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SECOND CIRCUIT REVIEW

Expert Analysis

# Holding the Line on the Foreign Corrupt Practices Act

In *United States v. Ho*, 984 F.3d 191 (2d Cir. Dec. 29, 2020), the U.S. Court of Appeals for the Second Circuit refused an invitation to narrow the scope of the Foreign Corrupt Practices Act (FCPA). Two years ago, in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), the Second Circuit ruled that the FCPA only applies to foreign nationals covered by the statute's specifically enumerated categories. In *Ho*, the defendant argued that *Hoskins* required a further narrowing of the statute, insisting that these enumerated categories were mutually exclusive and that it was inappropriate to convict him under two separate provisions.

In an opinion written by Circuit Judge Richard Sullivan and joined by Circuit Judges Reena Raggi and Denny Chin, the court disagreed and ruled that the FCPA provisions separately targeting foreign activities by a domestic concern and U.S.-based activities by a foreign entity are not mutually exclusive. The court upheld the defendant's bribery convictions.

By **Martin Flumenbaum** And **Brad S. Karp**

### The FCPA and Precedent

The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78, is a federal statute proscribing bribery of foreign government officials by U.S. entities and, as of 1998, by foreign entities whose bribery-related conduct occurs on U.S. soil. The FCPA applies to publicly traded companies and their officers, directors, employees, shareholders, and agents.

Two specific provisions are relevant to the case at hand. Section 78dd-2 prohibits an officer or director of a "domestic concern" from offering or paying bribes to a foreign official to gain "any improper advantage," "in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person." A "domestic concern" includes any entity that has its principal place of business in the United States or is organized under the laws of a U.S. state.

Section 78dd-3, by contrast, prohibits the same conduct by "any person other than … a domestic concern," or any officer, director, employee, or agent acting on such person's behalf while in the territory of the United States.

Cases involving the FCPA frequently end in private settlements, so decisions delineating the FCPA's jurisdiction are rare. In those few jurisdictional decisions, the Second Circuit had repeatedly confirmed a relatively broad application of the FCPA. But in 2018, in *United States v. Hoskins*, the court refused to use conspiracy and complicity liability to apply the FCPA to persons not covered by the Act's enumerated categories.

The court pointed out that Congress had specified foreign persons would be liable under the FCPA if they "fit within three categories: (1) those who acted on American soil; (2) those who were officers, directors, employees, or shareholders of U.S. companies, and (3) those who were agents of U.S. companies." 902 F.3d at 91. By specifying these categories, the court reasoned, Congress precluded using other liability doctrines to bring within the ambit of the FCPA a foreign national who had never done business in the United States or for a U.S. entity. Id. at 83-95.

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*Hoskins* highlighted that it was in fact possible to challenge the scope of the FCPA's jurisdiction and was taken as a potential signal that the Second Circuit was turning away from a decade of applying the FCPA relatively broadly. Two years later, *Ho* presented another opportunity to clarify the FCPA's jurisdiction and to determine whether *Hoskins* had indeed been a bellwether for a narrower construction.

**Background**

Dr. Chi Ping Patrick Ho, a Hong Kong citizen, was an officer and director of two non-profits funded by CEFC China Energy Company Ltd. (CEFC Energy), a Shanghai-based conglomerate. The first non-profit (CEFC NGO) was based in Hong Kong, and funded a second, U.S.-based non-profit. CEFC NGO held itself out as an organization "headquartered in Hong Kong" with an office "in the United States," and as a Chinese think tank registered in both Hong Kong and the USA. 984 F.3d at 195.

Dr. Ho served as an officer and director of both the Hong Kong and U.S.-based non-profits and ran their daily operations. He described himself as the "Secretary General" of "a Chinese think tank registered in Hong Kong" and "in the USA as a public charity." His job focused on making contacts with high-ranking officials at the United Nations to drum up business for CEFC Energy.

This case arose out of Dr. Ho's bribing central African political leaders in an attempt to access their countries' oil fields. During negotiations, Ho sent the President of Chad $2 million (which he rejected), and wired $500,000 from CEFC NGO to a charity controlled by the Foreign Minister of Uganda (a transaction transferred through multiple New York bank branches). 984 F.3d at 195-97.

Ho was convicted in the Southern District of New York on seven counts charging violations of and conspiracy to violate FCPA §§78dd-2 and 78dd-3, and the money laundering statute, 18 U.S.C. §1956(a)(2)(A). *United States* v. *Ho*, 2019 WL 9042917 (S.D.N.Y. March 27, 2019). On appeal, Ho challenged his conviction on numerous grounds, including on the basis that the indictment was defective because it contained material contradictions and the charges under §§78dd-2 and -3 were mutually exclusive. 984 F.3d at 198. With respect to this ground, he argued that §78dd-2 and §78dd-3 were mutually exclusive because the two provisions target completely different entities: the former applies to the foreign activities of U.S.-based companies, while the latter is aimed at the U.S. activities of foreign companies. 984 F.3d at 210.

Ho argued that *Hoskins* and the legislative history of the FCPA made clear Congress added §78dd-3 after §78dd-2 to create criminal penalties for persons not covered by existing provisions. Therefore, he argued, an indictment under both provisions was contradictory because he could not be both an officer/director of a U.S-based company acting abroad and an officer/director of a foreign company acting in the U.S. with regard to the same conduct. 984 F.3d at 212-13.

**The Second Circuit Opinion**

In *Ho*, the Second Circuit held that §§78dd-2 and 78dd-3 of the FCPA are not mutually exclusive. 984 F.3d at 212. As the court explained, "the FCPA's statutory language contains no indication that the provisions are mutually exclusive, or that both sections would not cover a director, like Ho, who acts on behalf of both a domestic concern … and on behalf of a person other than a domestic concern."

The court characterized *Hoskins* as simply clarifying the three congressionally created categories of FCPA liability for foreign persons, not precluding an individual from falling within more than one category. Without the text or Hoskins explicitly stating otherwise, the court concluded, it was appropriate for both §78dd-2 and 78dd-3 to apply, "particularly where, as here, that individual acts on U.S. soil on behalf of both domestic and foreign entities." 984 F.3d at 213.

**Conclusion**

The Second Circuit's ruling in *United States v. Ho* silenced post-*Hoskins* speculation that the Second Circuit would continue to narrow the scope of FCPA liability. Rather, the Second Circuit remains open to FCPA liability as long as law enforcement can make a credible argument that the defendant fits into any of the enumerated categories. Indeed, *Ho* and *Hoskins* together confirm that the Second Circuit expects an explicit textual hook to support arguments about the Act's jurisdiction.

As for the effect of the *Ho* ruling, it appears to have been crucially important to the court that Dr. Ho held himself out as working on behalf of both CEFC NGO and the U.S. NGO. This raises questions as to how foreign persons with a U.S. affiliate will characterize their activities or division of responsibilities going forward.