



ONPOINT / A legal update from Dechert

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Second Circuit Limits FCPA's Extraterritorial Reach Over Non-U.S. Persons in Conspiracy and Aiding and Abetting Cases

The United States Court of Appeals for the Second Circuit dealt a blow to the U.S. government's extraterritorial enforcement power on Friday, August 24, 2018, in prosecuting alleged violations of the Foreign Corrupt Practices Act ("FCPA"). The Second Circuit rejected the U.S. Department of Justice's ("DOJ") position that it can prosecute a non-U.S. person for conspiracy to violate, or aiding and abetting a violation of, the FCPA, even when the non-U.S. person did not engage in conduct that constitutes a direct violation of the statute. The Court ruled that conspiracy or aiding and abetting FCPA liability for non-U.S. persons is limited to circumstances where it can be shown that such persons acted while physically present in the United States or as an agent of a "domestic concern."

Background

In November 2015, French industrial company Alstom SA ("Alstom") reached the fourth largest FCPA settlement in history with the U.S. government, pleading guilty to criminal violations of the FCPA and agreeing to pay a US \$772 million penalty. Alstom pled guilty to charges that it paid more than US \$75 million in bribes to foreign officials to win contracts around the world, including in Indonesia, Saudi Arabia, Egypt, and the Bahamas. According to charging materials, Alstom obtained approximately US \$300 million in profits as a result of business it secured through improper payments.

After Alstom reached its settlement, the DOJ brought charges against former Alstom executives. Three individuals pled guilty to charges connected to the bribery scheme. A fourth former executive, Lawrence Hoskins, contested the charges.

The DOJ alleged that Hoskins, a non-U.S. citizen and an employee of a UK subsidiary of Alstom, was involved in Alstom's U.S. subsidiary's decision to hire consultants, knowing that payments made to those consultants would be used to bribe Indonesian officials. While Hoskins never traveled to the United States, he called and emailed conspirators in the United States. Prosecutors charged Hoskins based on the theories that he (1) was an agent of the U.S. subsidiary; and (2) aided or abetted or conspired with the U.S. subsidiary. After the District Court ruled the FCPA does not create liability for non-U.S. persons solely for aiding and abetting or conspiring to violate the statute, the government appealed. The Second Circuit affirmed the District Court's ruling on those issues.

Narrower FCPA Liability for Non-U.S. Persons

In *United States v. Hoskins*,¹ the Second Circuit rejected the DOJ's broad interpretation of FCPA liability. The Court analyzed the text, structure, and legislative history of the FCPA and concluded that the statute does not apply to a non-resident foreign national who acts outside the United States, is not an agent of a U.S. person and has no relevant connection to a U.S. business. The Court held that the FCPA applies only to four categories of persons:

1. U.S. citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;

2. U.S. companies, regardless of whether they violate the FCPA domestically or abroad;
3. Agents, employees, officers, directors, and shareholders of U.S. companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad;
4. Non-U.S. persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States.²

In addition to considering the text and structure of the FCPA, the Court reviewed the FCPA's legislative history, recognizing that, barring express congressional authorization, U.S. law does not apply extraterritorially. After examining decades of legislative history concerning the passage of, and amendments to the FCPA, the Court concluded that "the legislative history of the FCPA demonstrates Congress's affirmative decision to exclude from liability the class of persons considered in this case."³ The Court therefore held that the government may not use conspiracy and aiding and abetting charges to impose liability on persons not otherwise subject directly to the FCPA.

The Second Circuit's ruling in this case rejects the approach taken by the U.S. government, and articulated in a [2012 resource guide](#) published by the DOJ and the U.S. Securities and Exchange Commission ("SEC").⁴ The DOJ and the SEC, which both have jurisdiction to enforce the FCPA, have maintained their broad interpretation of extraterritorial liability for several years. The Second Circuit's decision in *Hoskins* will curtail the U.S. government's extraterritorial enforcement of the FCPA.

How Dechert Can Help

The Second Circuit's decision undercuts one aspect of the U.S. government's aggressive approach to FCPA enforcement. Nonetheless, the DOJ and SEC will no doubt continue to vigorously enforce the FCPA and will likely pursue alternative theories to seek to hold non-U.S. persons accountable. Dechert has represented many clients investigating potential FCPA violations and defending cases brought by the U.S. government. Dechert regularly advises U.S. and non-U.S. entities on the creation and implementation of effective anti-corruption and anti-bribery policies with a goal towards FCPA and international anti-corruption compliance.

Footnotes

1) *United States v. Hoskins*, No. 16-1010-cr, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).

2) *Id.* at *13.

3) *Id.* at *22.

4) Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 34 (2012).

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