JONES DAY

COMMENTARY

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# Second Circuit Rejects DOJ's Attempt to Expand Reach of the FCPA

## IN SHORT

**The Situation:** In *United States v. Hoskins*, the United States Department of Justice ("DOJ") charged a foreign national who worked in France for a British subsidiary of a French company with conspiring to violate the Foreign Corrupt Practice Act ("FCPA"), alleging that the executive was part of a scheme to bribe Indonesian officials that included U.S. persons.

**The Result:** A three-judge panel of the Second Circuit Court of Appeals held that DOJ cannot use the conspiracy and aiding and abetting statutes to expand FCPA liability to a foreign national who could not be held liable for a primary violation of the FCPA.

**The Analysis:** The Second Circuit based its holding on the carefully tailored text of the FCPA, the presumption against the extraterritorial application of U.S. law, and the legislative history of the statute, which reflects Congress's concern about the scope of the statute's extraterritorial application.

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On August 24, 2018, a three-judge panel of the Second Circuit Court of Appeals held that DOJ cannot use the conspiracy and aiding and abetting statutes to expand FCPA liability to a foreign national who could not be held liable for a primary violation of the FCPA. This holding will apply to, among others, foreign companies that do not file periodic reports with the Securities and Exchange Commission ("SEC").

In *United States v. Hoskins*, DOJ charged Lawrence Hoskins, a former executive of the French company Alstom S.A., with, among other offenses, conspiring to violate the FCPA with an Alstom U.S. subsidiary and various individuals. The government alleged that the U.S. subsidiary retained two consultants to bribe Indonesian officials who could help secure a $118 million power contract for the company. Hoskins, a foreign national, never worked directly for the U.S. subsidiary and never set foot in the United States in connection with the alleged bribery scheme. DOJ nevertheless charged Hoskins with violating the FCPA, alleging that Hoskins, while working from France, played a knowing role in authorizing payments to bribe the Indonesian officials.

By its own terms, the FCPA applies to three categories of persons: (i) issuers (*i.e.*, companies that list their securities on national U.S. exchanges or that otherwise file periodic reports with the SEC), and the issuer's officers, directors, employees, and agents; (ii) domestic concerns (*i.e.*, U.S. persons and U.S. business organizations, and their officers, directors, employees, and agents); and (iii) foreign persons and businesses that take action in the United States in furtherance of a bribery scheme. *See* 15 U.S.C. §§ 78dd-1 *et al*. Separate from the FCPA, U.S. criminal statutes make it illegal to conspire to violate federal criminal law, or to aid and abet another person to violate federal criminal law. *See* 18 U.S.C. §§ 2 and 371. The issue in *Hoskins* was whether an individual who did not fall within one of the three categories of persons who could be charged with a primary violation of the FCPA could nevertheless be charged with conspiring to commit, or aiding and abetting the commission of, an FCPA violation.

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As a general rule, conspiracy and aiding and abetting statutes do not cease to apply where a criminal law is limited to a specific class of persons. In *Hoskins*, however, the Second Circuit held that an exception to this general rule applies in the FCPA context because there was an affirmative legislative policy "that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability." The court based its holding on the carefully tailored text of the statute, the presumption against the extraterritorial application of U.S. law, and the legislative history of the statute, which reflects Congress's concern about the scope of the statute's extraterritorial application.

The government may seek *en banc* review of the *Hoskins* panel's decision (*i.e.*, review by the entire Second Circuit), or appeal to the Supreme Court. Barring a reversal, the case will proceed against

Hoskins on the government's alternative theory that he acted as an agent of the U.S. subsidiary, which was unquestionably a domestic concern and subject to the FCPA. Indeed, in the absence of conspiracy and secondary liability theories to rely on, we would expect the government increasingly to rely on the doctrine of agency as a basis to investigate and prosecute foreign companies and individuals. For companies and individuals potentially subject to FCPA liability, developments in this case merit careful attention and should be taken into account when structuring their business relationships.

## THREE KEY TAKEAWAYS

1. The FCPA applies to three specified categories of persons with a direct connection to the United States. The issue in *Hoskins* was whether an individual who did not fall within one of these categories could nevertheless be charged by DOJ with conspiring to commit, or aiding and abetting the commission of, an FCPA violation. The Second Circuit ruled against DOJ.
2. In the absence of conspiracy and secondary liability theories to rely on, expect the government increasingly to utilize the doctrine of agency as a basis to investigate and prosecute foreign companies and individuals.
3. Companies and individuals potentially subject to FCPA liability should take careful note of these developments.



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