Baker McKenzie FenXun
奋迅 · 贝克麦坚时

Compliance & Investigations
Beijing/Hong Kong/Shanghai

Client Alert

September 2018

US Court of Appeals limits jurisdictional reach over foreign nationals in conspiracy to violate the FCPA: Lessons for companies in Asia

On 24 August 2018, the US Court of Appeals held in *U.S.A v. Lawrence Hoskins No. 16-1010-CR* (*Hoskins*) that a non-resident foreign national cannot be guilty of violating the US Foreign Corrupt Practices Act (FCPA) as an accomplice or a co-conspirator if that person was incapable of committing it as a principal.

In recent years, US authorities have successfully prosecuted a number of foreign corporations for bribing non-US public officials. In addition to US domestic concerns, issuers of securities and their employees or agents, the FCPA also applies to US citizens outside of the US and any persons committing a prohibited act while in the territory of the US.

However, US prosecutors have faced difficulties in establishing the jurisdictional nexus between a potential foreign defendant and corrupt activity in the US. In this context, the US government has taken an expansive view that individuals and companies, including foreign nationals and companies, may be liable for conspiring to violate the FCPA even if they are not, nor could be, independently charged with an actual violation[1]. While *Hoskins* appears to limit this expansive view of the FCPA's extraterritorial application, it is also likely to strengthen the US regulators' recent FCPA enforcement strategy of increased cooperation and coordination between global enforcement bodies to ensure wrongdoers are prosecuted in the most appropriate jurisdiction to achieve a conviction.

What *Hoskins* means for companies operating in Asia

Many MNCs operating in Asia have complex corporate structures and employ global talent. Companies are also aware of the FCPA's "long arm" jurisdiction. In this case, Hoskins, was a senior executive for the Asia region for the subsidiary of a French company and had allegedly approved payments to “consultants” retained to bribe Indonesian officials. He was a British national and was not working for a US company nor present in the US during the alleged violation.

On its face, *Hoskins* limits the extraterritorial application of the FCPA because it clarifies that the government cannot prosecute foreign nationals for conspiring to commit or aiding and abetting a violation of the FCPA if they are not otherwise subject to the FCPA. This statement may appear self-evident, but runs counter to the baseline rule for conspiracy that even when only a certain category of person may commit a crime, a person outside the category can still conspire (and be guilty) of the crime as conspiracy is a separate offense.

Undoubtedly, *Hoskins* will reinforce the US government's recent strategy of international coordinated and cooperative enforcement, under which they pursue the US company or issuer while local authorities prosecute the foreign individuals. In most cases, executives of foreign multinational companies not

[1] As provided in the FCPA Resource Guide jointly issued by the US Department of Justice and US Securities and Exchange Commission in 2012.

Baker McKenzie FenXun
A Leading Chinese and International Law Joint Platform

For further information, please contact:

Mini vandePol
Partner
+852 2846 2562
mini.vandepol@bakermckenzie.com

Simon Hui
Partner
+86 21 6105 5996
simon.hui@bakermckenzie.com

Vivian Wu
Partner
+86 10 6535 3860
vivian.wu@bakermckenziefenxun.com

Peter Andres
Special Counsel
+852 2846 1760
peter.andres@bakermckenzie.com

Henry Chen
Special Counsel
+86 21 6105 8521
henry.chen@bakermckenzie.com

otherwise subject to the FCPA are unlikely to function as agents because they are more likely the persons directing or approving a bribery scheme (i.e., the principal).

Recognizing the difficulty in prosecuting foreign nationals, recent enforcement actions demonstrate that the US government has taken a different and possibly more efficient approach - by resorting to collaboration and shared prosecutions with their foreign counterparts facilitated especially by the rising ease of international coordination. For instance, in the bribery scheme involving Telia Company AB[2], the US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ) pursued enforcement actions against Telia Company AB (but not the Telia executives), while the Swedish authorities charged Telia executives for bribery. Another example would be the Odebrecht global settlement[3], where the DOJ pursued enforcement actions against the company, while the Brazilian authorities prosecuted the Brazilian individuals.

Actions to take

Companies with operations across multiple jurisdictions should be prepared to coordinate concurrent investigations and prosecutions in each applicable jurisdiction which may be involved. We recommend that companies should:

- Continue to develop resources for building a compliance program which follows standards set out under both the FCPA and local anti-corruption laws.
- Provide anti-bribery training to employees emphasizing that prosecution can happen anywhere and to anyone, including individuals and not just companies.
- Be prepared to respond to investigations and prosecutions spanning multiple jurisdictions by developing legally privileged (where possible) cross-border engagement strategies with coordinated local counsel teams to assess disclosure obligations and related risks in each of those countries.

Comments

Hoskins may potentially face liability if found to be acting as an agent of domestic concern, a determination not made in this decision. The DOJ can pursue separate counts alleging that the defendant is an "agent" of a US company on the remaining counts that have been on-hold during the appeal. However, the court's decision creates an additional evidentiary burden for the DOJ as it requires evidence of an agency relationship. Such a requirement appears to be counter-intuitive especially when a senior manager of a foreign parent is alleged to be the agent of the US subsidiary (whereas it is almost a given that an employee of a subsidiary acts as its parent's agent).

We are seeing an uptick in US government coordination of and cooperation with foreign enforcement authorities in order to hold corrupt individuals and companies accountable, particularly foreign executives, perhaps as a result of the challenges faced in *Hoskins*. With the *Hoskins* ruling, we expect to see this trend continue with greater vigor. Companies must therefore ensure that their compliance programs conform with global standards, not just US benchmarks, and consider their engagement strategies with local regulators as well as the US DOJ and SEC.

www.bakermckenziefenxun.com
www.bakermckenzie.com
www.fenxunlaw.com

Baker McKenzie FenXun (FTZ)
Joint Operation Office
Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC

Tel: +86 21 6105 8558
Fax: +86 21 5047 0020

[2] USA v Telia Company AB No.17- CR-581-BGD (2017)

[3] USA v Odebrecht S.A. Cr. No.16-CR-643-RJD (2016)