Second Circuit Limits Extraterritorial Application of FCPA

On August 24, the U.S. Court of Appeals for the Second Circuit issued a decision that announced a new and important limitation on the application of the Foreign Corrupt Practices Act (FCPA). In *U.S. v. Hoskins*, the Second Circuit held that an individual who did not fall within any of the three categories of defendants enumerated by the statute could not be prosecuted for violating the FCPA. The court also went further, holding that such an individual could not be prosecuted for conspiring with individuals who were covered by the statute to violate the FCPA or for aiding and abetting those violations.

Federal prosecutors have long used the FCPA as a primary enforcement tool against companies and individuals believed to be improperly influencing foreign officials for personal or corporate gain. By its explicit terms, the FCPA applies to three categories of companies/individuals:

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1. any U.S. company or U.S. citizen using interstate commerce
2. any foreign company or foreign individual while present in the United States
3. any U.S. or foreign company that has issued securities pursuant to, or is required to file reports under, the Securities and Exchange Act of 1934 or any officer, director, employee or agent of such a company.

In *U.S. v. Hoskins*, federal prosecutors sought to extend the FCPA beyond these three enumerated categories by charging Lawrence Hoskins — a foreign national who worked for a foreign corporation and who never set foot in the United States — with conspiring to violate the FCPA and with aiding and abetting others in violating the FCPA. If allowed, the prosecutors’ efforts would have circumvented the fundamental FCPA requirement that only companies and individuals with sufficient connections to the United States fall within the statute’s scope. In rejecting the attempted extension, the Second Circuit reaffirmed the limits of the FCPA’s reach and provided the defense bar with powerful precedent to combat further attempts by federal prosecutors to circumvent clearly defined limits on the FCPA and other federal statutes.

**Background**

The FCPA case against Hoskins involved an alleged scheme to bribe officials in Indonesia to secure a large corporate contract. Hoskins worked for a U.K. subsidiary of Alstom Power, S.A., a global company that had been headquartered in France. U.S. prosecutors alleged that Alstom’s U.S. subsidiary retained the two consultants responsible for making the bribe and that Hoskins knew about the scheme and approved the payments to the consultants, knowing they would be used for bribes. Hoskins, however, never worked for Alstom’s U.S. subsidiary, nor did he travel to the United States while the alleged bribery scheme was ongoing.

The U.S. government charged Hoskins with violating the FCPA, conspiring to violate the FCPA, and aiding and abetting others in violating the FCPA. All of the government’s theories asserted that Hoskins was an “agent” of Alstom’s U.S. subsidiary and, therefore, fell within one of the categories of covered companies/individuals enumerated by the FCPA.

On appeal, the Second Circuit acknowledged that Hoskins did not fall within any of the FCPA’s enumerated categories of covered individuals. He therefore could not violate the FCPA himself as a matter of law. Accordingly, the thrust of the court’s opinion addressed
whether Hoskins could be guilty as a co-conspirator or accomplice for an FCPA crime that he could not commit himself. The court ultimately ruled that he could not.

**Conspiracy and Accomplice Liability**

At the outset, the Second Circuit acknowledged the general rule that conspiracy and accomplice liability are not limited by the specific terms of the underlying statute. “Conspiracy and complicity statutes do not cease to apply simply because a statute specifies particular classes of people who can violate the law,” the court stated. Because nothing in the FCPA purported to overrule or limit federal conspiracy or accomplice theories of liability (which are set by statute), the plain language of the FCPA governed. Applying this general rule, the Second Circuit found that the indictment did, in fact, charge Hoskins with each of the required elements for conspiracy and accomplice liability and that he would be guilty of those crimes if the government could prove those allegations at trial.

**The Affirmative-Legislative-Policy Exception**

However, the Second Circuit found that a very narrow exception applied to this general rule in the context of the FCPA and negated Hoskins’s liability. The so-called “Affirmative-Legislative-Policy exception” operates to extinguish conspiracy and accomplice liability with respect to statutes where lawmakers have made clear, through the text or structure of the statute or through the overall legislative scheme, that they intended to exclude individuals not covered by the statute from all liability (including conspiracy and accomplice liability).

With respect to the FCPA, the Second Circuit found that the statute evinced Congress’s affirmative legislative policy to leave any defendants omitted from the statutory framework — such as Hoskins — unpunished. Although Congress does not explicitly state this intent anywhere in the FCPA, the Second Circuit reached this conclusion based on three factors.

1. **The Text of the FCPA**

   The Second Circuit found it very significant that the text of the FCPA did not contain any provision assigning liability to individuals in Hoskins’s position — *i.e.*, a nonresident foreign national whose actions took place outside the United States and who is not an officer, director or employee of an American company. Stated very simply, the Second Circuit found “there is no text that creates any liability whatsoever for the class of persons in question.”
2. The Structure of the FCPA

The Second Circuit analyzed the structure of the FCPA and found that its omission of liability for individuals like Hoskins was deliberate rather than accidental. The court found it particularly noteworthy that the statute “cover[ed] every other possible combination of nationality, location, and agency relation,” but still excluded individuals like Hoskins. That “single, obvious omission,” the Second Circuit found, evidenced clear congressional intent that the FCPA should not reach such individuals.

3. The Legislative History of the FCPA

The Second Circuit engaged in a lengthy analysis of the legislative history of the FCPA before concluding that it, too, demonstrated Congress’s affirmative policy to exclude foreign nationals like Hoskins from the FCPA’s reach. The Second Circuit pointed to amendments to the FCPA that “narrowly tailored the liability for foreign individuals, and did not contemplate a reversal of that narrow tailoring by means of conspiracy and complicity liability,” and also observed that many of Congress’s stated concerns and aspirations in passing the FCPA (e.g., the aspiration that the FCPA would allow the SEC to supervise and police companies and the concern that the FCPA not overreach and impact foreign nationals not learned in American law) did not contemplate conspiracy or accomplice liability for uncovered individuals like Hoskins.

The Presumption Against Extraterritorial Application

After determining that the Affirmative-Legislative-Policy exception applied to bar FCPA liability against Hoskins, the Second Circuit held that, even if that were not the case, the FCPA charges against Hoskins would still not stand because of the longstanding principle that U.S. statutes are not to be applied extraterritorially absent a “clearly expressed congressional intent” to do so.

The government argued this principle did not apply because many of the FCPA provisions do, by their terms, apply extraterritorially. But the Second Circuit found that those provisions supported, rather than refuted, its conclusion that the FCPA could not apply to Hoskins. Because Congress explicitly stated that some of the FCPA’s provisions were to be applied extraterritorially, the Second Circuit found the presumption against extraterritoriality operated to limit the statute’s extraterritorial reach only to the terms of those provisions, and not beyond. Thus, “the territorial limitations of the FCPA preclude liability for [Hoskins],” and “[t]he government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes.”
Conclusion

Although the Hoskins decision is only binding on federal districts within the Second Circuit (Connecticut, New York and Vermont), it nonetheless represents a major victory for the federal defense bar's efforts to limit the application of federal statutes like the FCPA to their intended scope. The Second Circuit's analysis of the Affirmative-Legislative-Policy exception also provides a roadmap for how defense counsel can marshal the text, structure and legislative history of a particular statute to prevent prosecutors from circumventing its scope through the use of conspiracy or aiding and abetting charges. And if nothing else, this case serves as an imprimatur from one of the most influential circuit courts in the country for the notion that there are limits to the scope of the FCPA and other federal statutes; that those limits can be found in the text, structure and legislative history of statutes even when the statutory language does not explicitly state them; and that the government's efforts to circumvent those limits can be successfully met with strong defense opposition.