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Second Circuit Asks Whether It Should Further Limit FCPA's Application

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On March 11, 2020, the Second Circuit heard arguments in *United States v. Chi Ping Patrick Ho*, a case testing the reach of the Foreign Corrupt Practices Act (FCPA) much like the 2018 case *United States v. Hoskins*. And, once again, the Court raised serious questions about the DOJ's attempt to apply that Act broadly.

IN DEPTH

In 2018, the US Court of Appeals for the Second Circuit rejected a broad reading of the Foreign Corrupt Practices Act (FCPA) by the US Department of Justice (DOJ), and issued a ruling that limited the reach of the Act in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). On March 11, 2020, the Second Circuit heard arguments in *United States v. Chi Ping Patrick Ho*, another case testing the reach of the FCPA. And, once again, the Court raised serious questions about the DOJ's attempt to apply that Act broadly.

In December 2018, Chi Ping Patrick Ho, a Hong Kong official who ran a research organization run by CEFC China, was convicted of one count of conspiring to violate the FCPA, four counts of violating the FCPA, and additional counts for money laundering. DOJ alleged that Ho, on behalf of the Chinese conglomerate CEFC, had offered a $2 million cash bribe, hidden within gift boxes, to the president of Chad in an effort to obtain oil rights from the Chadian government. The president rejected the offer, and CEFC China did not obtain the advantage allegedly sought through the bribe offer. Ho then allegedly caused a $500,000 bribe payment to be made—via wire through the United States—to Uganda's foreign affairs minister, and schemed to make a similar payment to Uganda's president, in exchange for partnering in joint ventures in that country.

Ho appealed to the Second Circuit, challenging both his FCPA and money laundering convictions. While the money laundering charges does not seem vulnerable to a jurisdictional attack, the Court appeared to view the FCPA as more susceptible to a jurisdictional challenge. With respect to the FCPA violations, Ho argued that the "government's theory of the case was internally inconsistent

and legally insufficient." In particular, DOJ rested its case on two theories. First, it claimed that the FCPA applied because Ho was an officer of a "domestic concern" under 15 U.S.C. §§ 78dd-2. That provision applies to domestic concerns and to their officers, directors, employees, agents or stockholders. Second, DOJ argued that the FCPA applied because Ho's conduct fell under Section 78dd-3, a provision that applies to those who are *not* domestic concerns, but who commit their criminal acts "while in the territory of the United States[.]"

According to Ho, he can be subject to either one provision or the other, but not both. Ho pointed to the legislative history of § 78dd-3, noting that the provision was enacted 21 years after § 78dd-2, and that Congress intended the two provisions to be mutually exclusive. Ho noted that the Senate's Committee Report stated the legislation was intended to provide for penalties for persons not covered by § 78dd-2.

DOJ argued that there was no ambiguity in the statutory language and thus it was inappropriate to consider the legislative history. Nonetheless, DOJ argued that nothing "in the language of the FCPA so much as suggests that Congress intended for the Government to have to choose to charge a given defendant under only one section, when he may have violated more than one section, removing an otherwise-applicable statute, with a different element, from the jury's consideration."

At oral argument, the Second Circuit panel focused on this issue, asking how a defendant could be guilty of both provisions. The panel further pressed DOJ on whether there were "two distinct wrongs" in the conduct at issue. DOJ asserted that helping a domestic organization carry out bribery and traveling to the United States to further an alleged scheme were two distinct acts that Congress intended to criminalize under the FCPA. Ho's counsel, however, pointed to *Hoskins*, in which the Second Circuit had already found that § 78dd-3 was meant to cover conduct not already addressed by the existing provisions.

It is not yet clear how the Second Circuit will decide the *Ho* case, or when we can expect a decision. Nonetheless, over the past decade, DOJ has applied a broad reading to the FCPA. *Hoskins* was significant because it was the first case that reigned in the DOJ's broad reading of the FCPA. The question now is whether *Ho* will be the second.

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