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New FCPA Decision Limits DOJ's International Reach

By Harry Sandick and Devon Hercher

In recent years, we have seen the Department of Justice (DOJ) expand its international focus, as it looks to punish foreign nationals, often for conduct that occurred almost entirely outside of the territorial borders of the United States, such as in the Libor and FX benchmark cases. *See*, *United States v. Allen*, 864 F.3d 63, 90 (2d Cir. 2018) (reversing conviction where compelled testimony in the United Kingdom was used against the defendants, both UK nationals, who were "hale[d] … into the courts of the United States to fend for their liberty"); *United States v. Hayes*, 118 F. Supp. 3d 620, 628-29 (S.D.N.Y. 2015) (prosecution of Swiss and UK nationals in U.S. courts where crime involved U.S. wire communications).

DOJ's eagerness to look outside of the United States in its investigations, however, has not been matched by judicial enthusiasm concerning the extraterritorial application of U.S. law. On the contrary, we have seen a string of Supreme Court decisions over the past decade that limit the reach of U.S. law. *See*, *e.g.*, *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2110-11 (2016) (limiting the international reach of the Racketeer Influenced and Corrupt Organizations Act); *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013) (limiting the international reach of the Alien Tort Claims Act); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 273 (2010) (holding that section 10(b) only reaches misconduct in connection with the purchase or sale of a security listed on an American stock exchange, or a purchase or sale in the United States).

The reach of the Foreign Corrupt Practices Act (FCPA) (https://bit.ly/2xDwTO3) has long been a central and unresolved question in this back-and-forth between the courts and the government. By its very nature, the FCPA is meant to address conduct that occurs at least in part outside of the United States: it applies only to the bribery of foreign government officials, not to bribery of U.S. government officials. In addition, the statute was enacted to level the playing field by prohibiting bribery not only by U.S. persons and firms, but by market participants in other countries who either worked for U.S. firms or who engaged in prohibited conduct within the United States.

Since 2015, we have observed a trend toward the government charging predominantly entities that are headquartered or incorporated outside of the United States. Data maintained by Stanford Law School's "Foreign Corrupt Practices Act Clearinghouse" shows that in 2015, the DOJ and the SEC charged one foreign firm and 12 domestic firms. Foreign Corrupt Practices Act Clearinghouse: DOJ and SEC Enforcement Actions Per Year, Stan. L. Sch. (https://stanford.io/2VKFC93). By comparison, in 2019, the DOJ and the SEC charged 17 foreign firms and eight domestic firms. *Id.* Between 2016 and the present, a majority of the charged firms have been foreign. In addition, the largest FCPA cases — measured by penalties and disgorgement amounts — have focused on non-U.S. firms. According to one source, nine of the top 10 FCPA cases of all time have punished foreign firms. *See*, FCPA Blog, "Airbus shatters the FCPA top ten," Feb. 3, 2020, (https://bit.ly/2xLhxXy)

Does the FCPA Apply To People With No Direct U.S. Connection?

Given this FCPA enforcement trend of focusing on foreign wrongdoers, it is not surprising that courts now have been asked to address whether the FCPA can reach actors who lack a direct connection to the United States. For the past several years, this question has been the subject of litigation

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in the District of Connecticut. *United States v. Hoskins* involved the prosecution of a foreign national for his alleged role in a bribery scheme involving the construction of a power plant in Indonesia by a global company, Alstom SA (Alstom) and its U.S. subsidiary, Alstom Power, Inc. (API). Hoskins was indicted for one count of conspiracy to violate the FCPA, six substantive FCPA bribery counts, and five counts related to money laundering.

By the plain language of the FCPA, Hoskins should never have been charged. This is because the FCPA only reaches the conduct of U.S. nationals, individuals who are employed by U.S. firms, or those who engage in acts within the United States. Hoskins did not fall into any of these categories; he is a UK national who worked for Alstom's French and UK subsidiaries. Despite this, prosecutors charged Hoskins based on a theory that he could be prosecuted for conspiring with or aiding and abetting others who were subject to the FCPA. In an interlocutory appeal, the Second Circuit rejected this theory, holding that the FCPA reflected a clear affirmative policy to exclude from prosecution foreign nationals who are employees of a non-U.S. firm and who do not act within the territory of the United States. *United States v. Hoskins*, 902 F.3d 69, 98 (2d Cir. 2018). However, the Second Circuit left open the possibility of trial and conviction on an agency theory. *Id*. at 98-99. That is, Hoskins could be convicted under the FCPA if he acted as an agent of a U.S. firm.

In October 2019, the government proceeded to trial on this agency theory and the jury returned a guilty verdict on all seven FCPA-related counts. The verdict's implications were discussed in the March 2020 issue of *Business Crimes Bulletin*. *See*, Darren Laverne et al., "Agency: A New Frontier for FCPA Jurisdiction," *Business Crimes Bulletin* (March 2020) (https://bit.ly/2zkfDhc). In their conclusion, the authors sounded a cautionary note:

> [I]f the government's view prevails, by authorizing the prosecution of the 'agents' of U.S. companies and issuers, Congress undermined the careful calibration it had achieved in drafting the statute. With one word, it imported into the FCPA common-law concepts that do not fit comfortably in the criminal context, and added substantial uncertainty to the task of assessing the statute's jurisdictional reach. It took many years, and the recent trend toward global expansion by U.S. law enforcement, to lay bare the consequences of this decision.

The *Hoskins* Court Holds The Government to a Demanding Standard For Agency

Shortly after the writing of the "New Frontier" article, U.S. District Judge Janet Bond Arterton, who presided over the *Hoskins* trial, dealt a blow to the government's efforts at global expansion by granting Hoskins's Rule 29 motion and reversing his FCPA convictions due to insufficient evidence that he was an agent of API. Judge Arterton's thoughtful and careful decision suggests that agency law cannot be used to expand the FCPA's reach as far as some had feared. If other courts follow this decision, then the standard for an FCPA conviction based on an agency theory will be a demanding one.

The *Hoskins* decision began by stating that it would be guided by traditional agency law. At common law, three elements define an agency relationship: 1) the manifestation by the principal that the agent shall act for him; 2) the agent's acceptance of the undertaking; and 3) the understanding of the parties that the principal is to be in control of the undertaking. *United States v. Hoskins*, No. 3:12-cr-238 (JBA), 2020 WL 914302, at 2 (D. Conn. Feb. 26, 2020).

The defense argued that this standard was not satisfied because API had no right to control Hoskins's actions. The defense pointed to evidence in support of its argument:

- Corporate records proved that Hoskins stood outside of API's corporate hierarchy; while Hoskins provided oversight and approval of consultants, he did not do so as an agent of API.
- Emails and trial testimony showed that Hoskins had approval authority over the hiring of outside consultants.
- Trial testimony demonstrated that Hoskins and the Alstom International Unit (the foreign subsidiary which employed Hoskins) had ultimate approval power over the hiring of consultants.

In response, the government's central argument was that API controlled the power plant project and that Hoskins assisted in the efforts to win the contract for the power plant, which it claimed was sufficient to prove an agency relationship. The government identified the following evidence in support of conviction:

- The corporate records and policies identified by the defense did not accurately capture the true relationships between API and Alstom employees, nor did they reflect how the power plant project was run.
- Documents proved that Hoskins acceded to and carried out API's instructions with respect to the power plant project, including the hiring of consultants.
- Testimony demonstrated that API, not Hoskins, had ultimate decision-making authority over the hiring of the consultants.

The court agreed that evidence supported the government's contention

that API controlled the hiring of consultants for the project, that API gave Hoskins instructions with respect to the project, and that Hoskins followed API's instructions. However, this evidence was insufficient to prove that Hoskins was an agent of API. As the court stated on multiple occasions, API did not have the right to control Hoskins' actions; it only had the right to control the broader project on which he worked. *Id*. at 7. Even if API exercised control over important elements of the broader project, this is insufficient to prove agency. To prove agency, API needed to retain a right of control over how Hoskins achieved the objectives set by API, as "that right of control is what distinguishes an agency relationship from a mere contractual one." *Id*. (internal quotation omitted). The court held that the government failed to prove that API "had a right of interim control over *Mr. Hoskins's actions* to procure consultants according to API's specifications." *Id*. (emphasis in original). Absent such evidence, the government had not proved that Hoskins was API's agent. In addition, the court explained that none of the classic indicia of control that define an agency relationship were present here: API did not have the right to terminate Hoskins, to assess his performance, to impact his compensation or to exert control over his actions.

Accordingly, in the absence of evidence that could "entitle a rational finder of fact to conclude beyond a reasonable doubt that there was an understanding between Mr. Hoskins and API that API would be in control of Mr. Hoskins's actions … [or] control Mr. Hoskins's actions in a manner consistent with agency relationships," the court granted the motion for acquittal. *Id*. at 9.

Concluding Thoughts

The *Hoskins* decision is by no means a categorical rejection of agency theory. The district court acknowledged that agency analysis is nuanced and highly factual. *Id*. at 3. The decision leaves the door open for the government to try again in another case, as it might have prevailed on a different set of facts. To the extent there are open questions regarding the suitability of applying common law agency principles to an "agent" in the context of federal criminal law, the court was not asked to address these questions. Indeed, the court simply accepted the parties' agreement that "traditional agency law principles" should apply. *Id*. at 2 n.1.

In addition, it should not be ignored that the court left in place the defendant's convictions for money laundering, because those offenses involved transactions that passed through the United States. This aspect of the decision suggests that the government may have more success by charging international bribery cases under statutes other than the FCPA. Still, *Hoskins* should make future prosecutors think twice before bringing an FCPA case under an agency theory. The district court concluded that API controlled the hiring of the consultants for the project *and* that Hoskins followed API's project instructions, and it still wasn't enough to sustain the conviction because API didn't control the specific steps taken by Hoskins.

The district court's decision also advances commendable policy goals. First, given that agency is a fact-specific standard, there may be fair notice problems with an approach that looks to a multi-factor test in order to determine whether there is criminal liability. The judge's decision to reverse on the grounds of sufficiency of the evidence avoided a situation in which a person would have stood convicted due to the post hoc application of a complicated legal formula. Such an outcome might present due process concerns. *See*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (rejecting constitutionality of statute where it produces "more unpredictability and arbitrariness than the Due Process Clause tolerates") (internal quotation omitted).

Second, Congress acted wisely when it limited the categories of defendants who can be charged under the FCPA to those with some connection to the United States. With resources limited and federal white-collar prosecutions at a decades low, there is little reason for the Department of Justice to become the world's policeman. When Congress drafted the FCPA, it likely had in mind the foreign policy consequences of American prosecutors indicting and convicting foreign nationals. It is hard to imagine that other countries wish to see their citizens subjected to the criminal justice system in the United States, which imposes sentences that are out of step with sentences in the rest of the world. *See*, "Cruel and Unusual: U.S. Sentencing Practices in a Global Context," Univ. of San Francisco School of Law: Center for Law and Global Justice, 15 (May 2012) (https://bit.ly/2xQoOWf) ("The severity and length of criminal punishments distinguishes the United States from the rest of the world.").

Both the government and Hoskins have appealed the district court's decision, and we look forward to seeing what the Second Circuit does with *Hoskins* when the case returns on appeal.

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