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Second Circuit Presents U.S. Companies Historic Opportunity to Defend Against FCPA Liability

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The Foreign Corrupt Practices Act (FCPA) involves application of U.S. law to extraterritorial misconduct. The FCPA is jurisdictionally limited to domestic concerns (essentially U.S. citizens or entities organized under U.S. law or with a principal place of business in the U.S.) and their agents and to foreigners that engage in prohibited acts while in the United States. But in many cases, the alleged misconduct is committed by individuals or entities that are neither a domestic concern nor present in the United States.

This raises two issues of extraterritorial application of U.S. FCPA jurisdiction. First, can U.S. authorities even charge these foreign actors for alleged FCPA offenses? Second, and more importantly for U.S. companies, can a domestic concern be liable for corruption occurring abroad committed by an individual or entity that it doesn't control?

The U.S. Court of Appeals for the Second Circuit resolved the first question regarding individual liability in 2018 in *United States v. Hoskins* (*Hoskins I*). That case involved a British citizen, Lawrence Hoskins, accused of wrongdoing while working in France for the UK subsidiary of a French company. The Second Circuit held in *Hoskins I* that criminal FCPA liability could not extend to Hoskins for corrupt actions outside the United States based on the theory that he conspired with a U.S. subsidiary of the French parent company.

On remand, the government alleged that Hoskins was nonetheless liable because he was the U.S. subsidiary's agent. Last month in *Hoskins II*, the Second Circuit affirmed the district court's judgment of acquittal despite a guilty jury verdict. The court of appeals concluded that although Hoskins worked closely with the U.S. subsidiary, it did not sufficiently control his actions to subject him to FCPA liability.

But the reasoning of *Hoskins II* is not limited to removing foreign nationals from U.S. jurisdiction. It likely also immunizes U.S. domestic concerns from FCPA liability for actions taken by foreign nationals over whom they had no control, including individuals employed by overseas affiliates.

Applying the logic of *Hoskins II*, U.S. companies facing potential FCPA liability should consider as a defense whether there is sufficient evidence the company "actually controlled" the bad actor. Without that evidence, there can be no liability. And the mere fact that the bad actor worked for a foreign affiliate of a U.S. company is not enough—even when he "collaborated with and supported" the U.S. company.

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Foreign Nationals Have Limited FCPA Exposure

In 2013, the U.S. Department of Justice charged Hoskins, a British citizen employed by a UK subsidiary of the French company Alstom SA, with participating in a scheme to bribe officials in Indonesia to secure a $118 million power contract. The Justice Department specifically alleged as part of the scheme that Alstom's U.S. subsidiary had hired two consultants to bribe the Indonesian officials.

Although Hoskins did not work for the U.S. subsidiary and never set foot in the United States during the alleged scheme, the government contended that he was responsible for selecting and authorizing payments to the consultants. Among other things, the government charged Hoskins with conspiring to violate the FCPA with Alstom's U.S. subsidiary and aiding and abetting its substantive FCPA violations.

The district court granted Hoskins's motion to dismiss the conspiracy count to the extent it charged Hoskins with conspiring to violate the FCPA as an agent of a foreign concern or for having engaged in overt acts outside the United States. The district court also denied the government's motion to preclude Hoskins from arguing that he could not be convicted as an accessory unless the government first proved that he was an agent of a domestic concern or had engaged in misconduct while in the United States.

The Second Circuit in *Hoskins I* affirmed the district court's dismissal of the conspiracy charge, holding that the government may not charge a defendant with conspiring to violate or aiding and assisting a violation of the FCPA if he is not otherwise primarily liable. The Second Circuit noted pointedly that "[t]he single, obvious [gap in FCPA coverage] is jurisdiction over a foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder."

Strict Application of Agency Principles

Hoskins's case proceeded to trial on remand, with the jury finding him guilty of conspiracy to violate the FCPA and aiding and abetting violations of the FCPA, both as an agent of Alstom's U.S. subsidiary. The district court, however, entered a judgment of acquittal on the grounds that the government had failed to prove that he was an agent of the U.S. subsidiary.

The Second Circuit in *Hoskins II* affirmed the acquittal, applying black-letter agency law, specifically that the principal—i.e., Alstom's U.S. subsidiary, the domestic concern subject to U.S. jurisdiction—must control the undertaking. There was no agency relationship, and therefore no FCPA liability for Hoskins, because the U.S. subsidiary "did not hire Hoskins, lacked the ability to fire Hoskins, and lacked any say in Hoskins's compensation."

This was despite the fact that the U.S. subsidiary had actually directed some of Hoskins's actions. For example, the U.S. subsidiary asked him to "execute certain tasks," and Hoskins asked the U.S. subsidiary for "approval" to hire a consultant later accused of paying bribes to government officials. Ultimately, however, the Second Circuit concluded that while there was "some evidence that Hoskins supported [the U.S. subsidiary] in his working relationship with the corporation, it is not sufficient to establish that [the subsidiary] exercised control over the scope and duration of its relationship with Hoskins."

The Second Circuit Has Given Domestic Companies a Potent FCPA Defense

Traditional agency principles have long facilitated imputation of FCPA liability to an alleged principal based on an agent's actions. But unless an agent is an employee or subsidiary of a domestic concern or otherwise present in the

United States when some or all of the charged misconduct occurred, *Hoskins II* has now made the government's formerly straightforward task of ascribing vicarious liability to a corporate principal considerably harder. Moreover, the impact of *Hoskins II* is not limited to personal jurisdiction over foreign nationals—it extends by implication to whether the government can even charge domestic concerns with the misconduct these foreign actors allegedly commit.

Most domestic corporate concerns are either unable or unwilling to test the strength of the government's evidence of agency in FCPA matters. This includes when the government seeks to impute FCPA liability based on the conduct of a foreign national or foreign concern. But the *Hoskins* rulings limit domestic concern liability to instances when the domestic concern actually exercised control over the putative foreign agent.

In short, FCPA liability is not based on whether the domestic concern allegedly benefited from the foreign national's illegal conduct, as has long been the standard under domestic criminal law. Rather, liability turns on whether the domestic concern *actually controlled* the foreign national. And the mere fact that a foreign national worked for an affiliated company, "supported" the U.S. subsidiary, and "located and hired consultants at the behest" of the U.S. subsidiary is not enough under *Hoskins II*.

It follows that when a domestic concern is faced with putative FCPA liability based on the conduct of a foreign national, which is the most common FCPA scenario, *Hoskins II* has empowered the domestic corporate target to challenge the government's theory of imputed liability. This is particularly the case when the foreign national is employed by a non-U.S. entity, including a foreign affiliate of a domestic concern. It is also true even when the domestic concern controls the structure and specifications of a transaction, including through contractual relationships, yet leaves the implementation and execution of these instructions to a foreign actor (i.e., the facts of *Hoskins II*).

What is required to establish agency—and hence domestic concern FCPA liability—is instead affirmative proof that the domestic concern was aware of and actively managed foreign corruption, evidence that often is simply not there.

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