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Two Seyfarth Shaw LLP attorneys discuss a recent noteworthy Second Circuit decision limiting the federal government's attempt to expand those categories of individuals who may be liable for bribery under the FCPA. The authors note that the upshot of the *Hoskins* ruling is that if someone cannot be prosecuted directly under a substantive FCPA charge, they cannot be prosecuted indirectly through use of a conspiracy or accomplice theory of FCPA liability.

INSIGHT: Government's Reach Limited as Court Disallows Conspiracy and Accomplice Liability Theories in Certain FCPA Cases

BY ANDREW BOUTROS AND JOHN SCHLEPPENBACH

At a high level, the Foreign Corrupt Practices Act applies to ''issuers'' (''dd-1'' jurisdiction), ''domestic concerns'' (''dd-2'' jurisdiction), as well as those acting on behalf of issuers and domestic concerns, in addition to those acting ''while in the territory of the United States'' (''dd-3'' jurisdiction), all in violation of the FCPA's substantive elements. 15 U.S.C. §§ 78dd-1, dd-2, and dd-3. Notwithstanding the statute's enumerated jurisdictional prongs, there has been a steady march by enforcers to expand the FCPA's reach and application.

Thus, it is significant that the U.S. Court of Appeals for the Second Circuit in *United States v. Hoskins* (Aug. 24, 2018) recently curtailed the federal government's attempt to further expand the grasp of the FCPA. The court ruled that the government could not use a conspiracy or accomplice theory of liability to expand the FCPA's application to a nonresident foreign national who was not an employee or agent of an American entity and whose acts had occurred entirely outside the United States.

The essence of the court's holding is that given the FCPA's clear structure, if the government cannot prosecute a person or entity directly under the FCPA, it may not do so indirectly through backdoor theories of conspiracy or accomplice liability. For foreign nationals and business executives (and their employers) residing overseas without a nexus to the United States, *Hoskins* is a significant, clarifying opinion.

Even more, the court's holding also has abrogated certain portions of the government's FCPA guidance issued in 2012, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. At least in the Second Circuit—if not more broadly, given the court's significant influence—no longer can the Department of Justice or Securities and Exchange Commission claim as they did in their Resource Guide that an entity or person that has ''never taken any actions in the territory of the United States, [ ] can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges under Pinkerton liability, namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy.''

In this regard, not only has *Hoskins* repudiated parts of the enforcement community's long-held (and espoused) interpretation of the FCPA, but it may serve as a forerunner of things to come as it emboldens defen-

dants to continue to challenge other DOJ and SEC interpretations of the statute that are largely anchored by settlement documents and not judicial explications.

The Government's Allegations and the District Court's Ruling

The government in *Hoskins* alleged that Lawrence Hoskins, who worked for the French company Alstom S.A., was one of the people responsible for selecting consultants and approving payments to them for the purposes of bribing Indonesian officials to secure a $118 million contract. Hoskins was technically employed by Alstom's U.K. subsidiary, but assigned to work with its French subsidiary, and the bribery scheme involved payments from Alstom's U.S. subsidiary, which was headquartered in Connecticut. The government sought to prosecute Hoskins for conspiracy to violate the FCPA and several substantive violations of the FCPA, based on a theory that he aided and abetted Alstom U.S. or served as its agent.

The connections the government alleged between Hoskins and the United States were attenuated. One of the consultants who made the improper payments kept a bank account in Maryland, and in some cases, funds for bribes allegedly were paid from bank accounts held by Alstom and its business partners in the United States to that Maryland account. The indictment also stated that several executives of Alstom U.S.—but not Hoskins—held meetings within the United States regarding the bribery scheme and discussed the project by phone and email while present on American soil. The government conceded that, although Hoskins ''repeatedly e-mailed and called . . . U.S.-based coconspirators'' regarding the scheme ''while they were in the United States,'' he ''did not travel here'' while the bribery scheme was ongoing. This concession was significant because under dd-3 liability, the government can only exercise enforcement jurisdiction over an individual (or entity) to the extent that such individual ''*while in the territory of the United States*, corruptly [ ] makes use of the mails or any means or instrumentality of interstate commerce'' in violation of the FCPA's elements. (Emphasis added).

Hoskins moved to dismiss the conspiracy count of the indictment, arguing that he could not be charged with conspiracy to violate the FCPA if he did not fall into one of the statute's enumerated categories of defendants, *i.e.*, those falling under the statutory jurisdictional hooks of dd-1, dd-2, or dd-3. The district court granted the motion in part, citing U.S. Supreme Court precedent stating that ''where Congress chooses to exclude a class of individuals from liability under a statute, the Executive may not override the Congressional intent not to prosecute that party by charging it with conspiring to violate a statute that it could not directly violate.''

But the court also denied the motion in part because, to the extent the government has charged Hoskins as an agent of Alstom U.S., he fell within one of the categories of defendants enumerated by the FCPA.

The Second Circuit's Decision

The government filed an interlocutory appeal from the district court's decision, which Hoskins challenged on jurisdictional and substantive grounds.

After first rejecting Hoskins' contention that the court lacked jurisdiction because the government was appealing the dismissal of only a portion of a count in the indictment, as opposed to an entire count, the Second Circuit proceeded to the merits of the partial dismissal. The court presumed for purposes of its decision that Hoskins was neither an employee nor an agent of a U.S. entity, either of which would clearly bring him within the FCPA's grip.

Thus, the issue was whether Hoskins could be charged under a conspiracy or accomplice theory of liability for FCPA violations he was incapable of committing as a principal.

The court noted that, as a general matter of federal law, an individual need not be capable of committing the substantive crime to be liable for conspiracy. There is an important exception to this rule, however, where it is clear from the structure of a legislative scheme that the lawmaker must have intended that accomplice liability not extend to certain persons.

The court cited the example of the Mann Act, which criminalized human trafficking; Congress clearly did not intend that the individuals trafficked be liable for conspiracy, even if they were willing participants.

The court found a similar legislative intent here, observing that the FCPA ''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.''

The court found support for this conclusion in its thorough review of the legislative history of the FCPA, the 1998 amendments, and related enactments, noting the following:

- The initial draft of the FCPA placed liability largely upon entities and allowed prosecution of individuals for conspiring with entities or aiding and abetting them. The enacted version changed this to instead specifically identify how individuals could be liable, suggesting a desire to avoid broad application of those conspiracy and aiding and abetting theories.

- Although the 1998 amendments extended the FCPA's jurisdictional scope, they did not embrace nonagent foreign individuals acting abroad.

- Congress expressed concern that the FCPA not overreach in its prohibitions against foreign persons who may not be learned in (much less aware of) American law.

The court also relied on the general presumption against extraterritoriality, stating that it is a ''basic premise of our legal system that, in general, United States law governs domestically but does not rule the world.'' Although the FCPA clearly has some extraterritorial application, the court concluded that precedent requires such application be ''limited by the statute's terms.''

In other words, since the prosecution of foreign nonagents acting abroad was not explicitly authorized by the statute, it could not be inferred.

The Concurrence

Although he joined in the court's unanimous opinion, Judge Gerald E. Lynch also wrote a separate concur-

rence to explain his view that this was a close case. He discussed the difficulty of determining when a legislature ''must have'' intended to exempt a particular class of persons from prosecution, such that the general rule favoring conspiracy or accomplice liability did not apply. He noted that the Model Penal Code would exempt only two classes of individuals from accomplice liability:

(1) victims of the offense, and

(2) those whose conduct is inevitably incident to the commission of the offense (such as the recipient of a bribe in the FCPA context).

Judge Lynch expressed uncertainty that Hoskins fell in either of those categories. Nevertheless, he concluded that ''the extraterritorial effects of the FCPA require us to exercise particular caution before extending its reach even farther than that expressly declared by the statutory text.'' He invited Congress to revisit the issue, however, to make sure that it was resolved consistently with its policy objectives.

Conclusion

Notably, the Second Circuit's holding in *Hoskins* rejected not just the government's position in that case, but also the expansive view of the FCPA's scope that the DOJ and the SEC have been espousing for years. In the 2012 FCPA resource guide, those agencies stated that:

> Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for *agreeing* to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation.

In light of *Hoskins*, the enforcement agencies cannot stand behind that interpretation anymore, at least in the jurisdictions bound by the Second Circuit. And, it is possible that *Hoskins* will serve as a catalyst to cause the government to revisit its enforcement position in this regard as a matter of national enforcement policy. As such, it would not be surprising—indeed, we expect—to see the DOJ and the SEC amend their guidance to acknowledge, in some fashion, *Hoskins's* holding.

Notwithstanding this setback for the government, the DOJ's and the SEC's FCPA guidance is valuable and entities should take it seriously—and should continue to rely on it proactively as part of their FCPA compliance initiatives. But, as the FCPA continues to mature and as more *individuals* are charged under the statute, the FCPA legal bar and their varied clients should expect to continue to see challenges brought by individuals to the statute's jurisdictional and substantive elements. Indeed, one does not need to look far to see proof of that. On the heels of the Second Circuit's decision, another defendant (Ng Lap Seng) is asking the Second Circuit to clarify other provisions of the FCPA, namely, the corrupt intent element as well as the obtain-or-retain-business element. *SeeUnited States v. Ashe (Seng)*, No. 18-1725.

Although entities are often understandably unwilling to litigate the FCPA's jurisdictional and substantive provisions since to do so requires the company to be charged, which carries significant collateral consequences, individuals charged with FCPA offenses can be expected to continue to test the FCPA's scope and elements. And, so long as the government keeps charging individuals, as current DOJ policy continues to emphasize—especially when the government does so using expansive theories of jurisdiction and liability—companies and individuals alike will benefit from those individuals litigating issues of FCPA interpretation in court.

To be sure, for individuals residing overseas, the court's holding in *Hoskins* may provide a sigh of relief at least from U.S. enforcers. What it does not do, however, is provide any relief to individuals (or entities) overseas who make improper payments beyond the reach of the United States, but well within the reach of their own local enforcement authorities or where the improper conduct occurred. As foreign enforcement authorities (such as those in Germany, the U.K., and Brazil) increase their anti-bribery enforcement efforts, nonresident foreign nationals beyond the reach of the United States should not get too comfortable that they are immune from prosecution. After all, most crimes are local and such individuals may well get snared by foreign enforcement actions.

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