

## LUTTE CONTRE LA CORRUPTION

## 160 Judicial Limits on US Prosecution of Foreign Nationals for Overseas Bribery



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**H**istoriquement, le Département de la justice américain (DoJ) s'est appuyé sur une interprétation extensive de la théorie du complot pour étendre sa juridiction aux personnes physiques ou morales américaines et étrangères mises en cause dans le cadre des lois anti-corruption. Une décision de la *US Court of Appeals for the Second Circuit* du 24 août 2018 apporte une limite à cette pratique de plus en plus agressive de l'autorité américaine par un contrôle à la fois rare et notable. Cet article offre un aperçu de l'étendue et de la portée de cette décision et envisage ses éventuelles conséquences sur les futures personnes de nationalité étrangère mises en cause.

United States v. Hoskins case, No. 16-1010, 2018 WL 4038192 (2d Cir. Aug. 24, 2018)

## 1. Introduction

Historically the DoJ has aggressively interpreted the US Foreign Corrupt Practices Act (FCPA) and related statutes in matters involving bribery of foreign officials by both US and non-US companies and persons. This approach - and in particular the DoJ's use of the US federal conspiracy statute - has resulted in numerous settled FCPA enforcement actions by foreign defendants involving overseas bribery with tenuous connections to the United States. On August 24, 2018, a leading federal appellate court, the US Court of Appeals for the Second Circuit, issued a decision in *United States v. Hoskins* restricting the DoJ's use of conspiracy and complicity statutes to reach foreign nationals who fall outside the FCPA's jurisdictional provisions.

As a result, the ruling makes it harder for the DoJ to bring criminal charges in FCPA cases against foreign nationals, particularly those working for foreign companies that are not "issuers" with shares traded on a US stock exchange and whose conduct takes place outside the United States. The ruling is sufficiently narrow in scope, however, that it is unlikely to meaningfully affect the number or types of FCPA investigations the DoJ will pursue.

## 2. The Hoskins Decision

### A. - Legal Context for Hoskins Decision

The FCPA's anti-bribery provisions establish jurisdiction over three categories of persons:

- "issuers" of securities traded on a US stock exchange, as well as any officer, director, employee, or agent of an issuer, or a stockholder acting on the issuer's behalf<sup>1</sup>, using interstate commerce;
- "domestic concerns", namely US persons and companies (whether or not there is any use of interstate commerce), as well as officers, directors, employees, agents, or stockholders acting on their behalf<sup>2</sup>; and,
- any other person (including non-US persons and businesses) engaged in acts to further corrupt schemes while in US territory (known as "territorial" jurisdiction)<sup>3</sup>.

The DoJ has long taken the position that a foreign defendant could be held liable for conspiring to violate the FCPA or for aiding and abetting a violation of the FCPA, even if he or she could not be independently charged with a substantive FCPA violation<sup>4</sup>. For example, the FCPA Resource Guide issued in 2012 by the DoJ and the US Securities and Exchange Commission (SEC) asserts that jurisdiction over all conspirators - including a foreign company or individual - generally will be es-

<sup>1</sup> See 15 USC § 78dd-1.

<sup>2</sup> See 15 USC § 78dd-2.

<sup>3</sup> See 15 USC § 78dd-3.

<sup>4</sup> See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 11 (Nov. 14, 2012): <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.