Dispute Resolution Hotline

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FOREIGN CORRUPT PRACTICES ACT: AN OVERVIEW OF ITS EXTRATERRITORIAL APPLICABILITY

BACKGROUND

The Foreign Corrupt Practices Act ("**FCPA/Act**") was enacted in the year 1977 but gained prominence in its application since the last couple of decades. With the United Nations General Assembly approving the Convention Against Corruption in 2002, the United States also committed more resources to fighting international crimes, including corruption.[1] The investigations following the Watergate scandal revealed that corporations had made illegal political contributions, both domestic and foreign, which were concealed in secret slush funds.[2]

APPLICABILITY

From a reading of the relevant provisions of the FCPA, we understand that the FCPA prohibits certain classes of persons and entities from advancing bribes to foreign government officials. In addition to this, the FCPA also requires the regulated entities/individuals to maintain proper books of accounts and to devise and maintain an adequate system of internal accounting controls.[3] The underlying objective of the FCPA is to ensure that US companies do not use their corporate funds to bribe foreign officials. The FCPA also prohibits transfer of any amounts to any person while 'knowing' that such payments would be used by the person to bribe foreign officials. In this context, 'knowing' includes willful blindness to the high probability of bribery.[4] The FCPA defines the term 'foreign officials' in a wide manner, which includes not just government officials but also an agent or person representing any government department or instrumentality of the government.

The anti-bribery provisions of the FCPA are applicable to three distinct classes of entities/persons, *viz*: issuers,[5] domestic concerns[6] and persons other than issuers and domestic concerns ("**Covered Classes**").[7] An **Issuer** is entity listed on a US security exchange (stocks or ADR). A **Domestic Concern** isan entity or individual other than an Issuer which is incorporated/registered or has its principal place of business in the United States. The FCPA prohibits Issuers and Domestic Concerns, as well as their officers, directors, employees, or stockholders acting on their behalf from bribing foreign officials. It also prohibits them from using mail or other means or any instrumentality of interstate commerce to commit an act in furtherance of bribing, promising or authorizing to pay a foreign official. This implies that the statutory ambit of the FCPA itself is wide enough to cover actions perpetrated outside the territory of the United States.

The third category includes all such persons (who may be foreign individuals or foreign non-issuer entities), including their officers, directors, employees, who use any means including mail services or other instrumentality of interstate commerce to offer to pay, pay, or authorize to pay a foreign official, while in the US territory ("**Class III**"). We will further in this piece discuss a judgment of a US District Court which interprets the FCPA in a manner so as to extend its applicability to individuals who have committed the offence even while being outside the territory of the United States.

The Department of Justice ("**DOJ**") along with Securities Exchange Commission ("**SEC**") are responsible for pursuing and investigating indictments under the FCPA.[8] The DOJ has enforcement authority over, *inter alia*, individuals and entities belonging to Class III.[9]

This article refers to court decisions and actions taken by the SEC and DOJ and aims to address the extra-territorial applicability of the FCPA and the possible liability that a foreign company or individual may face under the FCPA.

EXTRA-TERRITORIAL APPLICATION OF THE FCPA

The extra-territorial application of the FCPA is, *inter alia*, attracted through its coverage of (a) acts committed outside the territory of the United States by agents, officers, employees of Issuers/Domestic Concerns, and (b) acts committed by individuals/entities under Class III, both of which are explained below.

a. Foreign nationals who are agents, officers, etc. of an Issuer or a Domestic Concern

Section 78dd-1 and 78dd-2 provide that the FCPA is applicable to Issuers and Domestic Concerns, as well as any officer, director, employee, agent, or a stockholder acting on behalf of such Issuer or Domestic Concern. Therefore, such individuals can also be indicted under the FCPA even if they are foreign nationals. There have been multiple incidents affirming such applicability.

b. Foreign nationals who are not agents, officers, etc. Issuer/Domestic Concern

In *United States v. Firtash*,[10] two of the defendants, Dmitry Firtash (Ukrainian citizen) and Andras Knopp (Hungarian

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citizen) ("**Defendants**") were accused of bribing Indian officials to secure mining contracts in India. DOJ alleged that although the offence of bribery happened in India, the same was done by conspiring with US citizens ('Domestic Concerns' under the FCPA), thereby attracting the application of the FCPA. Noteworthy is the fact that Defendants were:

a. neither held to be an agent, officer, etc. of an Issuer or Domestic Concern (thereby excluding literal application of Section 78dd-2);

b. nor had they ever set foot in the United States (thereby excluding literal application of Section 78dd-3).

The district court of the Northern District of Illinois (Eastern Division) ("**Illinois DC**") held that a foreign person or entity not falling within the categories of Issuer, Domestic Concern and Class III can still be held liable under FCPA if such person/entity engages in a conspiracy to commit an offence under the FCPA.

Illinois DC further explained that conspiracy liability under a statute is automatic and could only be excluded in three circumstances. These circumstances were:

i. where the act is such an offence which requires two people, where abetment would not be possible;

ii. where the other party is the victim of the crime; or

iii. where the accused is member/ group that the statute aims to protect.

The Illinois DC reasoned that the FCPA did not automatically exclude abettor/conspiracy liability. Further, it observed that the Defendants did not fall within any of the exceptions provided. Therefore, the Defendants would be liable under the FCPA as conspirators/abettors to the other defendants.

In addition to above, it is also important to discuss the findings of the Second Circuit Court in *United States v. Hoskins* (2018).[11] In *Hoskins*, the court held that a foreign citizen, who does not independently fall within the scope of the Covered Classes, cannot be held liable under the FCPA merely on account of conspiring with an individual/entity falling under the Covered Classes. That is to say, a foreign citizen can only be liable under the FCPA if he is acting in the capacity of an agent, officer, etc. of an individual/entity falling under the Class I/Class II.

Lawrence Hoskins, a British national, was an executive with a French multinational, Alstom S.A. ("**Alstom**"). During 2002 to 2009, which was the period of the offence, Hoskins was assigned to work with one of Alstom's subsidiary, Alstom Resource Management (also in France). The act of bribery, as alleged by the DOJ, involved payment of bribe to Indonesian officials by consultants hired by Alstom's American subsidiary ("**Alstom US**"). The charges were framed against Hoskins, the consultants and other individuals associated with Alstom US. The charges against Hoskins included selecting the consultants and authorizing payments to such consultants while knowing that a portion of the payments to the consultants was intended for bribing Indonesian officials. Noteworthy is the fact that Hoskins neither worked with Alstom US, nor visited the US during the period of the offence.

The charges against Hoskins under FCPA were as follows:

a. He was an agent of Alstom US, thereby being liable under Section 78dd-2 (as an agent of a Domestic Concern); and;

b. He conspired with Alstom US and its employees to commit the alleged offence (as a person under Class III).

The Court out rightly rejected charge (b) because Hoskins was (a) not a domestic resident, (b) not an issuer, and (c) was not in the territory of the United States during the period of the alleged offence. Considering that the actions of Hoskins was beyond the scope of the FCPA, therefore, he could not be made liable under the FCPA merely due to an act of conspiracy with people to whom the FCPA was applicable.

Secondly, the DOJ argued that Hoskins acted as an agent of Alstom US. While dealing with this argument, the Second Circuit Court noted that although a foreign citizen, who was not present in the territory of the United States during the alleged period of the offence, would not be directly liable under the provisions of the FCPA; however, if it is proved that such an individual was an agent of an individual/entity under Class I and Clause II (Alstom US, in this case), such a person could be held liable. Having made these observations, the court transferred the matter to the District Court for trial.

In the ensuing trial, the jury found Hoskins to be an agent of Alstom US. Hoskins appealed against this decision. The appeal court in *Hoskins v United States* (2020)[12] examined the relevant factors to hold a person liable under the FCPA as an agent. The tests laid down were the "hire and fire test" and the "power to reassign". The hire and fire test looks at whether the principal had the ability to hire and fire the agent. The power to reassign assesses if the principal can alter the terms of service of the agent.

By applying these tests, the court found that Hoskins was not an agent of Alstom US on the basis that neither was he hired by the Alstom US nor did they control the terms of his service. Further, Alstom US also did not have the power to fire Hoskins. As a result, the tests for agency were not established. Thus, the position emerging from the decision in *Hoskins* is that a foreign national can be held liable under the FCPA only if such person is acting in the capacity of an agent of an individual/entity to which the FCPA is applicable.

KEY TAKEAWAYS

The statutory provisions and legal developments as set out above points to the fact that the FCPA has a broad extra-territorial application. Such application extends to agents, officers, directors, etc. of Issuers, Domestic Concerns and Class III. Considering the broad interpretation as set out in Firtash, we have explained the scope and ambit of such application through the following illustrations:

Illustration A: FCPA could be applicable to an Indian national who is acting as an agent, officer, director, etc. of an Indian company which has its stocks listed in the United States (as such a company would qualify as an Issuer). Further, such an Indian national could be liable under the FCPA for an offence of bribery in India even if it has never set foot in the United States.

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Illustration B: An Indian national who is acting as an agent, officer, or director of a US resident or US undertaking could also be liable under the FCPA for an offence of bribery in India.

Illustration C: The application of FCPA can also extend to arraign an Indian national or an Indian company not acting as an agent, director, etc. of a US individual/company, if it aids, abets, or conspires with an Issuer/Domestic Concern. Further, such an Indian national could be liable under the FCPA for an offence of bribery in India even if it has never set foot in the United States.

In light of the above discussion, it is imperative that Indian entities and individuals involved in business relationships with US nationals and undertakings should ensure proper maintenance of books of accounts which could evince contractual utilization of payments received from US entities/individuals. Further, there might be a narrow scope to contest the jurisdiction of the SEC/DOJ in prosecuting an Indian national for an offence under the FCPA.

– Adimesh Lochan, Arjun Gupta & Vyapak Desai

You can direct your queries or comments to the authors

[1] *From Watergate to Today, How FCPA Became So Feared*, Joe Palazzolo, The Wall Street Journal, available at

https://www.wsj.com/articles/SB10000872396390444752504578024791676151154

[2] *The History of FCPA Enforcement, Part 1*, Anne Eberhardt, Corporate Compliance Insights, available at

https://www.corporatecomplianceinsights.com/foreign-corrupt-practices-act-came/

[3] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq., available at:

https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf

[4] Investor Bulletin: The Foreign Corrupt Practices Act – Prohibition of the Payment of Bribes to Foreign Officials, SEC Office of Investor Education and Advocacy, available at

https://www.sec.gov/investor/alerts/fcpa.pdf

[5] § 78dd-1

[6] § 78dd-2

[7] § 78dd-3.

[8] http://www.justice.gov/criminal/fraud/fcpa/.

[9] A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, available at

https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf

[10] 392 F. Supp. 3d 872 (N.D. Ill. 2019).

[11] 5 902 F.3d 69, 103 (2d Cir. 2018).

[12] No. 3:12cr238, (JBA), ECF No. 617, at 14, 18 (D. Conn., Feb. 26, 2020).