August 2022

Day Pitney White Collar Roundup – August 2022 Edition

Second Circuit Rebuffs Long-Running FCPA Claim for Lack of Jurisdiction

The government continues to press for aggressive application of the Foreign Corrupt Practices Act (FCPA) to foreign nationals, and federal courts keep pushing back. (We covered another recent example here.)

The latest comes from the U.S. Court of Appeals for the Second Circuit, which in mid-August upheld (over a dissenting opinion) the district court's granting of a motion for acquittal of a former Alstom SA executive on all FCPA counts. The executive, Lawrence Hoskins, was accused of being involved in hiring consultants to bribe Indonesian officials in order to secure a large contract for Alstom. But Hoskins' jurisdictional ties to the United States during the relevant period were weak. He was a British citizen, a resident of France, and an officer of a foreign subsidiary of a French company with no obvious nexus to its U.S. operations. He never set foot on U.S. territory during the applicable period.

As we first reported two years ago, Hoskins' lack of obvious nexus to the U.S. caused the government issues in its efforts to prosecute him. Previously, the Second Circuit rejected the government's effort to hold Hoskins accountable under a *conspiracy* theory, finding that he could not be liable for conspiracy to violate the FCPA if he could not be subject to liability for the underlying FCPA offense. But Hoskins *could* be charged if the government were to show Hoskins was an "agent of a domestic concern." At the subsequent trial, the jury was persuaded that such an agency relationship existed, but Judge Janet Bond Arterton found the conclusion to be against the weight of the evidence and granted Hoskins' motion for acquittal on that point. The government appealed.

In its recent ruling, the Second Circuit affirmed the district court, holding that the government had not provided sufficient evidence of an agency relationship between Hoskins and Alstom's U.S. subsidiary to establish jurisdiction for FCPA purposes. Although Hoskins' actions occurred "at the behest" of Alstom's U.S. subsidiary and were "subject to the decision-making of" U.S. subsidiary executives, the court ruled there was no evidence that the U.S. executives "actually controlled Hoskins's actions" (a necessary element for proving an agency relationship). Key factors in the lack of control analysis were that the U.S. subsidiary did not hire Hoskins, could not fire him, and did not determine his compensation. Moreover, "there [was] no indication that Hoskins had any authority to negotiate binding terms nor that he served as anything more than a messenger for the US subsidiary."

Because the U.S. subsidiary lacked control over Hoskins, the court affirmed there was insufficient evidence from which a jury could find an agency relationship.

But a dissenting opinion foreshadows future battles over corporate criminal liability for overseas executives in the FCPA context and perhaps beyond. Judge Raymond Lohier's dissent acknowledged there was slim evidence to show the U.S. subsidiary exercised sufficient control over Hoskins but that "slim is not the same thing as insufficient." Beyond that disagreement, Judge Lohier noted potential consequences of the majority's decision, including that companies "will be motivated to organize themselves to avoid exercising control over the employees of foreign affiliated companies who engage in bribery overseas."

For now, the Second Circuit's decision may signal the end of the long-running FCPA saga for Hoskins. But we can expect the government to continue pursuing FCPA claims against other defendants beyond U.S. borders, and the courts to continue grappling with the jurisdictional challenges.

Second Circuit Also Foils FOIA Request for Investigative Materials

Over the past few weeks, much attention has been focused on the disclosure of materials about the government's ongoing investigation into former President Donald Trump's potential retention of classified records. Meanwhile, separate efforts to gain access to materials from the government's earlier investigation into one of Trump's presidential campaigns ground to a halt. In mid-August, the Second Circuit denied a request under the Freedom of Information Act (FOIA) for notes and memoranda of interviews conducted by the Department of Justice (DOJ) and Federal Bureau of Investigation (FBI) during their investigation of possible campaign finance violations related to the former president's 2016 campaign.

In 2018 and 2019, as described in the Second Circuit's opinion, the DOJ and FBI were investigating whether persons associated with the Trump campaign had violated campaign finance laws and/or had obstructed justice. Their investigation resulted in the high-profile prosecution of Michael Cohen, a lawyer for Trump, who subsequently pleaded guilty to campaign-finance and other violations. In 2019, a self-described watchdog organization sought, under FOIA, the FBI Forms 302 and other records memorializing the investigatory interviews conducted by the FBI and DOJ. The organization, modestly named American Oversight, subsequently sued both agencies for the materials. The district court granted summary judgment in favor of both defendants, relying on an exemption from the broad disclosure requirements of FOIA for documents that normally would be privileged in civil discovery, such as attorney work product documents.

As an initial matter, the Second Circuit confirmed that the FBI Forms 302 and other memoranda at issue had been prepared in anticipation of litigation by FBI agents working with DOJ lawyers and constituted work product. The Second Circuit then considered the centerpiece of American Oversight's novel argument on appeal: that the government had waived the work product protection because it had disclosed the contents of the interview memoranda to its adversaries, i.e., the subjects and targets of the investigation. The organization reasoned that, by having interviewed those individuals, the government had necessarily disclosed to the interviewees the matters that were subsequently covered in the interview memoranda and thus had waived the protection.

The Second Circuit disagreed. It reasoned that while the interviewees may have heard the DOJ's or FBI's words during their interviews, the government had not disclosed to the interviewees how the interviews would later be memorialized. In drafting an interview memo, the court continued, an agent "must make myriad choices—about what parts of the interview to recount in detail and what parts to summarize; when to quote responses and when to paraphrase them; whether to track the order of the interview, the chronology of the events discussed, or the topics covered—that can reveal impressions, opinions and theories without expressly stating them." In any event, the court explained, the government cannot have disclosed and thus waived the *answers* to various questions that the interviewees themselves, and not the government, had supplied.

For these and other reasons, the Second Circuit held that American Oversight had not established a waiver of the work product protection over the interview notes and memoranda and upheld the rejection of the FOIA request. Toggling back to the current DOJ investigation into Trump's possible retention of classified materials at his Mar-a-Lago residence, it will not be surprising if one or more groups seek (if they have not already) any interview notes and memoranda underlying that investigation. If so, there's at least one theory unlikely to help them.

The Reach of FARA Continues to Grow

In August, a jury sitting across the country from New York in California convicted Ahmad Abouammo, a former Twitter employee, of an array of offenses, flowing from him serving as an "agent" of a foreign government without notifying the U.S. Attorney General under the Foreign Agents Registration Act (FARA). In that capacity, Abouammo, along with a co-defendant, acquired information identifying Twitter users who had been critical of the government of the Kingdom of Saudi Arabia.

FARA, which dates back to 1938, was originally passed to address concerns about Nazi propaganda and was later used to address concerns about Soviet-sponsored Communism. The statute was little used and little known after the fall of the Soviet Union. But in the past decade it has become a frequent tool of the Justice Department. The premise of the statute is simple. It does not outlaw being a foreign agent but rather requires agents to "register" with the Attorney General: "Disclosure of the required information facilitates evaluation by the government and the American people of the activities of such persons in light of their function as foreign agents." In most FARA cases, the "victim" of the crime is seen as the American people.

But the Abouammo charges present an interesting twist, with two additional victim types—one explicit and one implicit—playing an important role in the prosecutorial narrative.

The first such victim is Twitter. The indictment charges, in addition to FARA violations, a series of counts grounded on the more generalized bases of wire fraud and honest services fraud pursuant to 18 U.S.C. 1343, 1346, and 1349. In short, the counts allege that Abouammo defrauded Twitter of his services as an "honest" employee and made material misstatements using digital communications. As described by the district court in its order denying defendant's motion to dismiss, "[t]he alleged victim of the fraud charged in the superseding indictment is Mr. Abouammo's former employer, Twitter, Inc." And the wire fraud counts were, as is often the case, tailed by related counts of alleged money laundering under 18 U.S.C. 1956.

The government's theory is not surprising, as the DOJ (as well as members of the U.S. intelligence community) increasingly turn their attention to the protection of information held by and issues related to the private sector. FARA, originally conceived as a mechanism for countering Nazi propaganda, is seen as a valuable tool to use against foreign governments that may be as interested—or more interested—in private sector information as information held in government safes.

The second type of victim in the case is a group of people that may inspire stronger emotions, as the charging documents make clear that the information obtained by the Saudi government may have allowed for identification of critics, which potentially could lead, in light of a recent report published by the U.S. State Department, to arrests, incarcerations or other human rights issues.

In short, the Abouammo case illustrates one important way in which the DOJ is utilizing existing statutes in additional ways. FARA, originally conceived in very different circumstances, turns out to have a multitude of uses.

Government Contract Scheme Unravels for Apparel Company

The U.S. Attorney's Office of the District of New Jersey announced in August that an apparel company based in the state will pay $7.6 million under a consent judgment with the DOJ to resolve allegations under the False Claims Act. The company, VE Source LLC, allegedly defrauded the government in order to obtain more than $16 million in government contracts that were set aside for businesses owned and controlled by service-disabled veterans. In order to qualify for such contracts, one or more service-disabled veterans must own 51 percent or more of the business and control its management and daily operations.

According to the complaint, one of VE Source's owners, Christopher Neary, who is not a service-disabled veteran, conspired with another individual to take advantage of the benefits awarded to businesses owned by service-disabled veterans. Neary and others solicited a service-disabled veteran and structured the business so that he would own a 51 percent stake. The complaint alleged that this veteran had no knowledge of the apparel industry and did not maintain any control over the company, and instead that Neary had "excessive control" over the company, such as by taking home substantially more compensation, signing off on most corporate documents, and taking an excessive number of interest-free loans from the company. Pursuant to the complaint, Neary and the veteran falsely certified on numerous occasions that VE Source was a service-disabled veteran's business and obtained government contracts to which they would not otherwise have been entitled.

In addition to the $7.6 million settlement with VE Source, the DOJ also entered into a separate settlement agreement with Neary, the veteran, and a related entity, for payments of $120,000, $75,000, and $180,000, respectively, to resolve civil claims. The DOJ reserved its rights as to certain other potential liabilities. The settlements show that if false claims appear woven into the fabric of a company, it may eventually have to pay.

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