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Expert Analysis

Questionable Extraterritorial Extension Of Foreign Corrupt Practices Act

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In recent years, application of the U.S. criminal laws to foreign nationals beyond the nation's borders has become an increasing area of dispute. For federal prosecutors, one approach has been to seek to use the breadth of conspiracy statutes and accomplice liability theories to extend their reach even beyond that of the underlying substantive criminal statute. One of the most significant areas of U.S. law enforcement's extraterritorial expansion has been the Foreign Corrupt Practices Act (FCPA), a niche notable for untested legal theories because of the dearth of cases that actually are litigated.[1] Now, however, the U.S. Court of Appeals for the Second Circuit has an opportunity to examine the validity of the government's approach in *United States v. Hoskins*,[2] an FCPA case the U.S. Department of Justice currently is prosecuting in the District of Connecticut. Given the federal courts' increasing sensitivity to issues related to extraterritoriality, the Second Circuit's decision is likely to have an impact beyond FCPA enforcement efforts.

Today many businesses operate with little regard to international borders. Nevertheless, courts repeatedly have recognized that the Justice Department's authority to police foreign conduct has its limits. For instance, attempts by the government to extend federal civil and criminal securities fraud statutes to foreign transactions and the purchase of securities outside the United States have been rejected by the courts.[3] Courts similarly have rejected efforts by the government to prosecute foreign defendants under the honest services fraud and federal funds bribery statutes for foreign activity where the only nexus to the United States alleged is that the "aim of the illegal activity was to cause harm inside the United States."[4]

Today many businesses operate with little regard to international borders. Nevertheless, courts repeatedly have recognized that the Justice Department's attempts to police foreign conduct has its limits.

The government's tendency to push the envelope regarding foreign actors has been seen most strikingly in the context of FCPA enforcement. The FCPA prohibits the bribery of foreign officials in return for favorable treatment in obtaining or retaining business. In recent years, the Justice Department broadly has interpreted the FCPA to prosecute conduct that has little contact with or effect in the United States. Many American firms that operate abroad have begun to push back against the government's aggressive tactics in this regard, most recently objecting to the Justice Department's scrutiny of corporate hiring practices abroad. Another of the Justice Department's broad policy positions—that foreign individuals and companies that are not otherwise subject to the defined extraterritorial reach of the FCPA can still be liable as conspirators or accomplices—is under scrutiny in *Hoskins*.

'United States v. Hoskins'

The defendants in *Hoskins* are alleged to have engaged in a bribery scheme over the span of seven years to secure the "Tarahan Project"—a $118 million undertaking to build power stations for Indonesia's state-owned electricity company—for Alstom Power U.S., an American company headquartered in Windsor, Conn. Lawrence Hoskins, a citizen of the United Kingdom was employed as a senior vice president for the Asian Region by Alstom Holdings, SA, the corporate parent of the various Alstom

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subsidiaries, from 2001 to 2004. The government alleges that in this role, Hoskins hired consultants to secure the Tarahan Project and authorized payments to the consultants for the purpose of paying bribes to Indonesian officials with the ability to influence the award of the contract.

Non-resident foreign nationals are not specifically within the jurisdictional reach of the statute unless they can be classified as an officer, director, employee or agent of a U.S. entity or issuer of securities. Hoskins was not a U.S. citizen or resident, was never in the United States in connection with the alleged scheme and was not employed by any of the charged entities. Initially, the government alleged in the Second Superseding Indictment only that Hoskins was liable as an agent of Alstom Power U.S.

Hoskins sought dismissal, arguing that he could not be considered an agent of Alstom Power U.S. because that entity had no control over him—control being the "sine qua non" of agency. In fact, Hoskins noted that he was an Area Senior Vice President of the parent company of Alstom Power U.S. and that in that position he was responsible for "oversight" of the subsidiaries' business efforts in his region of Asia. In other words, he exercised control over Alstom Power U.S., not vice versa.

The district court denied his motion to dismiss, finding that the question of whether Hoskins was an agent was a factual one to be decided at trial. Subsequently, however, the government filed the Third Superseding Indictment, which further alleged that, regardless of his status as an agent, Hoskins could be convicted as a conspirator and an aider and abettor of the illegal bribery without regard to his qualification as an agent of Alstom Power U.S.

Hoskins subsequently sought dismissal of the conspiracy and aiding and abetting charges arguing that, as a non-agent of a domestic concern and a foreign national who did not act within the United States, he was excepted from the class of persons who could be prosecuted under the FCPA and, therefore, he could not be convicted under a conspiracy or aiding and abetting theory. U.S. District Judge Janet Bond Arterton of the Connecticut District Court agreed and dismissed the FCPA conspiracy and aiding and abetting claims against Hoskins.[5]

As summarized by Judge Arterton in her opinion, the FCPA has three jurisdictional bases: (1) where a "domestic concern," defined as any U.S. citizen or entity, or U.S. issuer of securities, or any officer, director, employee, or agent thereof makes use of U.S. interstate commerce in furtherance of a corrupt payment; (2) where a U.S. citizen, national or resident acts outside the U.S. in furtherance of a corrupt payment, regardless of whether they make use of U.S. interstate commerce; and (3) where any person, while in the territory of the U.S., acts in furtherance of a corrupt payment, regardless of nationality and the use of interstate commerce.

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In granting Hoskins' motion to dismiss, Judge Arterton relied on the principle articulated by the Supreme Court in *Gebardi v. United States*,[6] 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.

On Sept. 9, 2016, the Justice Department filed an interlocutory appeal. The Justice Department asked the Second Circuit to answer the question whether a foreign person (who does not reside in the United States) can be liable for conspiring with or aiding and abetting a U.S. company to violate the FCPA if that individual is not in the categories of persons covered under the statute.

Conclusion

The court's ruling will have a significant impact on future cases involving foreign persons or non-U.S. companies that are not directly subject to the FCPA, especially given the dearth of judicial decisions in this area. The Second Circuit's decision also is likely to have a broader ripple effect on the government's aggressive enforcement strategies. A government victory in *Hoskins* will give the Justice Department additional justification for its aggressive enforcement efforts to police foreign actors and activity in a global economy.

1. Robert J. Anello and Kostya Lantsman, "Law vs. Lore: The Lack of Judicial Precedent in FCPA Cases," Business Crimes Bulletin (July 2015).

2. *United States v. Hoskins*, No. 16-1010 (2d Cir.).

3. Robert Anello, "What Happens Outside the USA, Stays Outside the USA: Reining in the Extraterritorial Reach of Criminal Securities Laws," The Insider Blog, Forbes.com (Sept. 3, 2013).

4. *United States v. Sidorenko*, 102 F.Supp.3d 1124 (N.D.Cal. 2015).

5. Ruling on Defendant's Second Motion to Dismiss the Indictment, *United States v. Hoskins*, 3:12cr238 (D. Conn. Aug. 13, 2015).

6. 287 U.S. 112 (1932).