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CLIENT ALERT

Second Circuit Reins in FCPA Jurisdiction

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The Department of Justice has long taken the position that those conspiring to violate the FCPA could be charged as co-conspirators, even if they did not fall within the three enumerated categories of those to whom the FCPA's provisions applied. *See, e.g.*, DOJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 34 (2012) ("Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA – i.e., for *agreeing* to commit an FCPA violation – even if they are not, or could not be, independently charged with a substantive FCPA violation." (emphasis in original)).

The Second Circuit recently rejected DOJ's position, holding that foreign co-conspirators who could not themselves be charged directly under the FCPA cannot be charged as conspirators, either. *See United States v. Hoskins*, -- F.3d --, 2018 WL 4038192 (2d Cir. Aug. 24, 2018). The opinion, though highly academic, has serious practical consequences, insofar as an entire class of potential co-conspirators are excepted from the FCPA's reach. DOJ had warned that such a holding "would create a gaping loophole in the law that would hinder, rather than promote, the enforcement of the statute, punishing low-level foreign nationals facilitating the bribe scheme on behalf of a domestic concern, but not the foreign national ringleaders of the very same offense." Brief for Appellant at 46, *United States v. Hoskins*, -- F.3d -- (2018) (No. 16-1010).

The Second Circuit's decision proceeds from two established principles in criminal law. First, a defendant's inability to be charged as a principal does *not* necessarily mean that he cannot be charged as an accomplice for either conspiracy or complicity. *See Hoskins*, 2018 WL 4038192 at *6 (collecting cases for this "deeply ingrained" and "firm baseline rule"). Second, notwithstanding the first principle, there is an "affirmative-legislative-policy" exception where the "literal definitions of accomplice liability" under a given statute may nonetheless conflict with the statute's text, structure, and legislative history such that "conspiracy and complicity liability will not lie." *Id.* at *6-9.

In *Hoskins*, the Second Circuit concluded that "Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability." *Id.* at *11. As the court noted, the "carefully tailored text" of the FCPA—which does not assign liability to nonresident foreign nationals who lack any agency relationship with domestic persons or companies—and the legislative history of the statute, evidenced "specific concern about the scope of extraterritorial application of the statute." *Id.* This conclusion was

buttressed the "well-established principle that U.S. law does not apply extraterritorially without express congressional authorization." *Id.* at *22-24.

This holding did nothing to save Mr. Hoskins from the *separate* charge that he acted as an agent of a domestic concern, but it does mean that he (and other foreign FCPA defendants) cannot be prosecuted absent such an agency relationship or acts committed within the United States.

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