

Client Alert

Special Matters & Government Investigations Practice Group

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DOJ Loses Argument for FCPA Jurisdiction Based Merely on Accessory Liability

A U.S. District Court has rejected the Justice Department's attempt to assign FCPA liability to a foreign citizen based on the "accomplice liability" theory sketched out in DOJ's public guidance.

On August 13, 2015, the U.S. District Court for the District of Connecticut in *United States v. Lawrence Hoskins*¹ contradicted the DOJ's public position to extend FCPA jurisdiction to non-resident non-U.S. citizens acting abroad, merely because of their assistance to Americans or U.S. companies that make corrupt payments to foreign officials.

In *Hoskins*, DOJ contended that the Defendant could be convicted under an accomplice liability theory—in essence, that he had assisted others in committing the corruption offence—despite that no independent basis for jurisdiction under the FCPA existed. The District Court granted the motion to dismiss this count and denied the Government's motion in limine to preclude the Defendant from arguing that it needs to prove at least one of the bases for jurisdiction explicitly listed within the FCPA.

Hoskins stems from the DOJ's high-profile FCPA enforcement action against the French energy giant Alstom concerning bribery allegations in Indonesia, Egypt, Saudi Arabia, Taiwan, and the Bahamas, which ended in Alstom's agreement to pay a fine of \$772 million². *Hoskins*, a British national and former Alstom U.K. executive based in Paris, is accused of participating in a bribery scheme involving a business project in Indonesia worth \$118 million. He has challenged the FCPA charges brought against him in the United States, *inter alia* for lack of jurisdiction over him.

Since *Hoskins* was never a U.S. citizen, national, or resident³, and is not accused of having acted in furtherance of a corrupt payment while in the territory of the United States⁴, a direct reading of the statute suggests he could only be charged under the third and remaining category for FCPA jurisdiction: as an agent of a "domestic concern"^{5,6}.

Nonetheless, the Government argued for an accomplice theory, consistent with the Resource Guide to the Foreign Corrupt Practices Act.⁷ That guidance, first released in 2012, posed just such a hypothetical scenario:

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Moreover, even if [defendant] had never taken any actions in the territory of the United States, they can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges under Pinkerton liability, namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy.⁸

The District Court rejected that theory, based on the U.S. Supreme Court's decision in *Gebardi v. United States*, which established that whenever Congress has intentionally excluded certain individuals from liability for a specific law, this congressional intent must not be circumvented by prosecuting such individuals based on accomplice liability.⁹

While the District Court rejected accomplice liability as an additional basis for FCPA jurisdiction, it remains to be seen how other courts will address this question, and whether the DOJ and the SEC will revisit their guidance on the matter. Given the rarity of written judicial opinions interpreting the FCPA, this ruling is likely to have an outsized impact on future FCPA enforcement actions.

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¹ *United States v. Laurence Hoskins*, Criminal No. 3:12cr238 (JBA).

² Plea Agreement between the United States of America and Alstom S.A. on December 22, 2014, available at <http://www.justice.gov/file/189331/download>.

³ Compare 15 U.S.C. § 78dd-2(i).

⁴ Compare *id.* § 78dd-3.

⁵ A domestic concern is defined as an "individual who is a citizen, national or resident of the United States" and "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." *Id.* § 78dd-2(h)(1).

⁶ Compare *id.* §§ 78dd-1(a), 78dd-2(a). The respective domestic concern would be Alstom Power U.S., Alstom's U.S. subsidiary which did not employ Hoskins, but might have used him as an agent anyway, subjecting him to FCPA liability. This, too, is alleged in the indictment, but was not discussed in the order at issue.

⁷ U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

⁸ *Id.* at 12.

⁹ *Gebardi v. United States*, 287 U.S. 112, at. 120-121 n.4 (1932).