

# The FCPA and Foreign Nationals

---

Despite the fact that the Foreign Corrupt Practices Act has been in force for decades there is relatively little case law interpreting its provisions. A great deal of the existing interpretation of the Act stems from settlements – the Department of Justice and the Securities Exchange Commission continue to investigate possible violations of the statutes which typically end in some type of a settlement. Those settlements, while not actual case law, become the fabric of the law. This point is clearly reflected in the Guide to the statute issued by the DOJ and the SEC, much of which is the view of the two enforcement agencies as reflected in the cases that have been charged and resolved but not litigated to a court decision.

As more individuals are prosecuted however, the number of litigated cases is increasing. That means more court decisions construing the statute. More court decisions should translate to a sounder basis of interpretation for the statute. The most recent decision of the Second Circuit Court of Appeals rejecting the DOJ's view on the reach of the statute with respect to foreign nationals is one of those decisions. *U.S. v. Hoskins*, Docket No. 16-1010-cr (2nd Cir. August 24, 2018).

## *The indictment*

The indictment centers on a scheme to bribe officials in Indonesia to secure a \$118 million contract from the government of that country. Lawrence Hoskins worked for Alstom S.A., a global firm based in France that provides power and transportation services. From 2002 through 2009 Mr. Hoskins was employed by Alstom's U.K. subsidiary but was assigned to work in another subsidiary, Resources Management in France.

The bribery scheme involved Alstom Power, Inc., Alstom's U.S. subsidiary based in Connecticut. Alstom U.S., and various individuals associated with the parent firm retained two consultants, according to the charges, to bribe Indonesian officials who could assist with securing the contract. Mr. Hoskins never worked for Alstom U.S. in any

## Related Capabilities

- Securities & Financial Services Litigation & Enforcement

direct capacity. The indictment claims, however, that he was one of the people responsible for approving the selection of, and authorization of, payments to, the consultants, knowing that a portion of the payments would be used to pay bribes.

Mr. Hoskins is charged with conspiring with the company and its employees, as well as foreign persons, to violate the statute. The dispute here is based on Count 1 of the indictment, alleging that Mr. Hoskins was an accomplice and conspired to violate the law. The objects of the conspiracy correspond with two provisions of the FCPA that Mr. Hoskins is alleged to have violated. One prohibits American persons and their agents from using interstate commerce in connection with the payment of bribes. The second prohibits foreign persons or businesses from participating in acts to further certain corrupt schemes which include the payment of bribes while present in the U.S. The indictment also includes seven counts alleging substantive violations of the FCPA.

Mr. Hoskins moved to dismiss Count 1 of the indictment, arguing that the FCPA only imposes liability on a narrow group of people – “American companies and citizens, and their agents, employees, officers, directors, and shareholders, as well as foreign persons acting on American soil.” Since he is not within that group, the count should be dismissed. The DOJ opposed the request and, in a related motion in limine, argued that Defendant should be precluded from claiming on the substantive counts that he could only be convicted on a conspiracy theory.

The district court granted the motion to dismiss in part, concluding that Congress did not seek to impose FCPA liability on foreign nationals who could not be held liable on the substantive provisions. That portion of count 1 which alleged a violation while Defendant was not in the U.S. was dismissed. The court denied the portion of the motion which alleged that Mr. Hoskins acted as an agent of a domestic concern. The Second Circuit affirmed.

#### *The Circuit Court’s opinion*

The question for resolution here is whether “Hoskins, a foreign national who never set foot in the United States or worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholders and persons physically present within the United States. In other words, can a person be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?” The answer is, in a word, no. This is clear from considering the text of the statute, its legislative history and the presumption against extraterritorially.

The general rule is that conspiracy and complicity statutes “do not cease to apply simply because a statute specifies particular classes of people who can violate the law” the Court began. To the contrary, it is well established that a person may be held liable for conspiracy even when he or she cannot be guilty of the substantive offense as the Court held in *Salinas v. U.S.*, 522 U.S. 52 (1998). An exception to this rule occurs when “it is clear from the structure of a legislative scheme that the lawmaker must have intended

that accomplice liability not extend to certain persons whose conduct might otherwise fall within the general common-law or statutory definition of complicity” as the Court held in *Gebardi v. U.S.*, 287 U.S. 112 (1932).

Here, the “carefully tailored text of the statute” read against the “well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute” establishes that the Act is an exception to the general rule of conspiracy liability.

First, the FCPA does not contain any provision “assigning liability to persons in the defendant’s position – nonresident foreign nationals acting outside American territory, who lack an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies.” The structure of the Act confirms that this omission was intentional. The statute contains specific categories of persons over whom the government may exercise jurisdiction: 1) an issuer; 2) a domestic concern; 3) a U.S. citizen or resident; and 4) most businesses such as partnerships, sole proprietorships and unincorporated organizations that are organized under state or federal law or have principal places of business in the U.S. Thus the statute prohibits any “person other than an issuer . . . or a domestic concern” from using interstate commerce in furtherance of corrupt payments to foreign officials, but only while the person is “in the territory of the United States.” 15 U.S.C. § 78dd-3(a).

Second, the legislative history of the Act confirms its limitations. The Conference Report, for example, “emphasized that the statute drew deliberate lines regarding the liability of foreign persons, both corporate and natural” the Court found. At the same time, it made no reference to conspiracy or aiding-and-abetting liability. While the Act was amended in 1998 to conform to the OECD convention, those amendments did not alter the scope of the statute in this regard. The government’s claim to the contrary, by reading those amendments in connection with provisions regarding the bribery of American officials, “would transform the FCPA into a law that purports to rule the world” the Court concluded in rejecting this view.

Third, the presumption against extraterritoriality confirms this limited reading of the statute. Since the statute has provisions that have clear extraterritorial application while others that do not, the presumption applies. The FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern unless that person commits a crime in the United States. Thus “the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge Hoskins with any offense that is not punishable under the FCPA itself . . .” This point, when read together with the history of the Act and its text, demonstrates that the first object of the conspiracy cannot stand – the decision of the district court is affirmed.

The second object of the conspiracy is different. There the government intends to prove that Mr. Hoskins acted as an agent of a domestic concern. Such conduct, if established, falls within the plain language of the statute. Accordingly, the government may proceed

with that portion of count one but not the initial part.

Judge Pooler joined the opinion of the Court but authored a separate opinion. Judge Pooler began by emphasizing the point that the exception to conspiracy liability must be narrowly drawn. Here, however, he found it applicable in view of the history of the FCPA. That history demonstrates clearly that “Congress must have intended to impose liability only on the American bribe giver, and not on the foreign official who receives the bribe, even though the latter plainly facilitates the criminal conduct of the bribe giver.” This is because Congress was concerned about “intruding into foreign sovereignty by attempting to punish under American law foreign officials taking bribes from Americans on their own soil.”

While the Court’s decision is consistent with the text of the statute and its history, if the charges in the indictment are established Mr. Hoskins was not an official of a corrupt foreign government but rather a U.K. citizen involved in the corrupt conduct. The prosecution of a person in that situation “does not threaten a foreign country’s sovereign power to select, retain, and police the officials of its own government, nor does it conflict with the policies of the countries involved” which were the concerns of Congress when writing the statute.

#### *Comment*

The Court’s decision circumscribing the reach of the FCPA is consistent with the text of the statute as well as its history. The text of the statute does not reach a foreign national who never entered the United States in the context posited here. That point is confirmed as the Court notes by a reading of the legislative materials, which reflect a clear reluctance to charge foreign nationals and thereby become involved in the internal affairs of a foreign country. Consideration of the presumption against extraterritoriality bolsters the point.

As Judge Pooler notes, however, it is somewhat ironic that the legislative history, which evidences a concern over intruding into the affairs of a foreign nation, in effect becomes a defense for a foreign citizen in the situation posed by this case. The available evidence does not support a claim that Congress was concerned with those in the situation of Mr. Hoskins.

Finally, while this decision represents a significant loss for the government, whether it will stand if appealed to the Supreme Court is questionable. The current Supreme Court has expressed a clear preference for relying on the plain text of the statute. At the same time several of the Justices have expressed concern about resorting to traditional statutory interpretation methods such as examining legislative materials. Failing to consider those materials could undercut the conclusions here. At the same time the current Court has not hesitated to consider the presumption against extraterritoriality. At some point the Court’s use of these principles will undoubtedly come into play in deciding the key question presented by this case.