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Federal Judge Rejects DOJ's Theory of FCPA Accomplice Liability

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On August 13, 2015, a US district judge dismissed a charge seeking to hold a defendant criminally liable for conspiracy to violate the Foreign Corrupt Practices Act (FCPA) if he is not a principal or agent of a US domestic concern and did not physically enter US territory.[1] The judge reasoned that Congress's intent regarding who should (and should not) be subject to the FCPA was clear and that the accomplice liability in the indictment would impermissibly extend the statute's reach. This ruling may significantly limit US authorities' ability to prosecute or obtain cooperation from non-resident foreign nationals.

The Decision

Lawrence Hoskins, a UK citizen employed by Alstom UK, has been charged with violating the FCPA and conspiring to do the same. The charges against Hoskins relate to an alleged scheme in which bribes were paid to Indonesian officials in exchange for assistance in securing a $118 million contract, known as the Tarahan Project, for Alstom Power, Inc., a Connecticut company, and its consortium partner to provide power-related services for the citizens of Indonesia. Hoskins, a senior vice president based in France, was allegedly responsible for hiring consultants to obtain contracts with new customers and to retain contracts with existing customers in Asia, including the Tarahan Project. The prosecutors allege that he was responsible for approving and authorizing payments to consultants retained for the purpose of paying bribes to Indonesian officials who had the ability to influence the award of the Tarahan Project contract. It is undisputed that Hoskins is not a US citizen and that he never entered US territory.

Hoskins moved to dismiss the conspiracy count of the indictment, "on the basis that it charges a legally invalid theory that he could be criminally liable for conspiracy to violate the FCPA even if the evidence does not establish that he was subject to criminal liability as a principal, by being an 'agent' of a 'domestic concern.'" The government opposed the motion. The government also moved *in limine* to preclude Hoskins from arguing to the jury that it must prove that he was the agent of a domestic concern, given that the government contends that Hoskins can also be convicted under the alternative theory of accomplice liability. District Judge Janet Arterton framed the question: "these two motions put before the Court the question of whether a non-resident foreign national could be

subject to criminal liability under the FCPA, even where he is not an agent of a domestic concern and does not commit acts while physically present in the territory of the United States, under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute's reach."

Judge Arterton held that "the answer is 'no' and that accomplice liability cannot extend to this Defendant under such circumstances. . . ." Thus, the defendant's motion to dismiss the conspiracy count was granted in part, and the government's motion in limine was denied. Judge Arterton's opinion relied on the 1932 US Supreme Court ruling in *Gebardi v. United States* for the proposition that where Congress chose to exclude certain individuals from liability under a statute, prosecutors cannot override Congress's will by charging those individuals with conspiracy to violate that statute. Applying the *Gebardi* principle, Judge Arterton found that the text, structure and legislative history of the FCPA indicate that Congress did not intend for non-resident foreign nationals to be subject to the FCPA unless they were agents of a US domestic concern or acted in the territory of the United States.

Accordingly, Judge Arterton prohibited the government from arguing that *Hoskins* could be liable for conspiracy if he is not proved to be an agent of a domestic concern. She did not dismiss the conspiracy count entirely, however, finding that criminal liability could attach if the government proves that Hoskins is in fact such an agent.

Significance

The FCPA grants jurisdiction over three categories of entities or individuals: (1) a US issuer or "domestic concern" or any officer, director, employee, or agent thereof; (2) a US citizen acting in furtherance of a corrupt payment; and (3) any person in US territory acting in furtherance of a corrupt payment. Under the Hoskins ruling, the government cannot charge any individual or entity who does not fall into one of these three categories with aiding and abetting or conspiring to violate the FCPA.[2] This ruling directly contradicts and overrules the 2012 FCPA Resource Guide, issued jointly by the Department of Justice and Securities and Exchange Commission, which asserted that "[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."[3]

Conspiracy and aiding and abetting charges have been effective prosecutorial tools in FCPA cases because defendants did not have to physically enter the United States or be otherwise covered by the statute. Furthermore, prosecutors can use such charges to gain leverage that can be used to seek cooperation or plea deals. By substantially limiting the cases where these inchoate theories are available, this decision presents a setback for prosecutors seeking expansive theories on which to build an FCPA case.

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[1] *United States v. Hoskins*, No. 3:12CR238(JBA), 2015 WL 4774918 (D. Conn. Aug. 13, 2015).

[2] 15 U.S.C. §§ 78dd-1, 2, 3.

[3] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 34.

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