Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Limits Of FCPA Jurisdiction Over Foreigners After Hoskins

By **Jason Linder and William Sinnott**

Jason Linder

William Sinnott

(April 10, 2020, 6:01 PM EDT) -- Imagine you are the CEO of a non-U.S. company — a Swiss bank, say, or a Brazilian oil services company or Korean infrastructure builder. You've seen the eye-popping penalties the U.S. government (sometimes in concert with authorities abroad) has recently imposed on other foreign companies for violating the Foreign Corrupt Practices Act.[1]

Your company is neither incorporated nor headquartered in the U.S., nor do its shares trade on a U.S. exchange. You want to know: when is my company (and when am I personally) in danger of being prosecuted under the FCPA?

Though the outer boundaries of FCPA jurisdiction over foreign persons are rarely litigated, the past two years have brought a handful of (sometimes conflicting) court decisions addressing the issue — including, most recently, several in the high-profile prosecution of former Alstom SA senior executive Lawrence Hoskins.

To guide foreign companies and persons as they assess their FCPA risk, this article: (1) outlines the FCPA's three statutory bases of jurisdiction; (2) analyzes the February 2020 U.S. v. Hoskins decision cabining the government's ability to prove agency under the FCPA; (3) addresses vicarious liability theories that may extend FCPA jurisdiction beyond the four corners of the statute, including the theory of conspiracy liability the U.S. Court of Appeals for the Second Circuit rejected in Hoskins in 2018 and another court later endorsed; and (4) surveys related U.S. federal criminal statutes that may increase a foreign person's risk of prosecution.

Statutory FCPA Jurisdiction

Before 1998, the FCPA had only two jurisdictional bases. First, it covered issuers — U.S. or foreign companies with shares trading on a U.S. stock exchange.[2] Second, it covered domestic concerns — meaning either "any individual who is a citizen, national, or resident of the United States" or any artificial person "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."[3]

The statute also explicitly covered any officer, director, employee or agent of an issuer or domestic concern, as well as any stockholder acting on their behalf.[4] To prosecute an issuer or a domestic concern (or their agents et al.) prior to 1998, the government had to prove that it had made corrupt "use of the mails or any means or instrumentality of interstate commerce ."[5]

In 1998, Congress expanded the FCPA's jurisdictional reach in two key ways. First, it added a third statutory jurisdictional basis encompassing foreign persons (natural or artificial) who "while in the territory of the United States" do any act in furtherance of a corrupt scheme, as well as their "officer[s], director[s], employee[s], or agent[s]" or "any stockholder thereof acting on behalf of such person."[6]

Importantly, for these foreign persons, a mere wire transiting through the U.S. is insufficient to establish liability; they (or their agents) must undertake an act in furtherance of a corrupt scheme "while in the territory of the United States."[7]

Second, for domestic concerns and U.S.-incorporated issuers, Congress eliminated the interstate commerce element, allowing the U.S. Department of Justice to prosecute them for conduct anywhere in the world even if it never touches the U.S. through a wire or otherwise.[8]

So, for example, if a U.S. citizen working for the Thai subsidiary of a French company bribes an official in New Zealand through a middleman in South Africa, the DOJ can prosecute that U.S. citizen under the FCPA even if no wires or communications touched the U.S.

U.S. v. Hoskins (February 2020): The Limits of Agency

In addition to a foreign person's statutory exposure for her own actions while in the U.S., the DOJ's and U.S. Securities and Exchange Commission's 2012 FCPA guide asserts that a:

foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.[9]

Recent litigation has grappled with multiple aspects of this assertion.

In February, the Connecticut district court presiding over the Hoskins matter decided as a matter of first impression what the government must prove to convict a foreign person of being an agent of a domestic concern (or issuer). In December 2014, the DOJ had fined the French power and transportation company Alstom $772 million for corrupt conduct in, inter alia, Indonesia, Saudi Arabia, Egypt and the Bahamas.

Lawrence Hoskins was a U.K. citizen who had been a senior executive at a French Alstom subsidiary. In November 2019, a jury convicted Hoskins of seven FCPA counts and three money laundering counts for his involvement in the Indonesia scheme.[10]

The operative indictment's sole FCPA charging theory was that Hoskins had acted as an agent of a domestic concern. As a foreigner who'd never come to the U.S. as part of the scheme, he fell outside of Title 15 of U.S. Code Section 78dd-3. And, as we discuss below, the Second Circuit had previously precluded the government from convicting Hoskins as a co-conspirator of a domestic concern.

Hoskins had worked for the French Alstom subsidiary from 2001 to 2004. The evidence adduced at trial showed that multiple Alstom subsidiaries, including both Hoskins' French one and a Connecticut-based subsidiary called Alstom Power Inc. worked together to bribe Indonesian officials in exchange for assistance in securing several contracts valued at approximately $375 million.

In that corrupt endeavor, API had the lead decision-making role, and Hoskins worked to achieve the objectives API set. API and Hoskins' subsidiary were in different reporting lines of Alstom's corporate

hierarchy — neither had legal authority over the other and, importantly, API did not have control over evaluating, promoting, demoting or firing Hoskins. At most, API could have taken indirect action against Hopkins by proceeding up Alstom's corporate structure to a point of common authority and lobbying that individual or entity to control Hopkins' actions to conform to API's directives.

On Feb. 26, the district court granted Hoskins' motion for acquittal on the seven FCPA counts. The court applied the common law definition of agency and found the government's trial evidence failed to meet that standard. The court determined that API did not exert over Hoskins the type of control of his activities required for an agency relationship. The court also found API's lack of power over the terms of Hoskins' employment almost dispositive.

The court, though, denied Hoskins' motion for acquittal on the money laundering convictions and, on March 6, sentenced Hoskins to 15 months in prison. The government has filed a notice of appeal from the district court's judgment of acquittal on the FCPA counts.

But if the Second Circuit affirms the district court, its decision will likely, as a practical matter, require the government to prove that foreign persons it contends are agents of a domestic concern or issuer are subject to that domestic concern's or issuer's power to control their terms of employment and to fire them.

Vicarious Liability: Conspiracy, Aiding and Abetting and Respondeat Superior

As mentioned above, the DOJ has contended that it can prosecute foreign persons who do not themselves fall within the FCPA's statutory jurisdiction (because they took no act in furtherance of a corrupt scheme while in the U.S. and are not agents of a domestic concern or issuer) as co-conspirators or abettors of those who do fall within one of the FCPA's three jurisdictional categories. Courts in two recent decisions have split on precisely this question.

The first is the Second Circuit's 2018 decision at an earlier stage of the Hoskins case.[11] There, the court rejected the DOJ's attempt to charge Hoskins for conspiring with the domestic concern API. It did so because:

the FCPA defined precisely the categories of persons who may be charged for violating its provisions" and "also stated clearly the extent of its extraterritorial application.[12]

Based largely on its reading of the FCPA's relevant legislative history, the Second Circuit held that "foreign nationals may only violate the [FCPA] outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern."[13]

In June 2019, a district court in Chicago came out the other way, explicitly rejecting the Second Circuit's reasoning in Hoskins.[14] This case involved Ukrainian oligarch Dmitry Firtash. According to the indictment, Firtash and his employees paid millions of dollars in bribes to Indian government officials in exchange for titanium mining rights. Firtash is not a U.S. citizen, nor did he ever travel to the U.S. (nor is he alleged to have been an agent or employee of an issuer or domestic concern).

But some of his alleged co-conspirators did take actions in furtherance of the conspiracy while in the U.S. and one of them was allegedly himself a U.S. citizen and thus a domestic concern. Despite Firtash's utter lack of personal touches to the U.S. and his not falling within any statutory basis of FCPA liability, the district court denied his motion to dismiss the indictment. In doing so, it found that the FCPA's plain language did not evince a legislative intent to foreclose conspiracy and abetting liability.

As a result, there is now a split among U.S. courts on whether a purely foreign person wholly beyond the FCPA's jurisdiction based on her own conduct may nonetheless be charged for her involvement with someone who falls within it.

Turning from conspiracy and aiding and abetting liability, should a foreign company be concerned that it will be held liable for the acts of its employees and agents if those employees and agents themselves fall within one of the FCPA's three jurisdictional bases? It depends, it appears, on into which jurisdictional bucket the employee or agent falls: domestic concern or a foreign person taking an act in furtherance of a corrupt scheme while in the U.S.

Congress clearly contemplated that a foreign company would be vicariously liable:

for acts taken on their behalf by their officers, directors, employees, agents or stockholders in the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder.[15]

So, if your Swiss bank or Korean infrastructure company sends a non-U.S. citizen to a meeting in the U.S. in furtherance of a corrupt scheme, your company is likely subject to FCPA jurisdiction.

What, instead, happens if your foreign company does business wholly outside the U.S. but happens to employ a U.S. citizen who engages in corrupt conduct that in no way touches the U.S.?

By operation of the 1998 amendments to the FCPA, that employee is himself amenable to U.S. FCPA jurisdiction wherever he is in the world. If his corrupt conduct occurred within the scope of his employment and benefited your company, could your company be vicariously criminally liable under the FCPA for his misconduct? No U.S. court has ever addressed the question, and we are not aware of any FCPA resolution the DOJ has entered with a company based on similar facts.

The Second Circuit's reasoning in Hoskins in 2018 — that Congress carefully circumscribed the FCPA's jurisdictional boundaries and common law and other principles shouldn't be read to expand them absent clear congressional intent to do so — would militate strongly against such an exercise of jurisdiction. And the Firtash district court's reasoning applied only cases dealing specifically with conspiracy and aiding and abetting and so is silent on this question.

Other Statutes May Broaden U.S. Jurisdiction

In investigating foreign bribery, FCPA prosecutors regularly find and charge other alleged misconduct against foreign persons. The crimes they most commonly charge include commercial bribery (usually charged under the Travel Act, Title 18 of U.S. Code Section 1952), corrupt conduct involving U.S. officials, money laundering (by either a bribe payer, a bribe recipient or others who facilitate or conceal unlawful payments), wire and mail fraud, tax evasion, violations of the Foreign Agent Registration Act, export controls and sanctions violations, and sundry others.

Some of these may have jurisdictional boundaries broader than the FCPA's — as evidenced by the outcome in Hoskins, in which the court found that the foreign national defendant was beyond the reach of the FCPA, but not beyond the reach of U.S. money laundering statutes. If a foreign company has concern it may someday appear on the DOJ's radar for possible FCPA violations, it should also consider whether it may run afoul of any of these other provisions.

Conclusion

The FCPA's jurisdictional reach is sweeping, its outer contours murky, and the DOJ aggressively investigates and prosecutes conduct in the furthest corners of the globe. Recent cases illuminate some of the outer limits of the FCPA's jurisdiction over purely foreign persons — particularly regarding liability as an agent and for conspiracy and aiding and abetting — but many issues remain to be litigated and a circuit split regarding conspiracy may yet need to be resolved.

For these reasons (and because the DOJ often brings other statutes with broader jurisdictional bases to bear when investigating FCPA allegations), foreign companies and executives should proceed with caution whenever they believe they may fall within the FCPA's jurisdiction.

Jason Linder is a partner and William Sinnott is an associate at Mayer Brown LLP.

[1] Some recent examples: Airbus's $3.9 billion payment in January 2020 to U.S., French, and British authorities; Ericsson's more than $1 billion payment in December 2019 to the U.S.; and Russian telecom MTS's $850 million payment in March 2019 to the U.S.

[2] 15 U.S.C. § 78dd-1(a).

[3] 15 U.S.C. § 78dd-2(a)(1), (h)(1)(A) & (B).

[4] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a)(1).

[5] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a)(1). "The term 'interstate commerce' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of— (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality." 15 U.S.C. § 78dd-2(h)(5).

[6] 15 U.S.C. § 78dd-3(a).

[7] Id.; see also S. Rep. No. 105-277, at 5 (1998) ("[T]his section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States . . . .").

[8] 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

[9] A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) at 12. While serving as an FCPA prosecutor, Mr. Linder assisted in the preparation of the Guide.

[10] The jury also acquitted Hoskins of one money laundering count.

[11] See United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018).

[12] Id. at 71.

[13] Id. at 97.

[14] United States v. Firtash, 392 F. Supp. 3d 872 (N.D. Ill. 2019). Mr. Linder was involved in the Firtash matter while at DOJ.

[15] S. Rep. No. 105-277, at 4 (1998); see also H.R. Rep. No. 105-802, at 21-22 (1998) (same).