Goodmans LLP Update

U.S. Appeals Court Clarifies Jurisdictional Limits of FCPA

A U.S. federal appeals court recently articulated the jurisdictional limits of the *Foreign Corrupt Practices Act* (FCPA), which establishes various criminal offences related to the bribery of foreign public officials (similar to the Canadian *Corruption of Foreign Public Officials Act* (CFPOA)). Canadian companies with connections to the U.S. have, or should have, been mindful of the reach of the FCPA given the concern that U.S. authorities would often seek to apply the statute broadly to any conduct occurring in foreign jurisdictions where there was some connection to the U.S.

In *United States v. Hoskins*, the Second Circuit Court of Appeals in New York (the "**Appeals Court**") ruled that a non-resident foreign national cannot be held criminally liable for aiding or abetting or conspiring to violate the FCPA, unless (i) the person acted as an officer, director, employee, agent or shareholder of a U.S. issuer or domestic corporation; or (ii) the person engaged in the wrongful act while physically present in the U.S. In other words, the (ordinarily) far-reaching anti-corruption statute does not extend to non-resident foreign nationals who lack sufficient personal connection to the U.S. or a U.S. company.

Although it is a U.S. case, *Hoskins* has important implications for Canadian companies and individuals with ties to the U.S., particularly those with U.S. subsidiaries or whose stocks trade on U.S. exchanges. However, the possible jurisdictional reach of the FCPA over the foreign parent company of a U.S. subsidiary, and how U.S. courts will interpret the jurisdictional limits articulated by *Hoskins* in different scenarios, remain to be seen. Moreover, while the decision in *Hoskins* appears to narrow the scope of FCPA jurisdiction, Canadian companies should note that corrupt practices in other countries will still fall within the jurisdiction of the CFPOA for Canadian companies and nationals, and that other countries have similar far-reaching anti-corruption legislation.

Background

Beginning in 2013, U.S. federal prosecutors brought a series of FCPA bribery charges against Lawrence Hoskins, a British national who worked for the French multinational energy and transportation company Alstom S.A. ("**Alstom**"). The indictments alleged Hoskins and several others bribed officials in Indonesia to secure a $118 million power contract.

At all relevant times, Hoskins was employed by Alstom's U.K. subsidiary, Alstom U.K. Ltd. Hoskins never worked for Alstom's U.S. subsidiary, Alstom Power Inc. ("**Alstom U.S.**"), directly; however, some elements of the alleged scheme, including meetings regarding the planned bribes, took place in the U.S.

The prosecutors proceeded on the basis that during the relevant period, Hoskins was an "agent of a domestic concern" – that is, he was an agent of Alstom U.S. – and that he violated the FCPA in that capacity. The prosecutors also alleged Hoskins was guilty of conspiring to violate the FCPA because he "acted together with a domestic concern".

Hoskins moved before the U.S. District Court (Connecticut) to have the conspiracy charges against him dismissed on the basis that he was not subject to the FCPA's jurisdiction. The District Court agreed, and held that the FCPA does not confer jurisdiction over individuals who are not U.S. nationals and who do not:

- carry out corrupt acts while in the territory of the U.S.; or
- fall within any of the specific categories of persons enumerated by the FCPA (for example, an "issuer" or "agent of a domestic concern").

The U.S. government appealed to the Appeals Court.

Decision on Jurisdictional Limits

The Appeals Court largely affirmed the District Court. It reversed a portion of the District Court's decision, but agreed that one of the counts against Hoskins of conspiring to violate the FCPA should be dismissed.

Following a lengthy discussion of the legislative history of the FCPA, the Appeals Court determined it was Congress' intent to limit liability under the FCPA to the following three categories of persons:

1. issuers of securities registered with a U.S. stock exchange, any officer, director, employee, or agent of such issuer, or any stockholder acting on behalf of such issuer who uses interstate commerce in connection with the payment of bribes;
2. U.S. companies and U.S. persons using interstate commerce in connection with the payment of bribes; and
3. foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the U.S.

The Appeals Court then concluded "the FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern – *unless* that person commits a crime within the territory of the United States".

On the facts, certain of Hoskins' alleged acts fell outside the scope of FCPA liability because at the relevant times, he was a non-resident foreign national, working for a France-based multinational corporation, and his otherwise criminal conduct took place outside the U.S. Accordingly, the Appeals Court dismissed a portion of the indictment alleging Hoskins conspired to violate the FCPA.

However, the Appeals Court allowed a separate count to proceed because it contained an allegation that Hoskins conspired to violate the FCPA specifically while in the territory of the U.S., and as an agent of a domestic U.S. company, bringing him within at least two if not all three of the FCPA's categories of persons who are subject to the FCPA.

Comparison to Canadian Decisions on Anti-Corruption Jurisdiction

The Appeals Court in *Hoskins* took a similar, but potentially different, approach to the issue of jurisdiction over foreign nationals than was taken by the Ontario Superior Court of Justice in *Chowdhury v. H.M.Q.* In *Chowdhury*, the Ontario Court held that the CFPOA may not give Canadian courts jurisdiction over offences committed by foreign nationals who are not located in Canada; however, Canadian courts can obtain such jurisdiction if the accused enters Canada or is extradited to Canada. As we noted in our June 20, 2014 Update, *CFPOA May Not Give Canadian Courts Jurisdiction Over Foreign Nationals Outside Canada*, although *Chowdhury* had the effect of limiting the practical scope of liability under the CFPOA, it also reaffirmed that Canada can prosecute CFPOA offences against anyone involved in an offence under the CFPOA who returns to Canada voluntarily, including foreign nationals, or when Canada can "lay hands" on the accused through extradition. In contrast, the U.S. Appeals Court in *Hoskins* appears to have accepted that liability for the offence itself, as opposed to just procedural jurisdiction, may not exist against foreign nationals who do not fit within one of the categories identified above. As a result, jurisdiction over foreign nationals may be more limited under the U.S. FCPA compared to the Canadian CFPOA.

Significance and Possible Implications for Canadian Companies

Given the global reach of many U.S. industries and the importance of the U.S. market internationally, the extent of the FCPA's jurisdiction is a concern for many companies. The ruling in *Hoskins* is significant as it appears to narrow the jurisdictional reach of the FCPA over certain non-resident foreign nationals.

Canadian companies should be mindful, however, that non-resident foreign nationals can still face liability under the FCPA – even if the offending conduct takes place entirely outside the U.S. – if that individual has sufficient connection to a U.S. company.

It remains to be seen how and to what extent other U.S. courts will accept the jurisdictional limits articulated by *Hoskins*. As such, Canadian companies should continue to maintain robust compliance and ethics programs and conduct adequate due diligence on all third-party relationships.

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