

CLIENT ALERT

Court Refuses to Extend FCPA Liability Beyond Statutorily Defined Covered Persons

Conspiracy and Complicity Statutes Do Not Expand Reach of the FCPA

August 30, 2018

AUTHORS

Jeffrey D. Clark | **Robert J. Meyer** | **Michael S. Schachter** | **William J. Stellmach**
Martin J. Weinstein | **Zachary Cobb**

In a rare litigated Foreign Corrupt Practices Act (“FCPA” or “Act”) case, the Second Circuit has rejected the Department of Justice’s (“DOJ”) attempt to expand the extraterritorial reach of the FCPA through conspiracy and accomplice liability theories. Lawrence Hoskins, a British citizen, was charged with both conspiracy to violate and substantive violations of the FCPA in connection with an alleged bribery scheme involving Alstom S.A. The Second Circuit held that 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 within the territory of the United States.” The Court also held, however, that the Government could proceed utilizing an agency theory.

Background

Hoskins was a British executive at Alstom S.A., a company headquartered in France. He was directly employed by Alstom’s U.K. subsidiary, but worked for a subsidiary based entirely in France. Although Alstom did have a U.S. subsidiary, Hoskins never worked for the entity in any direct capacity. The Government alleged that Hoskins was involved in a bribery scheme implemented by and benefiting the U.S. subsidiary of Alstom, but acknowledged that Hoskins never

Court Refuses to Extend FCPA Liability Beyond Statutorily Defined Covered Persons

traveled to the United States while the bribery scheme was ongoing. The Government indicted Hoskins on one count of conspiracy to violate the FCPA and six counts of substantive violations of the FCPA.

The FCPA imposes bribery liability in a three-part statutory scheme: 15 U.S.C. § 78dd-1, which covers issuers and their agents, employees, officers, directors or shareholders; 15 U.S.C. § 78dd-2, which covers domestic concerns (U.S. persons, both natural and juridical)¹ and their agents, employees, officers, directors or shareholders; and 15 U.S.C. § 78dd-3, which covers any other person who commits an act in furtherance of bribery while in the territory of the United States. Hoskins was charged with one count of conspiracy to violate the FCPA and six substantive counts of violating the Act.

Decision

While acknowledging the general rule allowing for accomplice liability under federal criminal statutes, the Court held that the affirmative-legislative-policy exception to the general rule applied, which prevents application of accomplice liability principles on individuals specifically excluded from the statute's direct liability.² Based on both its review of the text and legislative history of the FCPA, as well as the general principle against extraterritorial application of U.S. criminal statutes, the Court held that Congress intended to exclude foreign nationals with no connection to the United States from liability under the FCPA, a conclusion consistent with the Fifth Circuit, the only other circuit to rule on this issue.³ Accordingly, Hoskins could not properly be charged with conspiracy to violate or substantive violations of the FCPA absent an allegation that he was acting as an agent, employee, officer, director or shareholder of a domestic concern (i.e., Alstom's U.S. subsidiary) or that he took an act in furtherance of the bribery scheme while in the territory of the United States.

While the Court thus affirmed the dismissal of the conspiracy charge insofar as it relied solely on traditional principles of accomplice liability, the government will be able to proceed against Hoskins on the substantive counts of the indictment, as well as accomplice liability theories utilizing an agency theory. The Government will have to establish the elements of an agency relationship in order to prevail in the case.

¹ The statute defines "domestic concerns" as "any individual who is a citizen, national, or resident of the United States," or "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."

² In its opinion, the Court extensively discussed *Gebardi v. United States*, 287 U.S. 112 (1932). The *Gebardi* Court held that a woman transported across states lines could not be held vicariously liable for a violation of the Mann Act, which criminalized transporting across state lines "any woman . . . for the purposes of prostitution or debauchery," as the statutory scheme specifically excluded the woman herself from direct criminal liability.

³ See *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991).

Court Refuses to Extend FCPA Liability Beyond Statutorily Defined Covered Persons

Conclusion

While *Hoskins* assuredly narrows the ability of the DOJ to bring FCPA actions against foreign nationals involved in bribery schemes, the scope of its future applicability remains to be seen. Foreign nationals participating in a scheme, but acting outside the United States, may not face criminal sanctions under the FCPA. Liability would depend upon the government's ability to establish an agency relationship with an issuer or domestic concern or show that the foreign national took an act in furtherance of bribery in the United States. If that foreign national acted as an agent of an issuer or domestic concern, both direct and vicarious liability under the FCPA would still be allowed, even after *Hoskins*. An agency analysis now becomes more important in assessing potential FCPA liability for individuals.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Jeffrey D. Clark

202 303 1139

jdclark@willkie.com

Robert J. Meyer

202 303 1123

rmeyer@willkie.com

Michael S. Schachter

212 728 8102

mschachter@willkie.com

William J. Stellmach

202 303 1130

wstellmach@willkie.com

Martin J. Weinstein

202 303 1122

mweinstein@willkie.com

Zachary Cobb

202 303 1161

zcobb@willkie.com

Copyright © 2018 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.