CLIENT ALERT

Second Circuit Rejects Government's Attempt to Expand the Extraterritorial Reach of the FCPA Utilizing Accomplice and Conspiracy Liability

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On August 24, 2018, in *United States v. Hoskins*—F.3d—, 2018 WL 4038192 (2d Cir. 2018), the Second Circuit held that a foreign national who had not performed any illegal act within the territory of the United States could not be charged with accomplice or conspiracy liability in connection with a domestic concern's or a covered foreign national's alleged violation of the Foreign Corrupt Practices Act (FCPA). To convict, the government must show that the defendant, Lawrence Hoskins, was an "agent" of a "domestic concern" under 15 U.S.C. § 78dd–2 when allegedly conspiring to commit violations of the FCPA or aiding and abetting substantive FCPA violations.

This case arises from some of the conduct for which Alstom S.A. ("Alstom") pleaded guilty and for which certain Alstom subsidiaries, including Alstom Power Inc. ("Alstom US"), entered into deferred prosecution agreements in December 2014. As alleged in the Third Superseding Indictment, Hoskins was a senior vice president of a British Alstom subsidiary. He was allegedly responsible for retaining two consultants who Alstom US, a domestic concern, had allegedly used to bribe Indonesian officials to secure business for Alstom US.

The government conceded that Hoskins was not a U.S. citizen, did not reside in the U.S., and did not perform any illegal act within the territory of the United States (although the Indictment alleges numerous electronic contacts with the U.S.). The Indictment charged Hoskins with, *inter alia*, one count of conspiracy to commit violations of the FCPA as well as six substantive counts of violating the FCPA, both as an agent of a domestic concern and for "aiding and abetting" under 18 U.S.C. § 2.

In charging Hoskins under the FCPA, the government advanced its long-held position that even foreign nationals who do not meet the specific requirements of 15 U.S.C. § 78dd-3—which requires an act in furtherance of a corrupt payment while in the territory of the United States—can nonetheless be charged under accomplice or conspiracy theories. *See, e.g., FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2015) ("a foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States."). The district court disagreed, and the government brought an interlocutory appeal.

The Second Circuit largely affirmed the district court. It acknowledged the general rule that accomplice and conspiracy liability can reach individuals incapable of committing the underlying offenses. But the Second Circuit concluded that an exception to that rule existed in this case for two reasons.

First, relying on *Gebardi v. United States*, 287 U.S. 112 (1932), the Second Circuit concluded that conspiracy and accomplice liability will not lie when Congress demonstrates an affirmative legislative policy to leave that kind of participant in a criminal transaction unpunished. The court reviewed the legislative history of both the original FCPA and the 1998 amendments, which had added § 78dd-3. Based on that history, the Second Circuit concluded that Congress had expressly considered and rejected

the broader formulation as reflected in the government's long-held position. Rather, Congress settled on very specific provisions for determining which individuals, particularly foreign nationals, could be liable for FCPA violations.

Second, the court held that the general presumption against extraterritorial application of U.S. criminal statutes absent a "clearly expressed congressional intent" reinforced the conclusion that Congress did not intend the FCPA to reach foreign nationals who were not agents of "issuers" or "domestic concerns." That reasoning provided the basis for the concurring opinion. Again, because Congress specified which foreign persons could be liable for FCPA violations, the Second Circuit held that the government could not use accomplice or conspiracy theories to expand those categories to reach foreign persons who did not act within the territory of the United States and may be completely unfamiliar with U.S. laws.

Given the recent and repeated pronouncements from DOJ leadership prohibiting the use by DOJ of "guidance" to create legal obligations, the decision may serve to temper DOJ's enthusiasm to put forward additional guidance stating its view of the law without supporting judicial precedent. Moreover, convincing the Solicitor General's office to seek *en banc* review or even an appeal to the Supreme Court may also prove challenging.

The ultimate impact of the decision remains to be seen because the government retains significant tools for combatting corrupt foreign payments.

On remand, the government may still pursue the alleged FCPA conspiracy and substantive violations under an agency theory. That may offer insight into the infrequently litigated issue of what factual showing is necessary for the government to establish that someone is an agent of a "domestic concern" under the FCPA.

Hoskins also faces money-laundering charges. In *United Stated v. Castle*, 925 F.2d 831 (5th Cir. 1991), the Fifth Circuit relied on *Gebardi* to hold that the government could not charge recipients of foreign bribes (a class of participants not covered under the FCPA) with conspiracy to violate the FCPA. Since *Castle*, the government has successfully prosecuted numerous foreign officials who had received corrupt payments under the U.S. money-laundering provisions instead of under the FCPA.

However the government chooses to proceed, the Second Circuit has now made clear that the government is limited to those tools that Congress has expressly identified in the FCPA.

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