



Can a Foreign Employee of a Foreign Company be Federally Prosecuted for Foreign Bribery?

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September 19, 2018

Prior to the enactment of the [Foreign Corrupt Practices Act](#) (FCPA) in 1977, U.S. corporate bribery of foreign officials was [commonplace](#). Believing corporate bribery is unethical, “[erodes public confidence in the integrity of the free market system](#),” and is harmful to the reputation of American businesses, Congress enacted the FCPA to prohibit U.S. businesses and persons (as well as their American employees and agents) from bribing foreign officials to secure business deals. The FCPA was subsequently amended in [1998](#) to cover foreign nationals and businesses acting within the United States to bribe foreign officials. This amendment also expanded criminal liability to foreign agents and employees of U.S. businesses, as well as to cover wholly extraterritorial conduct by U.S. businesses and persons. The statute, however, does not plainly extend to conduct by foreign nationals who never act within the United States and are not acting abroad as agents of American businesses or persons.

Nevertheless, the Department of Justice (DOJ) has long taken the [position](#) that foreign nationals and companies may be prosecuted for FCPA violations under conspiracy and accomplice liability theories, even if they cannot be independently charged with a substantive FCPA count due to acting outside of the country. This position is grounded in the “[general rule . . . that a conspiracy to violate the criminal laws of the United States, in which one conspirator commits an overt act in furtherance of that conspiracy within the United States, is subject to prosecution . . .](#)” But that general rule does not always apply in FCPA prosecutions, according to an [August 2018 ruling](#) from the U.S. Court of Appeals for the Second Circuit (Second Circuit). In *United States v. Hoskins*, the court was asked to determine whether federal prosecutors may use the general [conspiracy](#) statute or complicity liability (also known as “[aiding or abetting](#)”) to charge a defendant under the FCPA, even if he does not fall under one of the categories of foreign persons explicitly covered by that law. In short, the Second Circuit’s answer was “no.”

Congressional Research Service

7-5700

www.crs.gov

LSB10197

Overview of the FCPA: The FCPA criminalizes the payment of bribes to foreign government officials. The law describes certain categories of persons to which it applies. As framed by the Second Circuit in *Hoskins*, the four covered [categories](#) are:

1. American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;
2. Most American companies, regardless of whether they violate the FCPA domestically or abroad;
3. Agents, employees, officers, directors, and shareholders of most American companies, when they act on the company’s behalf, regardless of whether they violate the FCPA domestically or abroad;
4. Foreign 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.

Background to the *Hoskins* Decision: Alstom S.A. (“Alstom”) was a French business specializing in power generation and transportation services on the world market. Alstom had numerous subsidiaries around the world, including one based in the United States (“Alstom U.S.”). The defendant in the case, Lawrence Hoskins, a citizen of the United Kingdom and an employee of Alstom’s U.K. subsidiary, worked in France as a Senior Vice President for Alstom’s Asia Region. The government alleged in the criminal [indictment](#) against Mr. Hoskins that he was responsible for hiring consultants to assist Alstom’s Asian business ventures. In that capacity, he was accused of conspiracy by virtue of his coordination with Alstom U.S. to pay and retain these consultants to bribe Indonesian government officials to steer a \$118 million contract to Alstom and its partners. Regarding the conspiracy count, the prosecution proceeded under two separate theories of liability. First, Hoskins was liable as an agent of Alstom U.S. And second, even if he was not an agent, he was still liable because he conspired with the company and aided and abetted the conspiracy. The indictment also charged Hoskins with substantive violations of the FCPA for specific wire transfers of money to the consultants. Similarly, with respect to those counts, the government contended that Hoskins was liable as an agent, but – even if he was not an agent – that he was liable as an accomplice (an aider and abettor) to an FCPA offense.

The Second Circuit Rejects The Indictment Theories: On appeal from a decision dismissing part of the indictment, the Second Circuit was asked to decide whether these theories presented valid bases to prosecute Hoskins under the FCPA. The court agreed that, so long as the government could prove that Hoskins was an agent of Alstom U.S., he could be found liable under both the conspiracy count and the substantive FCPA counts given the specific statutory authorization for such liability. However, it found that, absent such a finding, no liability would attach under conspiracy and aiding and abetting theories.

The Second Circuit acknowledged that, generally, those who facilitate others’ criminal activity may be held liable under conspiracy and aiding and abetting statutes. For example, the court used the analogy of the get-away driver for a bank robbery, who is normally held liable for the substantive crime, by either agreeing to the robbery (conspiracy) or aiding the crime (complicity or “aiding and abetting”). This general rule nevertheless has a narrow exception, sometimes labeled the “affirmative-legislative-policy exception” or the “[Gebardi principle](#)”: when the legislature intended that accomplice liability should not extend to certain classes of persons. The court referenced, for instance, statutory rape. There, even if the underage party may have been a willing participant in the underlying conduct, the law is intended to punish only the adult participant.

In concluding that the FCPA contained an affirmative legislative policy to omit certain persons—including foreign persons like Hoskins who are not agents of U.S. companies and whose alleged misdeeds take place outside the country—from the statute’s reach, the Second Circuit pointed to four categories of evidence. First, it looked to the statute’s [text](#) and observed that the FCPA “contains no provision

assigning liability to persons in the defendant's position – nonresident foreign nationals, acting outside American territory, who lack an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies.” Second, the court examined the FCPA's structure, observing that it includes specific coverage for every combination of defendant traits *except* for nonresident, non-agent foreign nationals whose conduct occurs outside the United States. Third, the court opinion included a lengthy, 24-page recitation of the FCPA's legislative history – spanning its 1977 enactment through its more recent 1998 amendments – to reach the conclusion that Congress did not intend for the FCPA to ensnare foreign nationals without ties to the United States. And fourth, the Second Circuit referenced the general presumption that U.S. law does not apply beyond the country's borders [absent clear congressional intent](#) that it should do so (the presumption against “[extraterritorial application](#)”), finding no such clear intent to permit conspiracy and aiding and abetting liability that would broaden the FCPA's international reach.

The bottom line for the court: the government may hold foreign defendants criminally liable for FCPA violations under a count charging conspiracy or accomplice liability, but only if it proves that they otherwise come within the statute's reach. In the case of Hoskins, per the indictment, that would mean proving he was an agent of Alstom's U.S. subsidiary.

An Invitation to Congressional Action: In a concurring opinion, Judge Gerard E. Lynch agreed with the majority's reasoning, but also believed that the omission of defendants like Hoskins from FCPA was based on a deliberate decision by Congress. He further [continued that](#) “Congress might want to revisit the statute with this case in mind, as the result . . . seems . . . questionable as a matter of policy.” Judge Lynch believed that the presumption against extraterritoriality was warranted in construing the FCPA's reach; the statute was a “novel expansion of criminal liability to impose duties on American businesses to conform to domestic ethical standards even when they operate beyond our borders, in lands with different cultures, laws, and traditions.” The legislative history, in Judge Lynch's view, indicated that the FCPA's primary focus was not to directly reform foreign countries' practices (particularly in developing countries where corruption might be more rampant) but to avoid perpetuating them, while respecting foreign sovereignty. The concurring judge opined, however, that the prosecution of Hoskins did not hinder these policy goals. He was not a foreign official, but a private citizen of the United Kingdom working for a multinational company in France: two countries that are signatories of the [Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) and are purportedly committed to legislation similar to the FCPA.

Thus, Judge Lynch suggested that the result reached by the Second Circuit may be questionable on public policy grounds. The opinion noted that “Hoskins is alleged to have been part of the team that reached into the United States to counsel and procure the commission of an American crime by an American company, and to assist that company in executing bribes in violation of American law.” It seemed to be a “perverse result,” in Judge Lynch's view, to punish foreign nationals who act as agents of U.S. companies bribing foreign officials, but not foreign nationals who instruct U.S. companies to bribe such officials.

Options for Congress: Legislation has not been introduced in the 115th Congress to amend the FCPA to clearly reach extraterritorial conduct by foreign entities who are not U.S. agents. If Congress seeks to do so, it could, for example, extend the principles of conspiracy and accomplice liability to the FCPA generally. This would permit prosecution of foreign nationals, no matter their relationship with U.S. businesses, if those foreign persons assisted in facilitating bribes or even agreed to do so. However, taking such a broad action would potentially deviate from Congress's earlier intent to limit the FCPA's extraterritorial reach to prevent potential interference with the sovereignty of foreign countries. Additionally, in some instances those countries may have anticorruption statutes that provide an avenue for the prosecution of persons in those [jurisdictions](#).

Moreover, although the Second Circuit has rejected the DOJ's arguments, the Second Circuit's opinion is controlling only within that circuit. Federal prosecutors could potentially continue to pursue foreign

nationals using the conspiracy and aiding and abetting statutes in the other circuits. And if other courts of appeals agree with the DOJ position, a future circuit split may lie on the horizon for possible resolution at the Supreme Court.

Finally, Congress may consider whether the existing laws reach the same conduct that would be addressed through an amendment to the FCPA. The Second Circuit's holding was fairly narrow. It only dealt with theories behind some of the counts against Hoskins. It did not dismiss any of the indictment's counts in full. If the government proves Hoskins was acting as an agent of a U.S. business (or if it had alleged that the conduct occurred in the United States), all of the FCPA counts will proceed. And the Second Circuit's ruling did not affect other non-FCPA related counts of the indictment involving money laundering (the [money laundering statute](#) contains a provision specifying when it can be applied extraterritorially). Accordingly, Congress may contemplate whether an expanded jurisdictional reach for the FCPA is a necessary additional tool for federal law enforcement's anti-bribery initiatives.
