

# Second Circuit Holds That DOJ Cannot Reach Foreign Nationals Not Otherwise Covered by the FCPA Through Conspiracy or Aiding-and-Abetting Charges

August 29, 2018

## Introduction

On August 24, 2018, in a rare, 73-page decision interpreting the Foreign Corrupt Practices Act (“FCPA”), the Second Circuit in *United States v. Hoskins*<sup>1</sup> largely rejected a Department of Justice (“DOJ”) interlocutory appeal and limited the FCPA’s reach, holding that foreign nationals who cannot be convicted as principals under the FCPA also cannot be held liable for conspiring to violate or aiding and abetting a violation of the statute. The decision, written by Judge Pooler (joined by Chief Judge Katzmann and Judge Lynch, who also wrote a concurring opinion), concluded that, due to affirmative legislative policy and extraterritoriality concerns, the FCPA’s application was limited to the three specific categories of individuals and entities identified in the statute, namely, U.S. issuers and U.S. “domestic concerns” (and their officers, employees, and agents, even if foreign), and anyone who engages in any act in furtherance of a corrupt payment while in U.S. territory. To the extent that *Hoskins*, a U.K. citizen working for a French company, did not fall within any of these three categories, the Court stated that he could not be charged as a co-conspirator of, or with aiding and abetting, someone who did.<sup>2</sup>

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### NEW YORK

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

<sup>1</sup> No. 16-1010, --- F.3d ----, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).

<sup>2</sup> *Hoskins*, 2018 WL 4038192 at \*65, 71.

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In reversing the district court's opinion in part, the Court reiterated, however, that any individual (including a foreign national) who *does* fall within one of those three enumerated categories can be charged with conspiracy to commit a FCPA violation, since neither the affirmative legislative policy exception nor extraterritoriality bases of its decision would apply.<sup>3</sup> As a result, the Court ultimately reinstated the conspiracy charge in keeping with the government's assertion that it could prove that Hoskins acted as an agent of a domestic concern.<sup>4</sup> Thus, while *Hoskins* certainly has implications for the government's enforcement of the FCPA against foreign nationals, given the breadth of the FCPA's jurisdiction and the agency doctrine that the DOJ relied upon in seeking reinstatement of its conspiracy charge, the practical impact of the decision is likely to be fairly limited.

## Factual Background

As noted, the FCPA prohibits corrupt conduct involving three categories of individuals or entities: (1) issuers of securities registered under the Securities Exchange Act, or any officer, director, employer, or agent thereof, or any stockholder acting on behalf of the issuer, (2) any U.S. "domestic concern" – a U.S. citizen, resident, or company, or any officer, director, employer, or agent thereof, and (3) any foreign person or business that commits an act in furtherance of a corrupt payment while in the United States.<sup>5</sup> In *Hoskins*, the government alleged that defendant Hoskins, a foreign national employed by the U.K. subsidiary of Alstom, S.A. and working in France, approved and authorized payments to two consultants retained by Alstom's U.S.-based subsidiary, Alstom Power, knowing that a portion of these payments would be used to bribe Indonesian officials.<sup>6</sup> The government alleged not only that Alstom Power was a U.S. domestic concern, but that certain acts in furtherance of the scheme occurred in the United States, including through U.S. executives who

discussed the scheme in person, by phone, and electronically while in the United States, and that certain of the funds used for bribes were held in accounts in the United States.<sup>7</sup> However, while Hoskins was allegedly in communication with U.S.-based Alstom employees about the bribery scheme, the government conceded that he never committed any act in furtherance of the scheme while in the United States.<sup>8</sup>

The government charged Hoskins in Count One of the Indictment with a two-object conspiracy to violate the FCPA's anti-bribery provisions, with the first object a violation of the prohibition on domestic concerns or their agents from violating the FCPA, and the second object a violation on the prohibition on foreign nationals from engaging in any acts relating to a bribery scheme while present in the United States.<sup>9</sup> Hoskins was also charged with six counts of substantive violations of the FCPA's anti-bribery provisions, both as an agent of a domestic concern (Alstom Power), and with aiding and abetting that domestic concern.<sup>10</sup>

## Procedural History

Hoskins moved in the district court to dismiss the government's conspiracy count because "it charged that he was liable even if he did not fit into one of the statute's categories" of relevant individuals, which Hoskins argued was an impermissible attempt by the government to bypass the "narrowly-circumscribed groups of people" for whom "the FCPA prescribes liability."<sup>11</sup> The government cross-moved in limine as to the substantive counts, arguing that, even if Hoskins did not himself fall within one of those enumerated categories, Hoskins could still be liable for conspiring to violate, or aiding and abetting others who violated, the FCPA, to the extent others with whom he participated in the offense fell within one of the three

<sup>3</sup> *Id.* at \*71-72.

<sup>4</sup> *Id.* at \*73.

<sup>5</sup> 15 U.S.C. § 78dd-1-3.

<sup>6</sup> *Hoskins*, 2018 WL 4038192, at \*6-7.

<sup>7</sup> *Id.* at \*7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*8.

<sup>10</sup> *Id.* at \*9.

<sup>11</sup> *Id.*; see also *United States v. Hoskins*, 123 F. Supp. 3d 316, 318-19 (D. Conn. 2015).

categories, and Hoskins should be precluded from arguing otherwise.<sup>12</sup>

The district court denied the government’s motion in limine and granted Hoskins’ motion to the extent the government failed to allege that Hoskins fell within one of the three categories of individuals or entities to whom the FCPA applied. In so holding, the court reasoned that Congress had not intended “to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability” under the FCPA.<sup>13</sup> However, the court denied Hoskins’ motion to the extent that the government charged him with conspiring to violate, or aiding and abetting a violation of, the FCPA as an agent of Alstom’s U.S. subsidiary, since he would then be expressly covered by one of the enumerated categories of individuals covered by the FCPA.<sup>14</sup> In light of its rulings, the district court dismissed the first object of the conspiracy count except to the extent the government could prove Hoskins was an agent of a U.S. domestic concern, and the second object in its entirety because Hoskins had not committed any act within the United States.<sup>15</sup>

### The Second Circuit Decision

On appeal, the Second Circuit affirmed in part and reversed in part the lower court’s decision.<sup>16</sup> In so ruling, the Court focused on whether “a person [can] be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal.”<sup>17</sup> The Second Circuit concluded that a defendant could not be, based on concerns relating to (1) the “affirmative legislative policy” exception and (2) the presumption against extraterritoriality.

### Affirmative Legislative Policy Exception

The Court explained that “the firm baseline rule” of conspiracy and complicity law is that individuals can be found liable for offenses they did not (or even could not) commit themselves as a principal, either as an accomplice who aided or abetted the commission of the offense or for the separate crime of conspiring to commit the offense.<sup>18</sup> However, there is a “narrowly circumscribed” exception to this rule: the “affirmative legislative policy exception,” which is triggered where “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.”<sup>19</sup>

The Court then examined two leading cases that define the contours of the affirmative legislative policy exception in the Second Circuit: *Gebardi v. United States*<sup>20</sup> and *United States v. Amen*.<sup>21</sup> In *Gebardi*, which contemplated violations of the Mann Act (prohibiting the interstate transportation of women for purposes of prostitution), the Supreme Court held that Congress did not intend for women who simply agree to be transported to be liable under the statute, and “a necessary implication of that policy” was to limit their liability for a conspiracy charge under the statute.<sup>22</sup> In *Amen*, the Second Circuit applied *Gebardi*’s reasoning to find that the continuing criminal enterprise statute similarly evinces an affirmative legislative policy to limit conspiracy or accomplice liability to the “kingpin” individuals who Congress intended as targets of the statute, and not third parties.<sup>23</sup>

Applying *Gebardi* and *Amen*, the Court examined the FCPA’s text, structure, and legislative history to

<sup>12</sup> *Hoskins*, 2018 WL 4038192, at \*10.

<sup>13</sup> *Hoskins*, 123 F. Supp. 3d at 327.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> The Court concluded that it had jurisdiction to review the lower court’s decision pursuant to 18 U.S.C. § 3731, which permits interlocutory appeal in criminal cases when there has been a dismissal of a count – even a partial dismissal, as was the case here. *Hoskins*, 2018 WL 4038192, at \*12. Interlocutory appeal is justified in such instances, the Court

noted, because a potential ground for conviction has been lost. *Id.* at \*14-17.

<sup>17</sup> *Id.* at \*18.

<sup>18</sup> *Id.* at \*18-20.

<sup>19</sup> *Id.* at \*21-22.

<sup>20</sup> 287 U.S. 112 (1932).

<sup>21</sup> 831 F.2d 373 (2d Cir. 1987).

<sup>22</sup> *Gebardi*, 287 U.S. at 123.

<sup>23</sup> *Amen*, 831 F.2d at 382.

determine whether “an affirmative legislative policy [could] be discerned.”<sup>24</sup> The Court found that each of these, and in particular the FCPA’s extensive legislative history, reflected Congress’s intent to limit liability to the statute’s enumerated categories of defendants.<sup>25</sup> As a result, “the government may not override that policy using the conspiracy and complicity rules” to find Hoskins liable for conspiring to violate the FCPA if he does not fall within one of the categories of individuals covered by the FCPA.<sup>26</sup>

In reaching this holding, the Court rejected the government’s narrower reading of *Gebardi*, as well as its more expansive reading of the jurisdictional reach Congress intended to afford the FCPA.<sup>27</sup> (Notably, the government’s position was consistent with the guidance it provides to companies and individuals in its FCPA Resource Guide, which has now been expressly refuted by the Second Circuit.) The Court pointed out that the government’s position “would transform the FCPA into a law that purports to rule the world,” and that would ignore Congress’s “desire[] that the statute not overreach in its prohibitions against foreign persons.”<sup>28</sup>

### ***Presumption Against Extraterritoriality***

The Court separately held that even if no affirmative legislative policy existed, the presumption against extraterritoriality still prohibits Hoskins’ conspiracy or complicity liability to the extent he falls outside of the categories of defendants covered by the FCPA.<sup>29</sup> Specifically, the Court explained that there is a presumption against the extraterritorial application of domestic law to individuals and entities outside of the United States. When a U.S. statute nonetheless is intended to apply extraterritorially, the presumption “operates to limit that provision to its terms.”<sup>30</sup> As a result, the presumption works to limit the FCPA “to its terms” by restricting extraterritorial liability under the FCPA to the statute’s specifically enumerated

categories of defendants, unless the government could demonstrate congressional intent otherwise.<sup>31</sup> Because “the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute” and because the legislative history demonstrated Congress’s intent to keep the FCPA’s reach circumscribed, the Court noted that the presumption therefore narrowed conspiracy and complicity liability under the FCPA to the specific provisions of the statute.<sup>32</sup> Accordingly, the Court held that the presumption provided an independent basis to conclude that Hoskins could not be charged with conspiracy and accomplice liability except to the extent he could be charged as a principal.<sup>33</sup>

### ***Reinstating the Second Object of the Conspiracy***

While the Second Circuit affirmed the district court’s conclusion regarding the general limitations on charging conspiracy and aiding and abetting liability under the FCPA, it reversed the lower court’s decision dismissing the second object of the conspiracy, in which Hoskins was charged with conspiring with foreign nationals who engaged in proscribed conduct while in the U.S. but had not himself committed any act on U.S. territory.<sup>34</sup> The Court noted that the government argued that it could prove that Hoskins had acted as an agent of a “domestic concern” – Alstom Power – in violating the FCPA.<sup>35</sup> The Court explained that, assuming the government was able to prove that, Hoskins fell within one of the three enumerated categories of individuals to whom the statute applied, and neither the affirmative legislative policy exception nor the presumption against extraterritoriality would be offended if Hoskins was also prosecuted for a conspiracy whose object was to violate the FCPA with foreign nationals who acted

<sup>24</sup> *Hoskins*, 2018 WL 4038192, at \*29.

<sup>25</sup> *Id.* at \*37-65.

<sup>26</sup> *Id.* at \*65.

<sup>27</sup> *Id.* at \*29-36.

<sup>28</sup> *Id.* at \*59.

<sup>29</sup> *Id.* at \*65-71.

<sup>30</sup> *Id.* at \*67.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*68-69.

<sup>33</sup> *Id.* at \*71.

<sup>34</sup> *Id.* at \*73.

<sup>35</sup> *Id.* at \*72.

within the United States, even if he did not do so himself.<sup>36</sup>

### ***Concurring Opinion***

Judge Lynch issued a concurring opinion in which he largely agreed with Judge Pooler’s reasoning, but explained that he viewed the case as a close one, in which the “important purposes” of the FCPA had to be balanced against an “intru[sion] into foreign sovereignty” due to the “novel” nature of the FCPA’s already expansive jurisdiction.<sup>37</sup> Judge Lynch noted that it was unlikely that Congress had anticipated a scenario like *Hoskins*, in which a senior official of a French company could potentially escape liability for directing an American subsidiary and its employees to undertake certain acts in furtherance of a bribery scheme, and that this potentially led to a “perverse” result where lower level employees and others who were agents of that U.S. company could be charged but not *Hoskins*.<sup>38</sup> That said, Judge Lynch concluded that the legislative history of the FCPA combined with the presumption against extraterritoriality led him to conclude that the Court had reached the right result.<sup>39</sup>

### **Conclusion**

Although the Second Circuit’s decision limits the government’s ability to prosecute foreign nationals for conspiring to commit or aiding and abetting a violation of the FCPA, the practical implications of the decision seem limited. It applies only to a small class of foreign nationals and entities – those who engaged in a bribery scheme in which there is otherwise jurisdiction under the FCPA, but who are not themselves U.S. nationals or residents, or agents, employees, or officers of either a U.S. issuer or domestic concern, and who have not acted within the United States. That said, the ruling is significant as one of the few cases limiting the FCPA’s jurisdiction due to the statute’s unique, extraterritorial nature, which may encourage charged defendants in other cases to challenge the DOJ’s broad interpretation of its jurisdiction.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at \*13 (Lynch, J., concurring).

<sup>38</sup> *Id.* at \*15-16 (Lynch, J., concurring).

<sup>39</sup> *Id.* at \*16 (Lynch, J., concurring).