign nationals who may not know American law. It emphasized that the conspiracy and complicity statutes “are among the broadest and shapeless of American law, and may ensnare persons with only a tenuous connection to a bribery scheme.”

Finally, the court found that where Congress has explicitly provided the limits of the extraterritorial reach of the FCPA, the presumption against extraterritoriality limits its application to only those provisions. The court held that conspiracy or complicity theories simply cannot expand these provisions.

The court’s decision to limit jurisdiction in this case will have ongoing implications, as recognized in Judge Gerard E. Lynch’s concurring opinion. Judge Lynch, while agreeing with the result under the current language of the FCPA, noted that it could have the perverse result of exempting foreign nationals from prosecution under the FCPA if they mastermind a bribery scheme, as long as they are not agents of a US company and do not commit any of the acts on US soil. On the other hand, a low-level employee of a US company who engages in this activity in his/her home country would be liable. Judge Lynch suggests that Congress must now determine whether this is the intended effect of the FCPA, as interpreted by the court.

However, the Second Circuit reversed the district court’s dismissal of allegations that Hoskins was liable as an agent of a domestic concern. The government will be allowed to argue that Hoskins conspired as an agent, which “places him squarely within the terms of the statute.” Because “there is no affirmative legislative policy to leave his conduct unpunished, nor is there an extraterritorial application of the FCPA,” the court held that the government should have the opportunity to prove these agency allegations.

In recent years, the DOJ has made the prosecution of responsible individuals a priority in its FCPA enforcement program. While the Second Circuit’s Hoskins decision has limited the scope of the statute in certain respects, the case certainly suggests that the DOJ will continue to test the jurisdictional limits of this statute in an effort to continue to hold accountable individuals responsible for multinational bribery crimes.

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2 The court also referred to the Organisation for Economic Co-operation and Development Convention on
Combating Bribery of Foreign Public Officials in International Business Transactions, under which signatories, including England and France, are committed to enacting legislation similar to the FCPA. Notably, the UK Serious Fraud Office pursued bribery, corruption and conspiracy to corrupt charges against Alstom’s business units and certain employees, but has not brought charges against Hoskins, a UK national employed as an executive by Alstom’s UK subsidiary.

In November 2017, the DOJ announced a revised FCPA Enforcement Policy, which offers a presumption of no prosecution to those companies that self-report FCPA violations. Among the considerations for self-reporting is the requirement that companies disclose all relevant facts about individuals involved in a violation of the law.

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