William & Mary Business Law Review

Volume 11 (2019-2020)
Issue 3

Article 5

April 2020

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CONSPIRACY LIABILITY AND THE FCPA: THE SECOND CIRCUIT'S RARE INTERPRETATION OF THE FCPA IN *UNITED STATES V. HOSKINS* AND ITS POTENTIAL IMPLICATIONS

MORGAN R. KNUDTSEN*

ABSTRACT

The scope of the Foreign Corrupt Practices Act (FCPA) is inherently difficult to ascertain. Over time, the SEC and DOJ have privately settled claims under the FCPA, leaving most interpretation to government agencies. Though agency interpretation happens frequently, there has been little interpretation over major questions such as who is subject to the FCPA's jurisdiction and how far that jurisdiction extends. United States v. Hoskins*, which was decided in August 2018, involved the FCPA, conspiracy, and foreign corporate officials. The Second Circuit in its decision subsequently limited the scope of the FCPA, holding that liability cannot extend to foreign persons who have never set foot in the United States or who do not fit within the categories set forth within the statute.* Hoskins*, a case of statutory interpretation, leaves many holes in our understanding of FCPA compliance and enforcement. This Note seeks to determine the implications the Second Circuit's decision will have for future courts and defendants.*

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INTRODUCTION

The Foreign Corrupt Practices Act (FCPA or The Act) was the product of years of uncovered corporate corruption and bribery in the United States.[1] Codified as part of the Securities Exchange Act of 1934, the FCPA contains anti-bribery provisions, which prohibit individuals from seeking favorable business opportunities by offering things of value to foreign officials.[2] Almost inevitably, the government implemented the FCPA to require corporations to monitor their employees, comply with government standards, and prevent the bribery of foreign officials.[3] As written, the statute addresses a class of persons that must comply with its command, seemingly identifying who can be liable for violating the FCPA.[4] However, though passed in the wake of Watergate, there remains a void in our understanding of the FCPA's reach, making the Second Circuit's decision in *United States v. Hoskins* a stepping-stone to greater understanding of the law.[5]

Hoskins questioned the limits of the FCPA's jurisdictional reach in addressing whether conspiracy liability may attach to individuals who have never stepped foot in the United States but have communicated with a U.S. corporation for the purpose of bribing foreign officials.[6] At the time of writing, the *Hoskins* story is seemingly complete, as the United States has declined to seek certiorari. The Second Circuit announced its decision in August 2018, offering an exceptional judicial interpretation of the FCPA and seemingly limiting the government's fairly expansive reading of FCPA liability.[7] Given the Circuit's restriction on the government's reach, this Note considers the unique position the government now faces in future FCPA prosecutions.

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[1] *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 230 (1997).

[2] Taylor J. Phillips, *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, 6 WM. & MARY BUS. L. REV. 89, 92 (2015).

[3] Salbu, *supra* note 1, at 230–31.

[4] *See* 15 U.S.C. § 78dd-1 (1976).

[5] *See* Ezekiel K. Rediker, *The Foreign Corrupt Practices Act: Judicial Review, Jurisdiction, and the "Culture of Settlement,"* 40 SETON HALL LEGIS. J. 53, 54 (2015).

[6] *See generally* United States v. Hoskins, 902 F.3d 69, 76 (2d Cir. 2018).

[7] Christian R. Martinez, Note, *The Curious Case of Lawrence Hoskins: Evaluating the Scope of Agency Under the Anti-Bribery Provisions of the FCPA*, 53 COLUM. J.L. & SOC. PROBS. 211, 212, 214 (2020).

Notably, *Hoskins* renders a decision not only on the FCPA, but also on our understanding of conspiracy liability.[8] In light of the Second Circuit's decision, this Note begins with a brief overview of conspiracy liability as it has been interpreted across various courts. Part II then considers the unusual position the Second Circuit was in to consider the FCPA's jurisdictional reach by briefly considering the historical background of the FCPA. Before concluding in Part IV, Part III shifts to demonstrate the *Hoskins* decision particularly focusing on how the Second Circuit used preexisting case law to establish its unique holding. Finally, in Part IV, this Note considers the practical side effects of *Hoskins*, its implications, and whether agency liability can—and will—attach to foreign individuals such as Mr. Hoskins in future litigation.

I. CONSPIRACY LIABILITY AND LEGISLATIVE INTENT—THE FOUNDATION FOR *HOSKINS*

Conspiracy liability is not a blanket rule that attaches to all individuals regardless of the underlying offense.[9] Rather, there are inextricable common law exceptions to criminal liability that are often tied to legislative intent.[10] The following discussions offer valuable insight into the history of the inquiry addressed in *Hoskins*. Importantly, these cases have laid the foundation for the Second Circuit to ascertain just how conspiracy liability and legislative intent work together to establish whether a statute can be extended to an unnamed class of individuals.[11] As a necessary precondition, this Note considers the logic set forth in these cases to make sense of the Second Circuit's holding. Subsequently, in Part III, this Note will consider how these cases uniquely shaped the Second Circuit's decision, why the Second Circuit found Mr. Hoskins was not liable under the FCPA, and how the court arguably extended the narrow exception set forth by the Supreme Court in *Gebardi v. United States*.[12]

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[8] *See generally Hoskins*, 902 F.3d at 76–77.

[9] *See* Shu-en Wee, Note, *The* Gebardi *"Principles,"* 117 COLUM. L. REV. 115, 116 (2017).

[10] *Id.* at 119.

[11] *Compare id.*, *with Hoskins*, 902 F.3d at 80–81.

[12] *See infra* Part III.

A. The Gebardi *Principle: A Springboard Exception to Accomplice Liability*

The leading case on conspiracy liability is the Supreme Court's 1932 decision in *Gebardi v. United States*.[13] Historically, *Gebardi* was decided at a time when strict application of the conspiracy statute led to jarring results.[14] Chiefly, the Supreme Court was concerned with the fundamental irregularities that existed where a statute would expressly protect a certain class of persons, but where the federal conspiracy statute would subsequently hold that same class of individuals liable for the underlying crime.[15] Consequently, the Court crafted a unique exception to conspiracy liability that protects against liability if a statute neglects to name a specific class of persons as a necessary component to the commission of the crime.[16]

At issue in *Gebardi* was the Mann Act, a federal law prohibiting the transportation of women for the purpose of sexual intercourse in interstate commerce, notwithstanding a woman's consent to the act.[17] The *Gebardi* petitioners allegedly conspired to transport a woman across state lines in violation of the Mann Act.[18] One of the named petitioners, however, was the woman transported.[19] Thus, the question before the Court was whether there was sufficient evidence to support the woman's conviction under a theory that she too conspired to commit the crime.[20] The Court understood the fundamental irregularities set forth by the conspiracy statute and, in evaluating the statute's text and the specific legislative intent at issue, declined to hold the woman liable for her participation in the crime.[21]

The Court heavily relied on the statute's text, stating that the Act failed to condemn a woman for her consent to participate in

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[13] *See* Wee, *supra* note 9, at 116.
[14] *See* Gebardi v. United States, 287 U.S. 112, 115 (1932).
[15] *See id.* at 123.
[16] *See id.*
[17] *Id.* at 118–20.
[18] *Id.* at 115–16.
[19] *Id.* at 116.
[20] *Id.*
[21] *Id.* at 123.

the crime.[22] Perhaps most importantly, the Court noted an underlying affirmative legislative policy to leave the woman free from liability.[23] The Court articulated that the Mann Act was not intended to punish a woman for "transporting herself" across state lines and, at the very least, liability could only attach if the woman helped another to transport herself.[24] Instead, Congress designed the Mann Act to punish only those who actually sought to violate the law.[25] The Court refused to extend liability to a woman who merely acquiesced to the principal's violation.[26]

The key to understanding *Gebardi* and its subsequent cases requires careful consideration of statutory interpretation as the foundation for legislative intent. The Court first determined the plain language of the Mann Act supports its conclusion that Congress intended only for the Mann Act to hold those that "transport" liable, instead of those that merely participate.[27] The statutory language created an underlying presumption that Congress intended to reach only a specific class of individuals.[28] In expressly identifying who is liable for violations of the Mann Act, Congress implicitly and intentionally immunized all other classes of individuals by choosing not to name them in the statute.[29] Immunization, however, is not absolute.[30] The law may hold an unidentified class liable where application of the conspiracy statute does not contravene Congress's underlying legislative policy.[31]

The principle set forth in *Gebardi* is arguably a rather narrow rule that seems to rely on the inherent differences between

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 118–19 (quoting United States v. Holte, 236 U.S. 140, 145 (1915)).

[25] *Id.* at 119–21, 123.

[26] *Id.* at 123. The Court's reasoning in *Gebardi* is consistently applied in cases where individuals are found to be the victims of the underlying crime. For example, in cases of statutory rape, courts will routinely decline to hold the underage person liable for the crime as an accomplice or co-conspirator, even if they were active and willing participants. The logic evidently stems from *Gebardi* but may also stem from a societal principle that the laws should not aim to punish those the laws deem victims of the alleged crime.

[27] *Id.* at 118–19.

[28] *Id.* at 119.

[29] Wee, *supra* note 9, at 116, 123–24.

[30] *Gebardi*, 287 U.S. at 123.

[31] *Id.*

statutes.[32] Constructing statutes requires an "affirmative congressional intent" to include or exclude certain classes from the law's reach.[33] With respect to the Mann Act, the Court reasoned that conspiracy to violate this specific kind of statute required more than consent to the principal's conduct, and instead required active participation.[34] The Court did not look to specific floor statements or to the law's codified purpose, but instead looked to the specific text and the woman's actual role in the commission of the crime.[35]

As it stands, *Gebardi* authored a narrow, two-pronged assessment for conspiracy liability. First, the statute must criminalize some action taken by an individual whose consent is an "inseparable incident" that merges with the underlying crime,[36] but whom the statute does not expressly punish.[37] Having established this prong, a court must then consider whether there is more than mere consent to commit the alleged crime.[38] *Gebardi* thus served as a starting point for later conspiracy cases by establishing that the fundamental presumption of immunity from conspiracy liability will only apply where the underlying offense both requires the named party to participate in the offense and where that party is not a class subject to liability in the underlying statute.[39]

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[32] *See id.* For example, a law prohibiting bankruptcy fraud could result in the imposition of conspiracy liability, because there does not appear to be a "victimized" participant—all individuals would seem to participate in the crime and the law does not aim to protect individuals that participate. *See id.* The Mann Act, however, does not allow for conspiracy liability because the Act specifically aims to protect the woman transported for the commission of the crime. *Id.*

[33] *See id.*

[34] Jack C. Smith, Note, *Grappling with* Gebardi*: Paring Back an Overgrown Exception to Conspiracy Liability*, 69 DUKE L.J. 465, 475–76 (2019).

[35] *Id.*

[36] *Id.* at 480.

[37] *Id.* at 477; *see also* Wee, *supra* note 9, at 123–24.

[38] Smith, *supra* note 34, at 477; *see also* Wee, *supra* note 9, at 123. The Court suggested that a woman may be liable for violations of the Mann Act if she was the "moving spirit" of the crime. *Gebardi*, 287 U.S. at 117. This seems to suggest that the woman must actively suggest the cross-border trip, finance the means to travel across state lines, or perhaps blackmail another into violating the law. *See id.*

[39] Wee, *supra* note 9, at 121.

B. Gebardi *in Application: Conflicting Interpretations of the Supreme Court's Narrow Holding*

1. United States v. Amen*: The Drug Kingpin Statute*

Prior to rendering its decision in *Hoskins*, the Second Circuit addressed *Gebardi* and conspiracy liability in relation to long-standing criminal enterprises.[40] At issue in *Amen* was the Continuing Criminal Enterprise statute ("the Drug Kingpin Statute"), which subjects high officials of drug organizations to a maximum of life imprisonment for serving as the kingpin of an organization.[41] The key question before the court was whether a person could be liable for conspiring with the kingpin of the enterprise; it held that nonemployees of a continuing criminal enterprise "could never conspire to violate" the statute.[42]

The case before the court involved a nonemployee who not only communicated with the kingpin's subordinates but also performed acts for the kingpin.[43] The statute, as written, did not directly apply to the "employees" or nonemployees of a drug enterprise.[44] The government conceded this point but considered the fundamental differences between employees and nonemployees.[45] The government maintained that a nonemployee could "knowingly provide direct assistance" to the kingpin and, consequently, should be guilty as a co-conspirator to the crime.[46]

The Second Circuit, however, in relying on an expanded version of the *Gebardi* principles, held that the government did not have sufficient legislative history to support its interpretation.[47] The Circuit read *Gebardi* to suggest that congressional identification of a liable party necessarily implies the exclusion of all others from liability for the underlying offense.[48] In particular, the Drug Kingpin Statute contemplates liability for "top brass"

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[40] *See generally* United States v. Amen, 831 F.2d 373, 375–76 (2d Cir. 1987).

[41] *Id.*; *see also* Smith, *supra* note 34, at 478. A drug kingpin has at least five subordinates and leads the drug organization. *Id.* at 478.

[42] Smith, *supra* note 34, at 479; *see also Amen*, 831 F.2d at 381.

[43] *Amen*, 831 F.2d at 377.

[44] *Id.* at 381.

[45] *Id.*

[46] *Id.* at 381–82.

[47] *Id.* at 382.

[48] Smith, *supra* note 34, at 479.

leaders, rather than "lieutenants and foot soldiers."[49] Because the statute suggests that only these individuals may be guilty for violating the law, nonemployees could not possibly be considered liable for aiding and abetting the kingpins.[50]

The concept of ordinary or plain meaning of the text, relevant legislative history, and substantive canons of construction tend to guide statutory interpretation, and did so in this case.[51] The Second Circuit heavily relied on the legislative history of the Drug Kingpin Statute to identify the affirmative policy set forth by Congress.[52] The court first concluded that Congress only intended to "target ringleaders of large-scale" operations, based on the statutory text alone.[53] More importantly, the court determined that Congress failed to mention aiding and abetting in the kingpin statute and specifically expressed that the statute was not intended to "catch" aiders and abettors.[54] While it is not necessary for Congress to include an aiding and abetting provision for liability to attach based on the nature of the federal conspiracy statute, the substantive canons of statutory interpretation dictated the court's understanding of statutory intent.[55]

The Second Circuit's interpretation arguably finds similar credence in the traditional rule of lenity, which asks the court to interpret statutory ambiguities in favor of the defendant.[56] The *Amen* court, however, expanded the Supreme Court's holding in *Gebardi* by requiring Congress to fully disclose all liable parties within the statute or else fully relinquish the government's ability to prosecute aiders and abettors through the federal conspiracy statute.[57] This conclusion is surely inapposite to *Gebardi*, in which the Supreme Court anticipated that a woman could be liable for violations of the Mann Act in specific circumstances despite the

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[49] *Amen*, 831 F.2d at 381 (quoting Garrett v. United States, 471 U.S. 773, 781 (1985)).

[50] *Id*.

[51] *See* Smith, *supra* note 34, at 469; Wee, *supra* note 9, at 125–26.

[52] Bridget Maloney, Comment, United States v. Amen*: Aiding and Abetting Kingpins*, 11 HARV. J.L. & PUB. POL'Y 501, 503–04 (1998).

[53] *Id.* at 503; *Amen*, 831 F.2d at 381.

[54] Maloney, *supra* note 52, at 503; *see Amen*, 831 F.2d at 381 (citing H.R. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4566, 4569).

[55] *See* Maloney, *supra* note 52, at 511–12.

[56] WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY, 698 (5th ed. 2016).

[57] *Amen*, 831 F.2d at 381–82.

statute's silence.[58] The Second Circuit's early decision to expand *Gebardi* to a wholesale implication of intent from silence perhaps misinterprets the Supreme Court's precedent and laid the foundation for the 2018 *Hoskins* decision.

2. Ocasio v. United States

More recently, in 2016, the Supreme Court decided a case relating to the "age-old principles of conspiracy" and violations of the Hobbs Act.[59] Perplexingly, the Court questioned whether a public official could conspire with shop owners to extort themselves.[60] Ocasio challenged his conspiracy conviction, alleging he could not conspire with individuals who voluntarily offered payment for referrals to their businesses.[61] Curiously, in relying on principles set forth in *Gebardi*, the Court held that the shop owners were capable of conspiring to extort themselves and, therefore, Ocasio was also liable under the federal conspiracy statute.[62]

In rendering its decision, the Court explained that the government need not prove individual intent to commit the underlying offense.[63] Co-conspirators may come to an agreement where only one person commits the offense while the other provides support.[64] Even in such a case, the latter party is "as guilty as the perpetrators."[65]

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[58] *Compare id.*, *with* Gebardi v. United States, 287 U.S. 112, 117 (1932).

[59] Ocasio v. United States, 136 S. Ct. 1423, 1429 (2016); *see also* Michael F. Dearington, Ocasio v. United States*: The Supreme Court's Sudden Expansion of Conspiracy Liability (And Why Bribe-Taking Foreign Officials Should Take Note)*, 74 WASH. & LEE L. REV. ONLINE 204, 205 (2017).

[60] *Ocasio*, 136 S. Ct. at 1427–28. Ocasio, the shop owners, and nine other officers were charged with violations of the Hobbs Act and conspiracy to violate the Hobbs Act. *Id.* The underlying scheme involved the police officers directing damaged vehicles to the shop in exchange for kickbacks for the referral. *Id.*

[61] Sigourney Haylock, Comment, *Distorting Extortion: How Bribery and Extortion Became One and the Same Under the Hobbs Act*, 50 LOY. L.A. L. REV. 285, 286 (2017).

[62] Dearington, *supra* note 59, at 205–06.

[63] *Ocasio*, 136 S. Ct. at 1429 (quoting 2 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 31:03, p. 226 (6th ed. 2008)); Dearington, *supra* note 59, at 207.

[64] *Ocasio*, 136 S. Ct. at 1430 (quoting Salinas v. United States, 522 U.S. 52, 64 (1997)) (internal quotations omitted); Dearington, *supra* note 59, at 207–08.

[65] *Ocasio*, 136 S. Ct. at 1430 (quoting *Salinas*, 522 U.S. at 64) (internal quotations omitted); Dearington, *supra* note 59, at 208.

In so holding, the Court determined that the apparent victims of extortion may also be members of the conspiracy.[66]

At its core, the Court stressed that even persons who are incapable of committing a crime against themselves may still be liable for conspiracy.[67] Most importantly, the Court elaborated on the concepts set forth in *Gebardi*.[68] Markedly, when a "person's consent or acquiescence is inherent in the underlying substantive offense," the government must establish more than just consent or acquiescence for liability to attach.[69] In essence, consent is not enough for conspiracy.[70] The shop owners here were incapable of committing the offense themselves, but criminal liability was proper because they "shared in the common purpose" of the kickbacks.[71]

The Court failed, however, to describe what "more" was needed and how far an individual must go for the government to properly classify him as a co-conspirator.[72] Notably, though the Court relied on the principles set forth in *Gebardi*, it neglected to consider whether Congress actually intended to define the shop owners as a liable class.[73] The Court seemed to misconstrue *Gebardi* to suggest that immunity applied there because the woman simply *could not* violate the Mann Act: a rationale fundamentally at odds with its earlier holding.[74] Critically, by failing to rely on legislative intent, the Court made a fundamental error.[75] The Court did,

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[66] *Id.*

[67] Dearington, *supra* note 59, at 208.

[68] *Ocasio*, 136 S. Ct. at 1431–32 n.4; *see* Dearington, *supra* note 59, at 212.

[69] *Ocasio*, 136 S. Ct. at 1432; Dearington, *supra* note 59, at 212.

[70] *See* Haylock, *supra* note 61, at 288.

[71] *Id.*

[72] *Ocasio*, 136 S. Ct. at 1432; *see* Dearington, *supra* note 59, at 212.

[73] *See Ocasio*, 136 S. Ct. at 1439 (Thomas, J., dissenting); Dearington, *supra* note 59, at 213–14.

[74] Dearington, *supra* note 59, at 214–15. As described above, the Court did not deny the possibility that the woman charged in *Gebardi* could never be liable. *See* Gebardi v. United States, 287 U.S. 112, 117 (1932). The holding instead only required a showing that the woman was actually the driving force behind the violation and, if so, the government may succeed in establishing conspiracy liability. *See Gebardi*, 287 U.S. at 117.

[75] Dearington, *supra* note 59, at 214. Of course, the Supreme Court is not bound by precedent. However, the Court specifically relied on *Gebardi* and misapplied the principles and understandings initially set forth, leaving conspiracy liability in an unclear state. *Id.*

however, leave future courts with a well-established presumption that a co-conspirator need not voluntary commit the offense or even be capable of committing it to face criminal liability.[76]

II. HISTORY OF THE FOREIGN CORRUPT PRACTICES ACT

After Watergate and the Vietnam War, all eyes were on the United States.[77] Public backlash related to both political and corporate corruption consequently influenced President Carter to rehabilitate the United States in the eyes of the international community.[78] In doing so, the Securities Exchange Commission (SEC) began to investigate then-President Nixon and U.S.-based multinational companies.[79] The SEC's investigations uncovered over 400 companies making illegal, or at the very least, suspicious, payments to foreign governments, their officials, and political parties.[80] Notably, the SEC found these payments were part of rampant bribery for favorable business opportunities, which existed on an international scale.[81] Consequently, in 1977, Congress unanimously passed and adopted the FCPA to criminalize bribing or otherwise providing "corrupt payments to foreign officials ...."[82] From its very inception, the FCPA was a revolutionary step in the scheme of widespread international bribery, as the United States became the only country to criminalize such behavior.[83]

As initially enacted, the FCPA allows both the Department of Justice (DOJ) and the SEC to bring civil or criminal charges against entities or individuals suspected of bribing foreign officials.[84] The key provisions at issue for the purposes of this Note are the anti-bribery provisions, which cover both "issuers" and "domestic concerns."[85] Originally, this meant the FCPA targeted issuers of

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[76] *Ocasio*, 136 S. Ct. at 1432.

[77] *See* Rediker, *supra* note 5, at 57.

[78] *See id.*

[79] *Id.*

[80] Kevin K. Smith, *The Foreign Corrupt Practices Act: Set Aside the Moral and Ethical Debates, How Does One Operate Within this Law?*, 45 HOFSTRA L. REV. 1119, 1122 (2017).

[81] *See id.*

[82] Rediker, *supra* note 5, at 57.

[83] *Id.* at 57–58.

[84] Phillips, *supra* note 2, at 92.

[85] Rediker, *supra* note 5, at 58.

certain securities regulated by the SEC as well as American citizens and corporations that arise under the laws of the United States.[86] To be guilty of an FCPA violation, the law further requires a payment, offer, or gift of something of monetary value to foreign officials or political parties, or to their intermediaries, who knew or should have known about the bribery.[87]

A. Key Amendments to the FCPA: Extending Its Jurisdictional Reach

As initially implemented, the FCPA did not extend to foreign individuals or corporations.[88] Nearly a decade after the FCPA was passed, the first amendment to the statute was introduced.[89] In 1988, Congress presented the Omnibus Trade and Competitiveness Act to "encourage the international community" to enact similar anti-bribery legislation.[90] The modified language added a scienter requirement that was intended to extend liability to third parties who have actual knowledge of the true intent of the payment or who have acted recklessly "with a conscious disregard for the truth."[91] Conversely, at that time, Congress recognized that

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[86] 15 U.S.C. § 78dd-1 (1977); Rediker, *supra* note 5, at 58.

[87] Ira Handa, *Fallacies in the Current Methods of Prosecuting International Commercial Bribery*, 38 CARDOZO L. REV. 725, 726–27 (2016). As a result of the FCPA, corporations have developed strict compliance programs to ensure their full submission to the FCPA. *Id.* at 727. These compliance programs track both the anti-bribery and the accounting provisions of the FCPA. *See id.* at 727, 743. The former aims to prevent bribery of foreign officials; the latter ensures corporations keep "adequate records and internal audit systems." *Id.* The government has instituted these programs in hopes that they prevent companies from falsely reporting to the SEC and the government. *Id.* at 743; *see also* Rahul Kohli, *Foreign Corrupt Practices Act*, 55 AM. CRIM. L. REV. 1269, 1271 (2018). Furthermore, the FCPA is perhaps one of the greatest risks multinational companies take on. *See* Garrick Apollon, *Article: FCPA Compliance Should Not 'Cost An Arm And A Leg': Assessing The Potential For Enhanced Cost-Efficiency And Effectiveness For An Anti-Corruption Compliance Program With The Implementation Of An Enterprise Legal Risk Management Framework*, 5 PENN. ST. J.L. & INT'L AFF. 486, 489 (2017).

[88] Rediker, *supra* note 5, at 58–59. Rediker notes that the FCPA was initially developed to police American businesses. There was an underlying expectation that other nations would look to the FCPA and create similar legislation that would curb corruption on an international scale. *See id.*

[89] *Id.* at 60.

[90] *Id.*

[91] *Id.* at 61.

legally made payments in foreign countries were not subject to FCPA scrutiny.[92]

Much to Congress's chagrin, however, other nations failed to follow suit.[93] Thus, despite the laudable purpose, the FCPA initially placed U.S. corporations at a competitive disadvantage in the international market.[94] While international corporations could secure contracts through bribery, American corporations were forced to choose between obtaining favorable business deals and civil or criminal liability.[95] Congress resolved this issue through additional amendments to the Act, which extended the FCPA's jurisdiction beyond just U.S. corporations and individuals to include individuals and entities abroad.[96]

A decade later, in 1997, the United States participated in the Organization for Economic Cooperation and Development Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).[97] At its close, thirty-four members signed a treaty pledging to adopt anti-bribery legislation within their individual states, which would model the standards set forth in the FCPA.[98] Uniquely, the states also agreed that all jurisdictions governed by anti-corruption legislation would be interpreted broadly, such that "extensive physical connection to the bribery [was] not required."[99] The OECD Convention sought to bring corporations onto the same playing field by eliminating the competitive disadvantage U.S.-based corporations had been facing for nearly twenty years.[100]

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[92] *Id*.

[93] Sarah Routh, *Tweet to Defeat Government Bribes: Limiting Extraterritorial Jurisdiction Under the Foreign Corrupt Practices Act to Combat Global Corporate Corruption*, 51 VAND. J. TRANSNAT'L L. 625, 630 (2018).

[94] *Id*. at 627.

[95] Rediker, *supra* note 5, at 63; *see also* Kayla Feld, *Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a "Foreign Official" in the Foreign Corrupt Practices Act*, 88 WASH. L. REV. 245, 256 (2013).

[96] Rediker, *supra* note 5, at 63; *see also* Barr Benyamin et al., *Foreign Corrupt Practices Act*, 53 AM. CRIM. L. REV. 1333, 1335 (2016).

[97] Rediker, *supra* note 5, at 62.

[98] *Id*. at 64; Routh, *supra* note 93, at 630–31.

[99] Rediker, *supra* note 5 (internal quotations omitted); *see also* Routh, *supra* note 93, at 631.

[100] Routh, *supra* note 93, at 631.

Following the convention, Congress again amended the FCPA to further extend the FCPA's jurisdiction to non-U.S. corporations and individuals.[101] In implementing the Convention's agreement to adopt greater anti-bribery legislation, Congress introduced the convention's mandate into the FCPA.[102] The amendment broadened the definitions set forth in the FCPA. [103] Notably, the broadened definitions included the expansion of "foreign officials" to include international public organizations, such as the United Nations, and their employees.[104] Similarly, "the definition of 'bribery'" now includes payments made to secure unjust or unfair advantages.[105]

Perhaps the most important change, however, involved the jurisdictional reach of the FCPA.[106] Where the previous reach applied only to American citizens and corporations that used "the mails or means of interstate commerce," the Amendment extended the FCPA's reach to issuers, domestic concerns, or agents whether or not mails or interstate commerce are used at all.[107] Consequently, the new Amendment allowed the Government to reach any actions taken by a party expressly recognized by the statute while they were in the United States or abroad.[108] Facially, the Amendment could be interpreted to apply only to acts taken in the United States that may violate the FCPA.[109] However, in practice, the DOJ and the SEC have continued to read the FCPA's jurisdiction broadly by attaching liability to all foreign corporations regardless of their connection to the United States.[110] The expanded jurisdictional scope meant that foreign agents would also be subject to prosecution for violating the FCPA.[111]

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[101] Rediker, *supra* note 5, at 62–63.

[102] *Id.*

[103] Rediker, *supra* note 5, at 63; *see also* Routh, *supra* note 93, at 631.

[104] Rediker, *supra* note 5, at 63.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] Routh, *supra* note 93, at 631. Despite the increased jurisdictional scope, foreign officials *technically* remained off the list of prosecutable parties under both the FCPA and the general conspiracy law. *See id.* at 639.

[110] Routh, *supra* note 93, at 631; *see also* Natasha N. Wilson, *Pushing the Limits of Jurisdiction over Foreign Actors Under the Foreign Corrupt Practices Act*, 91 WASH. U. L. REV. 1063, 1069 (2014).

[111] Smith, *supra* note 34, at 1122.

B. A History of FCPA Enforcement

The SEC and DOJ have sole authority to enforce the provisions of the FCPA.[112] Though the language of the Act suggests that those prosecuted must have a sufficient connection to the United States, beginning with George W. Bush's administration and continuing to the present day, the SEC and DOJ have broadly applied the statute.[113] Having implemented the 1998 Amendments, agencies have had much wider discretion to prosecute those who allegedly violate the Act both in the United States and abroad.[114] The DOJ and SEC have taken advantage of this power by prosecuting a significantly greater number of individuals since the FCPA's enactment.[115]

From its inception until the early 2000s, the DOJ and SEC prosecuted less than four actions each year.[116] In 2010, and for the last decade, however, the DOJ and SEC have averaged between seventy and eighty annual FCPA actions.[117] In 2010 alone, these agencies investigated seventy-four corporations and individuals, which resulted in the collection of over $1.8 billion in fines.[118] Perhaps unsurprisingly, between 1999 and 2010, the U.S. continued to lead the OECD nations in the number of enforcement actions it pursued.[119]

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[112] Kohli, *supra* note 87, at 1272.

[113] Rediker, *supra* note 5, at 54.

[114] *Id.*

[115] *Id.*

[116] Routh, *supra* note 93, at 632; *see also* STANFORD LAW SCHOOL ARTHUR AND TONI REMBE ROCK CENTER FOR CORPORATE GOVERNANCE, COLLABORATION WITH SULLIVAN AND CROMWELL LLP, FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, http://fcpa.stanford.edu/statistics-keys.html [https://perma.cc/UY8W-3N4B] [hereinafter STANFORD LAW SCHOOL].

[117] Routh, *supra* note 93, at 632; Emily Willborn, *Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors*, 22 MINN. J. INT'L L. 422, 428 (2013).

[118] Willborn, *supra* note 117, at 428.

[119] Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. LEGIS. 303, 319 (2012). Over the same period, the United States obtained forty-eight criminal convictions, twenty-seven plea agreements, and thirty-two deferred or non-prosecution agreements. ORG. FOR ECON. CO-OPERATION & DEV. WORKING GROUP ON BRIBERY: 2010 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION, COMPARATIVE TABLE OF ENFORCEMENT DATA COLLECTED FROM THE 38 PARTIES TO THE ANTI-BRIBERY CONVENTION, DECISIONS ON FOREIGN BRIBERY CASES FROM 1999 TO DECEMBER

Scholars have uniformly credited the 1998 Amendments for increased enforcement, given the Act's expanded jurisdictional coverage to all persons, regardless of their nationality.[120] While it is true that the number of prosecutions has decreased over the last few years, the decrease is perhaps due to a related increase in non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs), as well as a general strengthening of FCPA enforcement.[121] This includes a broader understanding of the FCPA's jurisdictional reach, international cooperation, and incentivized disclosure to both the SEC and the government.[122] Consequently, despite the government's broad prosecutorial discretion to investigate alleged violations of the FCPA, most cases result in settlement.[123] Over time, NPAs and DPAs have become increasingly popular because they grant corporate defendants the ability to avoid the risk of costly litigation and harsh punishment at trial.[124] With NPAs and DPAs, corporations instead have the opportunity to settle their cases with civil fines and/or disgorgement.[125]

Perhaps rather strategically, the U.S. government has chosen to use NPAs and DPAs in cases where the defendant is a foreign individual or corporate entity.[126] As a result, corporations abroad

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2010, at 4 (Apr. 2011), http://www.oecd.org/dataoecd/47/39/47637707.pdf [https://perma.cc/F5T9-N6Y5]. Additionally, there have been thirty-seven noncriminal sanctions against individuals and forty-five noncriminal sanctions imposed on corporations. *Id.*

[120] Evan P. Lestelle, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 535–36 (2008); *see also* Klaw, *supra* note 119, at 320.

[121] *See* Kohli, *supra* note 87, at 1273; Routh, *supra* note 93, at 632–33.

[122] Kohli, *supra* note 87, at 1273; Routh, *supra* note 93, at 633.

[123] Rediker, *supra* note 5, at 87.

[124] *Id.*

[125] Routh, *supra* note 93, at 633. Specifically, over the last forty years, ninety-two percent of defendants settled their FCPA claims with the SEC, and seventy-four percent of defendants settled with the DOJ following investigations that lasted an average of thirty-eight months. STANFORD LAW SCHOOL, *supra* note 116. Importantly, thirty-five percent of all FCPA violations involve foreign defendants. *Id.* Foreign corporations have settled some of the largest cases with the United States, including a 2017 settlement of $965 million by a Swedish corporation. Richard L. Cassin, *Telia Tops Our New Top Ten List (After We Do Some Math)*, FCPA BLOG (Sept. 22, 2017, 7:28 AM), http://www.fcpablog.com/blog/2017/9/22/telia-tops-our-new-top-ten-list-after-we-do-some-math.html [https://perma.cc/N6A6-5SWL].

[126] *See* Annalisa Leibold, *Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225, 257–58 (2015).

tend not to challenge the FCPA's jurisdiction, leaving the Second Circuit in a unique position to challenge long-standing government practices.[127] The tactical use of settlements has thus led to circular statutory interpretation and enforcement, whereby the SEC and DOJ have had wide discretion to both interpret and enforce their understanding of the FCPA without being subject to judicial review.[128] Without review and with an underdeveloped body of case law, these agencies have seemingly stretched the FCPA to capture illegal conduct that perhaps has no connection to the United States at all.[129] Until 2018, the DOJ and SEC had nearly exclusive power to interpret the language of the FCPA.[130]

The Act's broad language has remained virtually unchallenged leaving the SEC and DOJ with few restrictions.[131] Scholars routinely critique the Act for its failure to define key terms.[132] Key to this Note, the FCPA states "a foreign official" can be an instrumentality of "any officer or employee of a foreign government," but fails to define *who* can be an instrumentality.[133] The FCPA's "lack of clarity" in this area grants prosecutors substantial power to interpret the ambiguous language of the FCPA and has been a major concern for legal scholars and courts alike,[134] but the DOJ and SEC have failed to address this confusion.[135]

With the large number of settlements that have occurred, there is an unfortunate shortage of jurisprudence regarding the true meaning and reach of the FCPA.[136] This shortage is perhaps the foundation for cases such as *Hoskins*, which has conceivably opened the door for future challenges to the FCPA. As agencies continue to enforce the FCPA, *who* may be charged with violations becomes as difficult a question to answer as *what* must be done to ensure compliance with the ostensibly broad-reaching statute.

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[127] Routh, *supra* note 93, at 633; *see also* Leibold, *supra* note 126, at 240.

[128] Routh, *supra* note 93, at 633, 641; *see also* Leibold, *supra* note 126, at 240.

[129] Routh, *supra* note 93, at 633; *see also* Leibold, *supra* note 126, at 240. The broad discretion exercised by these agencies has resulted in nearly $1 billion through settlements. Routh, *supra* note 93, at 641.

[130] Rediker, *supra* note 5, at 55.

[131] Routh, *supra* note 93, at 628.

[132] *Id.* at 642. *See* Alexander G. Hughes, *Drawing Sensible Borders for the Definition of "Foreign Official" Under the FCPA*, 40 AM. J. CRIM. L. 253, 256–57 (2013).

[133] Hughes, *supra* note 132, at 256.

[134] Rediker, *supra* note 5, at 54.

[135] Hughes, *supra* note 132, at 256.

[136] Rediker, *supra* note 5, at 54–55.

C. Precedent, Conspiracy, and the FCPA: United States v. Castle

An important step in understanding the FCPA came in 1991 when the Fifth Circuit expressly examined the relationship between conspiracy liability and the FCPA.[137] Though decided before the 1998 Amendments, *Castle* determined the FCPA could consistently be applied with regard to international law.[138] The *Castle* decision set forth ample precedent for the Second Circuit as the first appellate decision on whether foreign officials can conspire to violate the FCPA.[139]

Castle involved the indictment of Canadian officials for violations of the FCPA and federal conspiracy law.[140] Allegedly, a U.S.-based company paid Canadian officials a $50,000 bribe to secure a favorable government contract.[141] Relying on *Gebardi*, the district court dismissed the claims and the Fifth Circuit subsequently affirmed.[142] As an important precursor, the court held that foreign officials, who were the very subject of the bribes, cannot be charged for conspiring to violate the FCPA because, as the target, they cannot themselves substantively violate the FCPA.[143] Because the Canadian officials were central to the actual commission of an FCPA violation, the Fifth Circuit determined there was "overwhelming evidence" that Congress intended to exempt foreign officials who merely received a bribe.[144]

As in other cases of conspiracy liability, the court drew on legislative intent.[145] Namely, the statute's failure to expressly address the subject of the bribes led the Fifth Circuit to determine there was an affirmative legislative policy not to punish the Canadian officials as co-conspirators.[146] The court emphasized that the Court in *Gebardi* "refused to disregard Congress' intention to exempt" a class of persons by allowing the class to be prosecuted

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[137] *See generally* United States v. Castle, 925 F.2d 831, 832 (5th Cir. 1991); Dearington, *supra* note 59, at 221.

[138] Klaw, *supra* note 119, at 363.

[139] Dearington, *supra* note 59, at 221.

[140] *Castle*, 925 F.2d at 832.

[141] *Id.*

[142] *Id.* at 836.

[143] Dearington, *supra* note 59, at 221.

[144] *Castle*, 925 F.2d at 835.

[145] *Id.*; Dearington, *supra* note 59, at 212.

[146] United States v. Lake, 472 F.3d 1247, 1265 (10th Cir. 2007).

under the conspiracy statute.[147] Given the *Gebardi* principle, the Fifth Circuit analogized the FCPA to the Mann Act.[148] The court articulated how the statutes were drafted in a similar manner, which was indicative of congressional intent to limit the FCPA's reach.[149] In so arguing, the court reasoned Congress understood how far it could extend the FCPA but deliberately chose only to penalize the active participants in the bribe.[150] Consequently, to disregard Congress's intent to expressly limit the statute's reach would be to disregard binding precedent.[151]

In its holding, the Fifth Circuit recognized that in drafting the FCPA, it was evident that there would be instances in which foreign officials would accept bribes offered to them.[152] Congress, however, did not place liability on or "condemn the foreign official's conduct under the statute."[153] Congress instead wished merely to prosecute and proscribe the actual conduct of *bribing* foreign officials by persons or entities *within* the United States rather than the mere *acceptance* of a bribe.[154] It seems fair to suggest *Castle* interpreted the FCPA as exhibiting congressional intent not to embarrass "friendly [ ] governments" by punishing foreign officials for accepting bribes.[155]

An alternate theory, however, is merely that the Fifth Circuit believed there was only a one-sided approach set forth in the FCPA.[156] In essence, to prosecute only those who *participate* in the act of bribery regardless of the briber's location.[157] The Circuit's holding can thus be narrowed by attaching liability to "every possible person connected to the" bribes, except for those on the demand side of the transaction.[158] This interpretation would seem to suggest

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[147] *Castle*, 925 F.2d at 833; Dearington, *supra* note 59, at 222.

[148] *Castle*, 925 F.2d at 833; Dearington, *supra* note 59, at 222.

[149] *Castle*, 925 F.2d at 833; Dearington, *supra* note 59, at 222.

[150] *Castle*, 925 F.2d at 833; Dearington, *supra* note 59, at 222; *see also* Garen S. Marshall, *Increasing Accountability for Demand-Side Bribery in International Business Transactions*, 46 N.Y.U. J. INT'L L. & POL. 1283, 1293 (2013).

[151] *Castle*, 925 F.2d at 833; Dearington, *supra* note 59, at 222.

[152] *Castle*, 925 F.2d at 833; Dearington, *supra* note 59, at 222.

[153] Dearington, *supra* note 59, at 224.

[154] *Castle*, 925 F.2d at 835; Dearington, *supra* note 59, at 224.

[155] *Castle*, 925 F.2d at 835; *see also* Letter from Elliot L. Richardson, Secretary of Commerce, to Senator William Proxmire (June 11, 1976).

[156] Klaw, *supra* note 119, at 309; Sarah Bartle et al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1276 (2014).

[157] *See* Klaw, *supra* note 119, at 309.

[158] *Castle*, 925 F.2d at 835; *see also* Marshall, *supra* note 150, at 1287.

that *Hoskins*-like situations will not be affected because *Hoskins*, as discussed below, involved a supply side transaction. While there are clear implications for international relations if a foreign official is prosecuted in the United States for accepting a bribe, it is much less clear whether there are diplomatic concerns with enforcement actions against foreign participants in a U.S.-based bribery scheme.[159] Thus, the question before the Second Circuit was still a case of first impression.

Since the Circuit decided *Castle*, the government has widely accepted its holding and, until recently, has not prosecuted foreign officials for alleged FCPA violations under a theory of conspiracy liability.[160] Furthermore, in line with *Castle*, in 2012 the SEC and DOJ released guidance expressly indicating "that bribe-taking foreign officials are not liable under the general federal conspiracy statute."[161]

All things considered, the question remains whether *Castle* remains good law in light of the Court's decision in *Ocasio*.[162] While foreign officials cannot bribe themselves or commit FCPA violations single-handedly, the Supreme Court's precedent establishes they are not inherently barred from a conspiracy charge.[163] Arguably, in examining the FCPA under the lens of *Ocasio* or *Gebardi*, if a foreign official does more than consent or acquiesce to the bribe, he arguably has done enough to establish co-conspirator liability under the FCPA.[164]

III. *UNITED STATES V. HOSKINS*

A. History and District Court Opinion

United States v. Hoskins involved a citizen of the United Kingdom, Lawrence Hoskins, employed by a U.K.-based subsidiary of Alstom, a French multinational company.[165] The DOJ alleged Hoskins played a part in a scheme in which three Alstom executives,

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[159] *See* Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 460 (2009).

[160] Dearington, *supra* note 59, at 224–25.

[161] *Id.*

[162] *Id.*

[163] *See id.* at 225–26.

[164] *See id.* at 227–28.

[165] 902 F.3d 69, 103 (2d Cir. 2018) (Lynch, J., concurring); *see also* United States v. Hoskins, 123 F. Supp. 3d 316, 318 (D. Conn. 2015).

some of whom worked for Alstom's U.S. subsidiary, bribed Indonesian officials to obtain a $118 million contract.[166] The United States government alleged that the Alstom U.S. executives met multiple times while in the United States to discuss and further the bribery scheme.[167] Further, it was alleged that the executives frequently communicated via phone and email.[168]

According to the DOJ, Alstom U.S. paid consultants to deliver the bribe to the Indonesian officials.[169] Hoskins was purportedly responsible for selecting those consultants and authorizing the payments with full knowledge of the purpose of the payments to both influence and assist Alstom in obtaining a contract.[170] To further tie the consultants to the United States the indictment asserted one of the consultants had a bank account in Maryland.[171]

Notably, Hoskins never worked for Alstom U.S. and had never stepped foot in the United States at any point during the Indonesian bribery scheme.[172] Nonetheless, the DOJ charged Hoskins with conspiring to violate the FCPA, aiding and abetting an FCPA violation, and with substantive FCPA violations.[173] At trial, Hoskins moved to dismiss the conspiracy count.[174] Hoskins's chief argument was that the DOJ could not charge him with conspiracy because he did not fall within the expressly defined categories of defendants Congress anticipated and intended would be charged under the FCPA.[175]

In the alternative, the DOJ alleged Hoskins was an agent of Alstom's U.S. subsidiary.[176] This theory centered on a number of emails and telephone calls between Hoskins and his U.S.-based co-conspirators.[177] Therefore, the government argued, it was at

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[166] *Hoskins*, 902 F.3d at 72; *Hoskins,* 123 F. Supp. 3d at 318.

[167] *Hoskins*, 902 F.3d at 72; *Hoskins*, 123 F. Supp. 3d at 327.

[168] *Hoskins*, 902 F.3d at 72; *Hoskins*, 123 F. Supp. 3d at 327.

[169] *Hoskins*, 902 F.3d at 72; *Hoskins*, 123 F. Supp. 3d at 318.

[170] *Hoskins*, 902 F.3d at 72.

[171] *See id.*

[172] *Hoskins*, 902 F.3d at 72; *Hoskins*, 123 F. Supp. 3d at 318, 327 n.14.

[173] *Hoskins*, 902 F.3d at 73; *Hoskins*, 123 F. Supp. 3d at 318–19 n.1.

[174] *Hoskins*, 902 F.3d at 73; *Hoskins*, 123 F. Supp. 3d at 317.

[175] *Hoskins*, 902 F.3d at 73; *Hoskins*, 123 F. Supp. 3d at 320.

[176] CHRISTOPHER B. BRINSON, CONG. RESEARCH SERV., LSB10197, CAN A FOREIGN EMPLOYEE OF A FOREIGN COMPANY BE FEDERALLY PROSECUTED FOR FOREIGN BRIBERY? 2, https://fas.org/sgp/crs/misc/LSB10197.pdf [https://perma.cc/7C9C-ZAJW].

[177] *Hoskins*, 902 F.3d at 72; *Hoskins*, 123 F. Supp. 3d at 327.

least plausible that Hoskins could be convicted for violating the FCPA as an accessory or co-conspirator despite lacking a physical presence in the United States.[178]

In responding to the question, the district court refused to dismiss the DOJ's claim that Hoskins was liable as an agent.[179] However, the court held that the FCPA cannot reach a non-resident foreign national who is not an agent of a U.S. company and who does not commit acts while physically present in the United States.[180] The court consequently foreclosed the possibility of conspiracy liability.[181] The district court relied on the statute's legislative intent, specifically finding the categories of persons expressly mentioned in the FCPA were the only class of persons subject to the Act's jurisdictional reach.[182] Moreover, the district court held, "Congress did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability" under the FCPA.[183] The government subsequently appealed.[184]

B. Second Circuit's Affirmation

On appeal, the court addressed whether Hoskins, a foreign national who had never entered the United States or worked for a U.S. based company, could be held liable under conspiracy or complicity theories for violating the FCPA.[185] The Second Circuit carefully framed the question, indicating what while Hoskins was "incapable of committing [substantive FCPA violations] as a principal" the key issue on appeal was whether he could still be liable as an accomplice or co-conspirator.[186] In answering the question, the Second Circuit focused on history and precedent, the legality of conspiracy liability, the affirmative legislative policy exemption, and the presumption against extraterritorial application.[187]

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[178] *Hoskins*, 902 F.3d at 73; *Hoskins*, 123 F. Supp. 3d at 325.
[179] *Hoskins*, 123 F. Supp. 3d at 327.
[180] *Id.*
[181] *See id.* at 327, 327 n.14.
[182] *Id.* at 325.
[183] *Id.* at 327.
[184] *Hoskins*, 902 F.3d 69, 74 (2d Cir. 2018).
[185] *Id.* at 76.
[186] *Id.*
[187] *See generally Hoskins*, 902 F.3d 69.

Common law has long-standing practical effects, particularly with respect to conspiracy liability.[188] In particular, at common law, one who intentionally directs or facilitates the crimes physically executed by others is still accountable for their actions under the laws of the United States.[189] This implicit rule has since been codified to hold accountable those who may not personally commit crimes but who "'aid[ ], abet[ ], counsel[ ], command[ ], induce[ ] or produce[ ] the commission of" a crime by another.[190] As the Second Circuit notes, conspiracy liability can still attach even when the person "was incapable of committing the substantive offense" himself.[191]

Beyond basic conspiracy liability, common law has identified an affirmative legislative policy exception.[192] The exception functions similarly to a canon of construction, considering the legislature's intent not to extend liability to specific groups of individuals even if the statutory text requires compliance.[193] Here, both Hoskins and the government put forth their understanding of this affirmative legislative exception, debating whether the legislative policy exception applies to the FCPA and, more specifically, whether Congress meant to extend liability.[194]

Notwithstanding the legislative policy exception, the Second Circuit heavily relied on the presumption against extraterritorial jurisdiction.[195] This presumption similarly seeks to understand congressional intent.[196] Here, the court assessed whether the FCPA provides "a clear, affirmative indication that it applies extraterritorially."[197] More importantly, the Second Circuit had to determine whether the conduct in question occurred in the United States.[198] If so, the conduct may permissibly be susceptible to legal action in the United States under the FCPA even if the conduct occurred abroad.[199]

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[188] *See id.* at 77.

[189] *Id.*

[190] *Id.* at 77 (quoting 18 U.S.C. § 2(a)).

[191] *Id.* (quoting Salinas v. United States, 522 U.S. 52, 64 (1997)).

[192] *Hoskins*, 902 F.3d at 77.

[193] *Id.* at 77–78.

[194] *Id.* at 78.

[195] *Id.* at 95 (quoting RJR Nabisco, Inc., v. European Cmty., 136 S. Ct. 2090, 2100 (2016)).

[196] *Id.* (quoting *RJR Nabisco*, 136 S. Ct. at 2101).

[197] *Id.*

[198] *Id.* at 96–97.

[199] *Id.*

All things considered, when examining the district court's ruling, the Circuit unanimously rejected both the DOJ's theory of extraterritorial jurisdiction and its broad-sweeping understanding of jurisdiction.[200] The Circuit agreed with the district court finding that Congress affirmatively excluded foreign individuals from liability when it drafted the FCPA.[201] The Circuit's immediate affect consequently narrowed the FCPA's reach.[202]

The Second Circuit, nevertheless, did reverse in part.[203] The Circuit disagreed with the district court's determination that because Hoskins never entered the United States, he could not be prosecuted under the FCPA.[204] The court instead recognized that if the government could prove Hoskins was an agent of a domestic concern, he could still be liable under the FCPA for conspiring with employees and other Alstom agents.[205] It is this very holding that may have implicit effects for future litigation.

C. Application of Precedent to United States v. Hoskins

The Second Circuit primarily relied on *Gebardi* and *Amen* as sounding boards to define the very contours of conspiracy liability and affirmative legislative policy.[206] The Circuit seemingly accepted the Court's ruling in *Gebardi*, maintaining that such liability does not exist where the legislature expresses a clear intent to leave certain classes of persons beyond the statute's scope.[207] The court stressed *Gebardi*'s need for "something more" for liability to attach because congressional silence inherently acts as "a conferral of immunity."[208] The overarching need for "something more" is, at its core, a searching examination of congressional intent, particularly as it relates to the text of the statute.[209]

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[200] *Id.* at 97.
[201] *Id.* at 74, 97.
[202] *Id.*
[203] *Id.* at 72.
[204] *Id.* at 98.
[205] *Id.* at 72.
[206] *Id.* at 78–80.
[207] *Id.* at 80.
[208] *Id.* (citing Gebardi v. United States, 287 U.S. 112, 121–23 (1932)).
[209] Libby Gerstner, Case Comment, United States v. Hoskins*: An Originalist Approach to the Foreign Corrupt Practices Act*, 27 TUL. J. INT'L & COMP. L. 379, 384 (2019) (citing *Hoskins*, 902 F.3d at 81).

Before ruling in *Hoskins*, the Second Circuit had already established that circumventing the statute's purpose by extending conspiracy liability would be a disservice to legislative intent.[210] In both *Amen* and *Hoskins*, by looking at the "text of the statute and the purpose that Congress was trying to achieve," the Circuit reasoned it was obliged to impose congressional will in interpreting the statute at issue.[211] The Second Circuit's use of originalism extends from *Amen* to *Hoskins* as a means of understanding and analyzing criminal statutes in a manner that allows others to fully escape criminal liability.[212]

The government proposed that *Gebardi* only applies if "(1) 'the defendant's consent or acquiescence is inherent in the [substantive] offense,' or (2) 'the defendant's participation in the crime is frequently, if not normally, a feature of the [substantive] criminal conduct.'"[213] The Second Circuit, however, used *Amen*'s guiding principles to reject the government's contention that *Gebardi* should be narrowly read.[214]

In rejecting the first proposal, the court found it to be "foreclosed" under Wharton's Rule, which prohibits liability from attaching based on the exact agreement at issue in substantive crimes.[215] *Amen* further supported this supposition by refusing to extend liability to third parties who were "required for a criminal enterprise to exist," but who were not the subject of the statute.[216]

The government's second argument failed for strikingly similar reasons—legislative intent.[217] In both *Gebardi* and *Amen*, the statutes did not require "frequent[ ], if not normal[ ]" conduct

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[210] *Hoskins*, 902 F.3d at 80 (citing United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1987)).

[211] *Id.* at 80–81.

[212] *See* Gerstner, *supra* note 209, at 383.

[213] *Hoskins*, 902 F.3d at 81 (quoting Appellant's Opening Br. At 24).

[214] *See id.* at 385.

[215] *Id.* Wharton's Rule requires conspiracy indictments to be dismissed before trial. Iannelli v. United States, 420 U.S. 770, 774 (1975). The rule operates as an exception to a principle that conspiracy and the substantive offense cannot converge where two or more persons, together, commit the underlying crime and the "immediate consequences of the crime" impact the "parties themselves rather than … society at large." *Id.* at 782–83.

[216] *Hoskins*, 902 F.3d at 82 (citing United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1987)).

[217] *Id.*

related to the criminal activity.[218] Instead of focusing on frequency, the Court required there be action or participation by the charged party on *every* occasion for which there had been an alleged violation.[219] Unlike the Mann Act, which had the potential to impose liability on women for transporting themselves, the Circuit reasoned the FCPA contains no such possibility.[220] Rather, the text of the FCPA expressly identifies who is subject to the statute, and arguably does not leave open the possibility for further extension to others.[221] According to the court, the very omission of language that would cover a foreign official acting outside of the United States and not on behalf of any American person or company dictates that such a person cannot be liable.[222] By considering congressional hearings and floor debates to identify legislative intent—which has often been critiqued as an unreliable source to determine the statute's intent—the court held true to its precedent.[223]

In the United States, it is accepted that while our laws govern conduct on American soil, they "do[ ] not rule the world" unless Congress has deliberately and intentionally expressed such an intent.[224] In essence, the Second Circuit seemingly relied on a presumption against extraterritorial application of U.S. law.[225] This presumption against extraterritoriality is a canon of statutory construction that requires the court to determine whether the conduct is domestic.[226] Only where a statute expressly states its intent to apply to "foreign matters" can the presumption be overcome.[227] Importantly, as a canon of construction, the presumption is not dispositive and cannot be considered in a vacuum.[228] Assuming the presumption has not been rebutted, the court may ascertain

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[218] *Id.* at 81–82.

[219] *Id.*

[220] *Id.* at 84.

[221] *Id.*

[222] *Id.* at 85.

[223] *See* United States v. Firtash, 392 F. Supp. 3d 872, 891 (N.D. Ill. 2019); *see also* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1130 (1983); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641 (1990).

[224] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

[225] *See Hoskins*, 902 F.3d at 95 (citing *RJR Nabisco*, 136 S. Ct. at 2100–01).

[226] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[227] *Id.*

[228] *Id.*

whether the conduct occurred in the United States—thereby requiring a domestic application of the law—or, alternatively, if the alleged crime occurred abroad.[229]

In application, the Second Circuit determined that the presumption against extraterritorial application could not be rebutted.[230] First, the FCPA was arguably clear on its territorial limits; unless a foreign national either commits a crime within the confines of the United States or is otherwise an agent, employee, or shareholder or an American issuer or domestic concern, liability will not be imposed.[231] Congress's deliberate choice to exclude foreign nationals from the Act effectively necessitated a holding that Hoskins could not be liable under either conspiracy or complicity theories of liability.[232]

Given the Second Circuit's holding, there appears to be tension between the *Hoskins* decision and *Gebardi*.[233] By its own account, the Second Circuit did follow its established precedent.[234] In doing so, the Circuit underscored how *Amen* continues to be fundamentally at odds with *Gebardi* and how that has impacted its holding.[235] *Amen* relied on the mere *absence* of evidence to find congressional intent.[236] The *Gebardi* exception, in contrast, was rather narrow, identifying an exception only where the court could ascertain an affirmative legislative policy.[237] The absence of a clear statement of liability in *Gebardi* did not foreclose such accountability, and instead meant the court must instead undergo a searching analysis for intent.[238] The cases are further distinct in that *Amen* relied more on legislative history than statutory text, which the *Gebardi* Court examined closely as a means to decipher the statute's underlying purpose.[239] Despite the application of precedent in *Hoskins*, the Circuit's decision is not inherently incorrect or inconsistent with its past decisions. Rather, and perhaps more problematic to our

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[229] *Hoskins*, 902 F.3d at 95 (quoting *RJR Nabisco*, 136 S. Ct. at 2100).

[230] *Id.* at 96.

[231] *Id.*

[232] *Id.* at 97; *see also* Gerstner, *supra* note 209, at 387.

[233] *See* United States v. Firtash, 392 F. Supp. 3d 872, 891 (N.D. Ill. 2019).

[234] *Hoskins*, 902 F.3d at 96.

[235] *See Firtash*, 392 F. Supp. at 891. *Compare* Gebardi v. United States, 287 U.S. 112, 123 (1932), *with* United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1987).

[236] *Amen*, 831 F.2d at 382.

[237] *Gebardi*, 287 U.S. at 123.

[238] *Compare Gebardi*, 287 U.S. at 121–23, *with Amen*, 831 F.2d at 382.

[239] *Compare Gebardi*, 287 U.S. at 123, *with Amen*, 831 F.2d at 382.

understanding of the FCPA, *Hoskins* merely makes for continued confusion in this area of the law.

IV. IMPLICATIONS OF THE SECOND CIRCUIT'S RULING

Hoskins left the courts in a unique position for future applications of conspiracy liability and the FCPA. At this point, this Note addresses the potential implications that the *Hoskins* decision will have in future FCPA investigations and litigation. The potential effects are addressed in two parts. First, this Note will focus on the proactive steps the government could take in an attempt to re-expand its jurisdiction or, conversely, to codify the Second Circuit's holding. Beyond these affirmative steps, this Note aims to examine solutions to the Second Circuit's restrictions on the FCPA's extraterritorial position. Primarily, this portion will assess a return to agency theory in the circuits in the prosecution of foreign individuals and companies for FCPA violations.

A. Potential for Circuit Splits and Potential Congressional Action

At present, the government has not sought a rehearing or filed a petition for a writ of certiorari with the Supreme Court. This is perhaps not surprising, given the Second Circuit was the first to directly address whether foreign nationals could conspire to violate the FCPA.[240] Given the FCPA's expansive reach and the compliance requirements set forth by the statute, it is necessary for companies and individuals to fully understand the implications of the law.

The recency of the decision lends itself to much speculation as to the primary effects *Hoskins* will have on FCPA regulations and prosecutions. Companies have a unique and expected tendency to avoid litigation, leaving individuals to bear the weight of prosecutions because they often have less incentive to settle their cases.[241] Consequently, the government may take new approaches to

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[240] Kimberly A. Parker et al., *Second Circuit Limits Government's Ability to Prosecute Foreign Persons and Companies for Conspiracy to Violate the FCPA*, WILMERHALE (Aug. 28, 2018), https://www.wilmerhale.com/en/insights/client-alerts/20180828-second-circuit-limits-governments-ability-to-prosecute-foreign-persons-and-companies-for-conspiracy-to-violate-the-fcpa [https://perma.cc/NWQ8-55DR].

[241] STANFORD LAW SCHOOL, *supra* note 116.

old methods while simultaneously attempting to expand its jurisdiction over these cases.

Before *Hoskins*, there was already substantial confusion as to the FCPA's reach. Adding to the confusion in this area of the law, the *Hoskins* decision inherently contravenes the DOJ and SEC's 2012 joint Resource Guide.[242] The Guide describes the SEC and DOJ's stance on aiding and abetting and conspiracy, specifically in relation to the anti-bribery provisions.[243] According to the Guide, the FCPA retains jurisdiction over *any* conspirators so long as one of the conspirators is "an issuer, domestic concern, or commits a reasonably foreseeable overt act" in the United States.[244] By logical extension, the Resource Guide explains the SEC's position that "[i]ndividuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA ... even if they are not, or could not be, independently charged with a substantive FCPA violation."[245] Of note, either "a foreign, non-issuer company" or an individual may be guilty for conspiracy to engage in a substantive FCPA violation.[246]

Accordingly, by the agencies' very definition and understanding of the FCPA, the Second Circuit's decision is directly adverse to its approach to foreign individuals.[247] The holding is remarkable not only because it is contrary to long-standing agency interpretation, but also because it has subsequently narrowed the SEC and DOJ's reach to non-residents or foreign companies involved in FCPA conspiracies, unless the proscribed conduct occurs in the

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[242] *See* U.S. DEP'T OF JUST. & SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 34 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/ATC6-4HU8] [hereinafter RESOURCE GUIDE]. The Resource Guide was developed for the purpose of explaining and answering some of the most pressing questions about the FCPA including, but not limited to, the costs of corruption, the Anti-Bribery Provisions, and guidance on the enforcement of the FCPA. *Id.* at Foreword. The Resource Guide thus serves the overarching purpose of guiding businesses in their compliance of the basic precepts of the FCPA's bribery and accounting provisions. *Id.* It is crucial to note that corporate bribery has a significant impact on overseas business which, in a free market system, fundamentally influences the price and quality of goods or services. *Id.* (quoting United States Senate, 1977).

[243] *Id.* at 34.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *See generally* United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018); RESOURCE GUIDE, *supra* note 242.

United States.[248] The Circuit's decision to override the government's "long-held position about the scope of the FCPA" leaves unanswered a number of questions about the FCPA's scope and how the government will proceed in the future.[249] Furthermore, because FCPA violations are often not brought to trial, it becomes unclear if or even when these questions will be addressed.[250]

Perhaps one of the most pressing issues is how the government will pursue future FCPA charges for foreign individuals and corporations following *Hoskins*. Evidently, *Hoskins* is binding precedent on the district courts within the Second Circuit and will be persuasive to the circuit if the same issue arises. However, while the court's decision is persuasive to others, it does not necessarily foreclose its sister circuits from exercising their own judicial review in similar cases.[251] In fact, while the Seventh Circuit has not yet addressed the same question, its precedent has declined to impose the *Hoskins* approach.[252]

In particular, the Seventh Circuit's holding in *United States v. Pino-Perez* considered the Drug Kingpin Statute at issue in *Amen*.[253] The case involved a drug supplier rather than the organization's kingpin.[254] As in *Amen*, the defendant alleged that aiding and abetting liability did not and in fact could not apply.[255] The Seventh Circuit specifically rejected *Amen*'s reliance on legislative history and instead explained that liability attaches *automatically* through the conspiracy statute, indicating that congressional intent should not be the key to a court's decision on liability.[256] Only in a limited number of circumstances are individuals immune from liability as an aider and abettor.[257] The Circuit continued, stating that only

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[248] *See Hoskins*, 902 F.3d at 69; RESOURCE GUIDE, *supra* note 242.

[249] *Second Circuit Decision Limits FCPA Jurisdiction as to Foreign Nationals Outside the United* States, O'MELVENY (Aug. 28, 2018), https://www.omm.com/resources/alerts-and-publications/alerts/second-circuit-decision-limits-fcpa-jurisdiction-as-to-foreign-nationals-outside-the-united-states/ [http://perma.cc/GbBY-4UJ2].

[250] STANFORD LAW SCHOOL, *supra* note 116.

[251] *See* United States v. Firtash, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019).

[252] *Firtash*, 391 F. Supp. 3d at 891.

[253] *See* United States v. Pino-Perez, 870 F.2d 1230, 1231 (7th Cir. 1989).

[254] *Id.*

[255] *Id.* at 1233.

[256] *Id.* at 1234.

[257] *Firtash*, 391 F. Supp. 3d at 891; *see also Pino-Perez*, 870 F.2d at 1234. The Seventh Circuit determined that individuals are not aiders and abettors

in those specifically defined circumstances may a court determine that Congress intended to shield accomplices from liability.[258]

Thus, there is a possibility that the DOJ or SEC will pursue conspiracy charges in these sister circuits in the hopes of reaching a contrary result. Should the agencies make such a decision, the circuits will either agree with the government's expansive view of the FCPA or find the Second Circuit's logic more persuasive. If the government attempts to expand the FCPA through further court cases, there is increased potential for circuit splits and a much greater likelihood of the Supreme Court granting certiorari. However, because most FCPA actions are settled, it seems unlikely that there will be an increase in cases to create a circuit split.[259] Practically, a potential split would take some time to come to fruition.[260]

Hoskins and the aforementioned cases in this Note were based on the deliberate intent of Congress.[261] It is more likely that, given the importance of statutory construction and interpretation in the above cases, the government will hone in on the possibility of future congressional action.[262] The Second Circuit understood that at common law, "persons who intentionally direct or facilitate the crimes physically executed by others must be held accountable for their actions" and "this recognition was effectuated

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in the following circumstances. First, if the crime is defined so as to require more than one person for its commission so as to render the second participant a principal rather than an aider and abettor. *See Firtash*, 391 F. Supp. 3d at 890. Second, if the participant is the victim of the crime, he cannot be an aider and abettor. *Id.* Lastly, if the participant is part of the class the statute is designed to protect, that participant is also not an aider and abettor. *Id.* (citing Gebardi v. United States, 287 U.S. 112, 123 (1932)).

[258] *Pino-Perez*, 870 F.2d at 1234.

[259] STANFORD LAW SCHOOL, *supra* note 116.

[260] Kara Brockmeyer et al., *Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery*, DEBEVOISE & PLIMPTON 6–7 (Aug. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/08/fcpa%20update_august%202018_v2.pdf [https://perma.cc/L4SZ-7DGC]; United States v. Hoskins—*Second Circuit Rejects DOJ's Attempt to Expand the Extraterritorial Reach of the FCPA Through Conspiracy and Complicity Doctrines*, SULLIVAN CROMWELL 1, 4 (Aug. 27, 2018), https://www.sullcrom.com/files/upload/SC-Publication-Second-Circuit-Limits-Extraterritorial-Reach-of-FCPA.pdf [https://perma.cc/4Y9Q-YETJ] [hereinafter SULLIVAN & CROMWELL PUBLICATION].

[261] *See generally Hoskins*, 902 F.3d 69; *Ocasio,* 136 S. Ct. at 1423; *Gebardi*, 287 U.S. 112; *Amen,* 831 F.2d 373.

[262] *See generally Hoskins*, 902 F.3d 69; *Ocasio,* 136 S. Ct. at 1423; *Gebardi*, 287 U.S. 112; *Amen,* 831 F.2d 373.

by developing the doctrines of conspiracy."[263] However, there remain exceptions to common law and the reach of the conspiracy statute.[264] In *Hoskins*, Judge Pooler argued:

> Accepting Gebardi's teaching that conspiracy and complicity liability will not lie when Congress demonstrates an affirmative legislative policy to leave some type of participant in a criminal transaction unpunished, the question becomes how to identify such a policy.... [W]e cannot identify such a policy whenever a statute focuses on certain categories of persons at the exclusion of others ... In both [Gebardi and Amen] the courts looked to the text of the statute and the purpose that Congress was trying to achieve thereby honoring their "over-arching obligation to give effect to congressional intent" when interpreting statutes.[265]

Put more simply, where Congress deliberately identifies which class of individuals will be liable, courts cannot read in other classes to extend liability.[266] Similarly, Judge Lynch in his concurrence expressed concern that allowing courts to "read in" their own interpretation of the law, despite what is plainly stated, goes against the very "obligation[s]" courts have to "honor[ ]" Congress.[267] This very principle consequently opens the door for congressional action.[268]

Judge Lynch continued, stating his belief that the *Hoskins* result seems "questionable as a matter of policy."[269] Judge Lynch dove deeper into congressional intent than Judge Pooler by focusing on the actual *purpose* of the law.[270] He reasoned the purpose was to avoid perpetuating crimes under the FCPA while also respecting the sovereignty of the foreign countries involved.[271] Consequently, these purposes are not hindered by attaching conspiracy liability to persons who are not physically present in the United States or who are not necessarily depicted in the statute's plain text.[272]

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[263] *Hoskins*, 902 F.3d at 77.

[264] *Id.*

[265] *Id.* at 80–81 (citations omitted).

[266] *Id.*

[267] *Id.*

[268] BRINSON, *supra* note 176, at 3.

[269] *Hoskins*, 902 F.3d at 102 (Lynch, J., concurring).

[270] *Hoskins*, 902 F.3d at 102 (Lynch, J., concurring); BRINSON, *supra* note 176, at 3.

[271] *Hoskins*, 902 F.3d at 102 (Lynch, J., concurring); BRINSON, *supra* note 176, at 3.

[272] BRINSON, *supra* note 176, at 3.

As a result, while Judge Lynch agreed with the textual reading of the statute, he seemed troubled by the possibility that a person who was a member of "the team that reached the United States" could not be found to have conspired with the U.S. subsidiary to perpetuate FCPA violations.[273] There is a distinct difference between the concept of agency and the actions of "instructors."[274] That is, agency requires a person to act on behalf of another, and therefore acts as an extension of the principal.[275] Conversely, instructors teach and guide others to proper practice or study.[276] This inevitable distinction proves concerning and allows individuals to act under the guise of an instructor to avoid criminal liability.[277] This creates an incentive for multinational corporations to "instruct" individuals rather than to expressly identify agents.[278]

The potential problems arising from the Second Circuit's decision invites Congress to amend the FCPA again.[279] Presumably, Congress may choose to expand liability beyond the groups expressly included in the statute.[280] The success of such an amendment, however, seems unlikely given President Trump's previous comments that the FCPA makes "it difficult for U.S. companies to compete overseas."[281] Similarly, in 2012, President Trump called for a change to the law, and enforcement under the FCPA appears to be declining despite officials in the administration claiming that they are "committed to enforcing it."[282] Given the apparent decline in enforcement proceedings under the FCPA and the President's stance, it seems unlikely that any real changes will be made to the law in the near future.[283]

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[273] *Hoskins*, 902 F.3d at 103.

[274] *Agency,* OXFORD ENGLISH DICTIONARY (2019), https://en.oxforddictionaries.com/definition/agency [https://perma.cc/8MBE-MWEW].

[275] *Id.*

[276] *Instruct,* OXFORD ENGLISH DICTIONARY (2019), https://en.oxforddictionaries.com/definition/instruct [https://perma.cc/7SL4-2GFG].

[277] BRINSON, *supra* note 176, at 3.

[278] *Id.* at 3.

[279] *Id.* at 3–4.

[280] *Id.*

[281] Jim Zarroli, *Trump Used to Disparage an Anti-Bribery Law; Will he Enforce it Now?*, NAT'L PUB. RADIO (Nov. 8, 2017), https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now [https://perma.cc/C57Q-FKMU].

[282] *Id.*

[283] *Id.* Furthermore, at present, the 115th Congress has not chosen to amend the FCPA. BRINSON, *supra* note 176, at 3.

B. The Implications of Hoskins *on Attaching Agency Theory to Foreign Officials*

Moving beyond affirmative actions that the government may take, there are more practical implications that may occur as a result of the *Hoskins* decision. Legal scholars have suggested that the scope of the decision may impact only a rather small portion of cases.[284] These theories exist primarily because individuals and corporations that have previously been guilty for violating the FCPA have been found to do so under traditional agency theories.[285] While agency theory may provide valid insights into current FCPA enforcement provisions, agency has rarely—if ever—been used to apply liability to foreign individuals or companies that exist in a space "unreachable" by the FCPA's jurisdictional bounds.[286]

Hoskins established that only those foreign officials who are "agents, employees, officers, directors, or shareholders of *an American issuer of domestic concern*" may be liable for violations of the FCPA.[287] Though the Second Circuit determined that Hoskins could not be liable for conspiring, the court did not foreclose the possibility of liability upon a sufficient showing of agency.[288] This holding created a fundamental hole in the FCPA doctrine. This decision ensures, without question, that a foreign national must be an agent of an American company to attach conspiracy and complicity liability, though the court refused to express just *how* a person could be an agent of domestic concern.[289]

Consequently, the Second Circuit's decision in *Hoskins* will likely have spillover effects into agency theory as the DOJ and SEC attempt to indict foreign individuals engaged in conduct violative of the FCPA.[290] An agent acts on behalf of another—the principal—and is subject to the principal's control.[291] An agency relationship creates a basic fiduciary obligation as a principal "manifests assent to another," the agent, to "act on the principal's

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[284] Brockmeyer et al., *supra* note 260, at 6.

[285] *Id.*

[286] *Id.*

[287] United States v. Hoskins, 902 F.3d 69, 97 (2d Cir. 2018) (emphasis added).

[288] *Id.* at 98.

[289] *See id.*

[290] Olesya Sidorkina, *Establishing Corporate Parent Liability for FCPA Violations*, 14 U.C. DAVIS BUS. L.J. 89, 98 (2013).

[291] *Id.*

behalf and subject to the principal's control," and the agent provides his consent to such actions.[292] Scholars have debated the certainty of agency theory and have, at times, considered agency to be a vague standard.[293]

The government, however, often "takes an expansive view of ... agency" when it prosecutes FCPA violations.[294] Currently, the SEC and DOJ do engage in prosecutions under agency theory for violations of the FCPA.[295] Multinational companies, in particular, engage in actions that open themselves up to agency liability under the FCPA more frequently than individuals or other nationally based companies.[296] These companies often open themselves up to liability by employing third parties to work on their behalf.[297] Companies are thereby required, under their fiduciary duty of loyalty, to monitor the actions of the third parties or otherwise be subject to FCPA liability.[298]

Consequently, it is possible that the government will try to broaden its basic definition of agency to hold foreign individuals and companies who allegedly conspired or aided in violations of the FCPA.[299] Shifting from conspiracy to agency will inherently avoid the effects of the Second Circuit's decision and perhaps provide stronger grounds for FCPA prosecution.[300] The Second Circuit did not fully answer whether Hoskins *could* be tried as an agent of the Alstom U.S. subsidiary, thus leaving the door open for the government to engage in similar indictments later.[301] Should the government pursue Hoskins or other foreign individuals or companies under this theory, the contours of agency may begin to be more clearly delineated.[302]

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[292] *Id.*

[293] *Id.* at 99.

[294] SULLIVAN & CROMWELL PUBLICATION, *supra* note 260, at 4; *see also Hoskins*, 902 F.3d at 83 (maintaining the decision did not foreclose attaching agency to foreign nationals such as Hoskins); RESOURCE GUIDE, *supra* note 242, at 34.

[295] SULLIVAN & CROMWELL PUBLICATION, *supra* note 260, at 4.

[296] Thomas J. Bussen, *Midnight in the Garden of* Ne Bis in Idem*: The New Urgency for an International Enforcement Mechanism*, 23 CARDOZO J. INT'L & COMP. L. 485, 489 (2015).

[297] *Id.* at 490.

[298] *Id.* at 491.

[299] SULLIVAN & CROMWELL PUBLICATION, *supra* note 260, at 4.

[300] *Id.*

[301] United States v. Hoskins, 902 F.3d 69, 97–98 (2018).

[302] *Id.*; SULLIVAN & CROMWELL PUBLICATION, *supra* note 260, at 4.

While it is clear that conspiracy claims are no longer viable for persons that are not considered agents and who have not stepped foot in the United States, agency is inherently broad and fact-specific, hinging on matters of control and the scope of employment.[303] Factual specificity is key in these determinations,[304] and it remains to be seen how individuals in Hoskins's position can be deemed agents of U.S. issuers or domestic concerns. Determining the true impacts of such theories will inevitably fall on later courts, including the Second Circuit, to determine at what point a foreign individual or corporate entity becomes an agent and can therefore be liable under the FCPA.

Specifically, *Hoskins* may result in implications for joint ventures as a matter of agency theory. "Few laws pose greater risks to multinational businesses than the Foreign Corrupt Practices Act."[305] For businesses, this means strict compliance, whistleblowing where necessary, and ensuring that all cross-border engagements are up to par with the requirements of the law.[306] Joint ventures, in particular, are "high-risk" engagements that "come with a myriad of anti-bribery compliance challenges."[307] When engaging in joint ventures, issuers and businesses in the United States have reason to fear being tagged with vicarious liability for the actions of their international partners.[308] This concern primarily comes from the definitional "fluid[ity]" of joint ventures.[309] Based in contract, they may be characterized in a variety of ways, taking on a variety of risks, control, and everything in between "an arm's length deal and a full merger."[310]

Under the FCPA, joint ventures have traditionally been targeted through agency.[311] Agency liability traditionally attaches vicariously to joint ventures based on the actions of venture partners who act on behalf of the joint venture.[312] The primary concern is

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[303] Sidorkina, *supra* note 290, at 98.

[304] *Id.* at 99.

[305] Daniel J. Grimm, *Article: Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act*, 9 VA. L. & BUS. REV. 91, 93 (2014).

[306] *Id.*

[307] *Id.* at 93.

[308] *Id.* at 94.

[309] *Id.* at 95.

[310] *Id.* at 97–98.

[311] Ike Adams & Robert Keeling, *Vicarious Liability Risks Facing the Financial Industry Under The FCPA*, 9 GEO. MASON J. INT'L COM. L. 1, 30 (2017).

[312] *Id.*

thus the extent of control the "parent" has over the persons engaging in the transaction.[313] The Resource Guide does not mention any strict expectations or liability beyond stating that an issuer is responsible for ensuring that its subsidiaries, which may include joint ventures, comply with all FCPA provisions.[314] More succinctly, issuers in the United States may therefore be liable for the acts of their subsidiaries or joint venture partners where they "authorize, direct, or control" such persons' activity.[315] Consequently, investors and companies engaging in these joint ventures should evaluate the risks involved in pursuing the venture in light of strict FCPA requirements.[316]

Despite the typical risks involved in joint ventures, the Second Circuit's decision in *Hoskins* may actually prove to be beneficial for foreign companies doing business with U.S. companies via joint ventures.[317] History recognizes the likelihood of attaching agency theory to joint ventures, but history also puts forth evidence that conspiracy charges have been used to attach liability in circumstances that would now otherwise be inappropriate under *Hoskins*.[318] Before *Hoskins*, for example, the government attached conspiracy liability to "actions involving Marubeni, JGC Corporation, and Snamprogetti Netherlands B.V. in connection with the TSKJ joint ventures."[319] These cases involved foreign companies participating in transnational joint ventures.[320] Working with these transnational companies leads to a variety of risks, including increased FCPA exposure.[321]

The *Hoskins* decision suggests that foreign businesses associating with domestic issuers or concerns may now have stronger

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[313] *Id.*

[314] *Id.* (quoting RESOURCE GUIDE, *supra* note 242, at 43).

[315] Claudius Sokenu, *Financial Institutions Face Increased Scrutiny Under the FCPA*, 30 J. TAX'N F. INST. 5 (Summer 2017).

[316] Adams & Keeling, *supra* note 311, at 31.

[317] Brockmeyer et al., *supra* note 260, at 6.

[318] Adams & Keeling, *supra* note 311, at 31.

[319] *The Second Circuit Rejects FCPA Liability for Foreign Persons under Accessory Liability Theories*, PAUL WEISS (Aug. 27, 2018), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/the-second-circuit-rejects-fcpa-liability-for-foreign-persons-under-accessory-liability-theories?id=26965 [https://perma.cc/4V4M-D3UY] [hereinafter PAUL WEISS PUBLICATION].

[320] Dennis Haist, *Guilty by Association: Transnational Joint Ventures and the FCPA*, 29 NO. 1 ACC DOCKET 70 (Jan./Feb. 2011).

[321] *Id.*

defenses if charged as coconspirators to FCPA violations.[322] Without application of agency theory in the case of the TSKJ joint ventures, for example, multinational businesses now face less risk, so long as they avoid authorizing or controlling conduct of joint venture partners.[323]

CONCLUSION

The Second Circuit's decision in *United States v. Hoskins* may have several implications for future enforcement of the FCPA. Perhaps most notably, should the SEC and DOJ choose to pursue further litigation to create a circuit split, it could result in a grant of certiorari by the Supreme Court. It is more likely, however, that the government will seek to attach liability under basic agency theory. While most cases are privately settled, it is likely that the government will seek to further ascertain the reach of its power to prevent foreign corruption and bribery.[324] Nonetheless, at present, the practical implications are yet to be seen but will perhaps be far-reaching. Overall, *Hoskins* provides another example of courts rejecting pleas to expand jurisdictional liability in cases where Congress has not explicitly intended.[325] In so doing, the Second Circuit potentially "jeopardizes the government's ability to charge foreign companies and individuals."[326] As it stands today, foreign persons who do not take action on U.S. soil or who act independently, but who have conspired to promote FCPA violations, are virtually untouchable by the U.S. government.[327]

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[322] PAUL WEISS PUBLICATION, *supra* note 319; *see also* SULLIVAN & CROMWELL PUBLICATION, *supra* note 260, at 4; Brockmeyer et al., *supra* note 260, at 7.

[323] Sokenu, *supra* note 315, at 7.

[324] STANFORD LAW SCHOOL, *supra* note 116.

[325] *Hoskins*, 902 F.3d at 71. *See generally* Ocasio v. United States, 136 S. Ct. 1423 (2016); Gebardi v. United States, 287 U.S. 112 (1932); United States v. Amen, 831 F.2d 373 (2d. Cir. 1987).

[326] SULLIVAN & CROMWELL PUBLICATION, *supra* note 260, at 4.

[327] *Id.* at 3; *Hoskins*, 902 F.3d at 103.