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JURISDICTION

Hoskins Provides an Opportunity for Judicial Determination of the FCPA's Jurisdiction

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According to the DOJ and SEC, the FCPA gives the government authority to regulate the extraterritorial behavior of foreign entities and nationals who have never stepped foot inside the United States. Until now, the DOJ and SEC have been unchecked in the exercise of such authority over foreign entities and individuals. However, one British national, Lawrence Hoskins, has asked the U.S. District Court for the District of Connecticut to rein in the DOJ and dismiss an indictment against him for actions he alleges occurred completely outside the territory of the U.S.

The case against Hoskins is not the first time the DOJ has gone after the activities of foreign entities and nationals who have not acted within the U.S. Previously, the DOJ has successfully entered into deferred prosecution agreements with two foreign companies – JGC Corporation (JGC), headquartered in Yokohama, Japan, and Marubeni Corporation (Marubeni), headquartered in Tokyo, Japan[1] – related to activity that occurred completely outside of the territory of the U.S.[2]

The charges against Hoskins, JGC and Marubeni are in line with pronouncements in the November 2012 Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA Guidance), where the DOJ and SEC put foreign entities and individuals on notice:

> A foreign national or company may . . . 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*."[3]

Should the Connecticut court dismiss Hoskins' jurisdictional challenge, it will effectively be the first judicial endorsement of this broad interpretation in the FCPA Guidance. If the court rejects Hoskins' arguments, foreign entities and individuals must pay even closer attention and commit additional resources to establishing systems to avoid the consequences of an allegation of an FCPA violation, including reputational damage, investigation costs, fines, penalties, and, for individuals, jail time. See also "How to Conduct an Anti-Corruption Investigation," Part One: "Ten Factors to Consider at the Outset," and Part Two: "Developing and Implementing the Investigation Plan," The FCPA Report (Mara V.J. Senn and Michelle K. Albert).

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If Hoskins is successful in his challenge, foreign entities and individuals should consider the viability of a jurisdictional challenge when evaluating whether to self-disclose a suspected FCPA violation or even whether to enter into non-prosecution agreements and deferred prosecution agreements.

The Allegations

The DOJ alleges that Lawrence Hoskins, former Senior Vice President of Alstom Holdings, SA (Alstom), Asia region, engaged in a conspiracy and committed substantive FCPA violations under 15 U.S.C. § 78dd-2.[4] The indictment claimed that Hoskins, through improper means, helped secure a $118 million contract for Alstom, a company headquartered in Paris, France, its subsidiaries, including Alstom Power, Inc., headquartered in Windsor, Connecticut (Alstom Connecticut) and business partner Marubeni, headquartered in Tokyo, Japan, to provide power-related services to Indonesia, the Tarahan Project.[5]

The DOJ alleges that in support of the Tarahan Project, Hoskins approved the hiring of, and authorized payments to, two consultants who were retained to pay bribes to a member of the Indonesian Parliament and officials in Indonesia's state-owned and state-controlled electricity company, Perusahaan Listrick Negara, and that in doing so he was an agent of Alstom's U.S. subsidiary.[6]

In seeking dismissal of the suit against him, Hoskins argues that Section 78dd-2 does not apply to the extraterritorial activities of foreign nationals. He takes the position that the fact that Section 78dd-2(i) makes the extraterritorial reach of the FCPA over U.S. citizens explicit, but that no such language is included in the rest of Section 78dd-2, indicates that Section 78dd-2(a) cannot apply extraterritorially to non-U.S. persons like Mr. Hoskins.[7] As a result, because he lived in Paris, France and never traveled to the U.S. while working for Alstom, he argues that he is beyond the jurisdiction of the FCPA.[8]

The DOJ's Arguments

Domestic Nature

In support of its charges against Hoskins, the DOJ first takes the position that the charges against Hoskins are of a domestic nature and thus, the extraterritorial argument does not need to be addressed. It alleges that even though Hoskins worked for Alstom, the parent company of Alstom Connecticut, he was an agent of Alstom Connecticut.[9]

Actions Related to the U.S.

The government further argues that because Hoskins used wires within the U.S., it is inconsequential that he took the relevant actions outside the US.[10] The DOJ points the court to wire fraud cases (like Section 78dd-2 violations, those cases base jurisdiction on the use of the wires) where jurisdiction has been found even when the defendants' alleged unlawful conduct occurred

extraterritorially. The DOJ contends that Hoskins' case is even stronger than the typical wire fraud case because Hoskins did more than use wires to carry out his criminal activity. He negotiated a bogus agreement with a consultant based in Maryland and sent and received emails to and from the U.S. in furtherance of the scheme.[11]

Like Immigration, FCPA Regulates Extraterritorial Activity

The DOJ also argues that the FCPA by its nature regulates extraterritorial activity.[12] Here, again, the DOJ cites to no FCPA cases and argues only by analogy. It points the court to immigration cases where U.S. laws regulate activity near the U.S. border. The Fifth Circuit has held that it is "natural to expect" Congress intended such laws to impact some conduct on the foreign side of the border.[13] Accordingly, DOJ argues, "it is natural to expect that Congress intends the FCPA to reach extraterritorial conduct."[14]

No Limit on Section 78dd-2 Jurisdiction

Finally, the DOJ addresses the heart of Hoskins' argument – that Section 78dd-2(i) renders Section 78dd-2 inapplicable to Hoskins because he is a foreign national and the activity he is alleged to have engaged in occurred wholly outside of the U.S.[15] The DOJ asserts that Section 78dd-2(i) is an alternative basis for establishing jurisdiction and does not, as implied, by Hoskins, limit the extraterritorial application of the remainder of Section 78dd-2.

Importantly, the DOJ, without citing any case law or legislative history, states that Congress amended Section 78dd-2 "to make clear that foreign nationals acting as 'agents' of domestic concerns could be criminally prosecuted for violating the FCPA so long as they made use of 'mails or any means or instrumentality of interstate commerce.'"[16]

Ramifications of the DOJ's Arguments

Here, the DOJ's position appears to be that only foreign entities or foreign nationals *not* acting as an agent or officer of an issuer or domestic concern must meet the higher territorial limitation under Section 78dd-3. According to the DOJ, applying the territorial requirement to agents of domestic concerns would render the addition of "agents" to Section 78dd-2 superfluous, which it says is prohibited under principles of statutory interpretation.[17]

Notably, the DOJ distinguishes Section 78dd-3. That provision applies to anyone other than parties subject to Section 78dd-1 (issuers) or Section 78dd-2 (domestic concerns), and prohibits parties that fall under Section 78dd-3 – generally foreign entities and foreign nationals – or any of their agents from committing corrupt acts of bribery of a foreign official "while in the territory of the United States." If a party subject to Section 78dd-3 only commits acts outside of the U.S., as Hoskins argues he did, then there would be no FCPA jurisdiction.

Accordingly, if Hoskins is an agent of his employer, the French parent Alstom, and not of the subsidiary, Alstom Connecticut, then his actions as an agent would seem to fall under Section 78dd-3 and would not be within the jurisdiction of the FCPA.

But even if Hoskins were an agent of the U.S. entity, he is arguably not subject to FCPA jurisdiction either. The DOJ is stating essentially that foreign nationals or companies who are agents of issuers or domestic concerns are moved out of the purview of Section 78dd-3 into that of Section 78dd-2, and that Section 78dd-2 applies equally to U.S.-based and foreign agents. However, although Section 78dd-2 contains no territorial limitations, Section 78dd-3 excludes only "a domestic concern (as defined in section 78dd-2 of this title)," but not its agents because the definition of domestic concern does not include agents.[18] All other foreign entities and nationals, including foreign agents, would appear to be subject to Section 78dd-3's jurisdictional limitations.

Jurisdictional Limits to Come?

The DOJ's and SEC's pronouncements in the FCPA Guidance, along with the basis for its exercise of jurisdiction over foreign entities like JGC Corporation and Marubeni Corporation, are on trial in *U.S. v. Hoskins*. Ideally, the court could use this opportunity to impose clarity on the constitutional limits of the government's exercise of jurisdiction over foreign entities and nationals. Compare *SEC v. Sharef*, 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013) (dismissing civil bribery case against Canadian employee of Siemens for lack of personal jurisdiction), to *SEC v. Straub*, 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013) (finding jurisdiction over foreign national in the Magyar Telecom case because he "knew or had reason to know that any false or misleading financial reports would be given to prospective American purchasers of those securities"). See "One U.S. District Court in New York Affirms Broad Jurisdictional and Temporal Reach of the FCPA While Another Dismisses FCPA Case for Lack of Contacts," The FCPA Report, Vol. 2, No. 4 (Feb. 20, 2013).

Even if the court punts on the jurisdictional issues raised by Hoskins, foreign entities and individuals now have the benefit of the DOJ's articulation of the basis for its jurisdictional authority. Perhaps this information can even be used to bring additional, more substantive jurisdictional challenges. *See, e.g., Gebardi v. U.S.*, 287 U.S. 112 (1932); *U.S. v. Castle*, 925 F.2d 831 (5th Cir. 1991) (when there is no jurisdiction to bring any substantive claim under the FCPA, aiding and abetting or conspiracy with a U.S. company cannot confer jurisdiction when there is no other connection to the U.S.).

Also irrespective of the court's outcome, given the reputational and financial risks of even an allegation of an FCPA violation, foreign entities and individuals are encouraged to adopt a robust compliance program that includes, among other things, due diligence on third parties, anti-corruption clauses in third-party agreements, anti-

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corruption training for third parties, and regular anti-corruption training for employees.

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[1] In *U.S. v. Carson*¸ the DOJ brought similar charges against Han Yong Kim, a South Korean national, for activity that occurred outside the jurisdiction of the U.S. *See U.S. v. Carson*, No. 8:09CR77, Indictment (C.D. Ca. Apr. 8, 2009). To date, the DOJ has successfully warded off a jurisdictional challenge, in part, because Kim refused to surrender to U.S. custody.

[2] In both JGC and Marubeni, the DOJ alleged jurisdiction based on the fact that JGC and Marubeni conspired with Houston-based Kellogg, Brown, and Root, Inc (KBR) to violate the FCPA by bribing Nigerian government officials to secure an engineering, procurement and construction contract on Bonny Island, Nigeria. The DOJ relied on its so-called authority to prosecute foreign companies for conspiring with U.S. companies even though they never entered U.S. territory. *See U.S. v. JGC Corp.*, No. 11CR260, Criminal Information (S.D. Tex. April 6, 2011) and *U.S. v. Marubeni Corp.*, No. 12CR22, Information (S.D. Tex. Jan. 17, 2012). Rather than challenging the basis of the DOJ's jurisdiction, both entities pleaded guilty to conspiring to violate the FCPA and aiding and abetting KBR to violate the FCPA.

[3] *FCPA Guidance* at 12 (emphases added).

[4] Section 78dd-2 states that "It shall be unlawful for any domestic concern, other than an issuer . . ., or for any . . . *agent* of such domestic concern . . . on behalf of such domestic concern, to make use of the mails or

any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official . . . in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. § 78dd-2 (emphasis added).

[5] *U.S. v. Hoskins*, No. 3:12CR238, Second Superseding Indictment (D. Conn. July 30, 2013).

[6] The Marubeni mentioned here is the same Japanese company that entered into the deferred prosecution agreement in *U.S. v. Marubeni Corp*., No. 12CR22. In connection with the Tarahan Project, Marubeni pled guilty to charges related to the Tarahan Project in March 2014, and agreed to pay an $88 million fine. *See* "Weak FCPA Compliance Program and Lack of Cooperation Cited in Marubeni's $88 Million Guilty Plea," The FCPA Report, Vol. 3, No. 7 (Apr. 2, 2014). Hoskins was identified as being involved in the scheme in the DOJ press release.

[7] *See U.S. v. Hoskins*, No. 3:12CR238, Memorandum of Law in Support of Lawrence Hoskins' Mot. to Dismiss the Second Superseding Indictment (D. Conn. July 31, 2014) at 34 (*quoting* 15 U.S.C. § 78dd-2(i) ("It shall be unlawful for any United States person to corruptly do any act *outside the United States* in furtherance of" a bribe to a foreign official.) (emphasis in original)); *see also id.* ("A fortiori, when a statute clearly indicates an extraterritorial intent with respect to a certain class of actors, then the presumption against extraterritoriality must operate to prevent extraterritorial application with respect to other classes of actors.") (citing cases regarding the presumption against extraterritoriality).

[8] *Id.* at 5.

[9] *U.S. v. Hoskins*, No. 3:12CR238, Government's Response to Defendant's Pretrial Motion to Dismiss at 37-39 (D. Conn. August 29, 2014) (Government's Response).

[10] *Id*. at 38.

[11] *Id*.at 37-38.

[12] *Id*.at 39.

[13] *Id*.at 40 (*quoting U.S. v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005)). The DOJ also cites to a Second Circuit case discussing criminal laws where the court noted the "Congress is presumed to intend extraterritorial application of criminal statues where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to the United States territory would severely diminish the statute's effectiveness." *U.S. v. Cohen*, 427 F.3d 164, 169 (2d Cir. 2005) (*quoting U.S. v. Yousef*, 327 F.3d 56, 87 (2d Cir. 2003)).

[14] Government's Response at 40.

[15] Section 78dd-2(i) states: "It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance [of paying a bribe to a foreign official] . . . irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization."

[16] Government's Response at 42. Even though not cited by the DOJ, the legislative

history of the 1998 amendments is also relevant. It states, in part, "In the current statute, foreign nationals employed by or acting as agents of U.S. companies are subject only to civil penalties. The Act eliminates this restriction and subjects all employees or agents of U.S. businesses to both civil and criminal penalties." S. Rep. No. 105-277 at 2 (1998); *see also* H.R. Rep. No. 105-802 (1998); *U.S. v. Bodmer*, 342 F. Supp.2d 176, 186 (S.D.N.Y. 2004) ("The legislative history for the 1998 amendments, as well as the Department of Justice's own pronouncements, suggest that until after the 1998 amendments, the criminal sanctions did not apply to foreign nationals who act as agents of domestic concerns, unless they were found in the United States.").

[17] Government's Response at 42.

[18] *See* Section 78dd-2(h)(i) (A "domestic concern" is "(A) any individual who is a citizen, national, or resident of the United States; and (B) 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.").