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US Statute Does Not 'Rule The World' – Second Circuit Limits Reach Of The Foreign Corrupt Practices Act

by Michael J. Engle and Brandon M. Riley

In a recent decision, the U.S. Court of Appeals for the Second Circuit ruled in *United States v. Hoskins* that the U.S. Department of Justice (DOJ) cannot use theories of conspiracy or complicity to bring criminal charges against a foreign national for violating the Foreign Corrupt Practices Act (FCPA) if that foreign national is not otherwise among the categories of persons directly covered by this statute. The court reaffirmed, however, that foreign nationals acting as agents of a domestic concern, or who conspire with foreign nationals engaging in criminal activity while in the U.S., may still be held liable under the FCPA, even without setting foot in the U.S. or its territories, because such agents are specifically covered by the statute. *Hoskins* may have important implications for foreign corporations that have business ties to U.S.-based companies, or that list securities with a U.S. exchange, as this decision potentially strengthens jurisdictional defenses when those foreign companies are ensnared in a DOJ or Securities and Exchange Commission (SEC) investigation solely by virtue of its business association with a domestic company.

In *Hoskins*, the DOJ alleged that several defendants, including Hoskins, were part of a scheme to bribe officials in Indonesia in order to secure a $118 million contract on behalf of Hoskins' company Alstom SA, a global company headquartered in France. The alleged bribery scheme involved Alstom SA's American subsidiary, Alstom Power Inc., and centered on various individuals, including Hoskins, who were connected to Alstom SA, and on Alstom Power's alleged retention of two consultants to bribe Indonesian officials who could help secure the contract. Although Hoskins worked for Alstom SA's U.K.-based subsidiary and never worked for U.S.-based Alstom Power in any direct capacity, the DOJ alleged that Hoskins was "one of the people responsible for approving the selection of, and authorizing payments to, [the consultants], knowing that a portion of the payments [was] intended for Indonesian officials in exchange for their influence and assistance in awarding [the contract]." The DOJ conceded that, although Hoskins emailed and called U.S.-based alleged co-conspirators while they were located in the U.S., Hoskins never traveled to the U.S. while the alleged bribery scheme was ongoing. Nevertheless, the DOJ asserted that Hoskins could be charged for aiding and abetting the alleged bribery scheme under the FCPA.

The Second Circuit squarely rejected the DOJ's broad interpretation of the FCPA. The court explained that the FCPA provides U.S. courts with jurisdiction over only the three categories of persons enumerated in the statute:

1. companies issuing securities on a U.S. exchange and officers, directors, employees, agents or stockholders acting on behalf of the issuer;

2. American companies and American persons; and

3. foreign persons or businesses acting in furtherance of corrupt schemes while present in the United States.

Hoskins did not fit into any of these categories under the DOJ's theory of culpability, and, therefore, the court held that the DOJ lacked jurisdiction over him under the FCPA to the extent it intended to prosecute him as an accessory to the alleged bribery scheme. "[A]dopting the government's view that the jurisdictional reach of the FCPA must be coterminous with that of bribery of American officials," the court explained, **"would transform the FCPA into a law that purports to rule the world."** As noted above, however, the court held that Hoskins could still be held liable as "an agent of a domestic concern" under the FCPA, provided that the DOJ could make the requisite showing that Hoskins acted as an agent for U.S.-based Alstom Power.

The Second Circuit's *Hoskins* opinion – a rare appellate court ruling on the meaning of the FCPA – will likely change the way the DOJ prosecutes FCPA cases, especially where there is a joint venture or other similar business arrangement between a foreign corporation and American companies or "issuers," i.e., U.S. or foreign companies listing securities on an American exchange. In fact, the opinion directly contradicts the SEC's and DOJ's FCPA Resource Guide, which states that "[a] foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the U.S." Applying *Hoskins* in a joint venture scenario, for example, it may be difficult for the government to show that foreign nationals working for the foreign corporation are "agents" of the domestic concern or issuer when those employees are most likely acting as agents of the foreign corporation for its benefit. For now, however, the Second Circuit's Hoskins opinion provides a valuable and important appellate court decision on the reach of the FCPA that should provide greater clarity to foreign actors and corporations asserting jurisdictional defenses to prosecution under this expansive statute.

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