Debevoise & Plimpton

FCPA Update
August 2022
Volume 14
Number 1

FCPA Update

A Global Anti-Corruption Newsletter

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Revisiting *Hoskins*: Second Circuit Holds Foreign Non-Issuers not Present in the United States are not Subject to the FCPA Absent Common Law Agency Relationship

In a significant ruling for foreign non-issuers, the Second Circuit once again strictly construed the scope of the FCPA's anti-bribery provisions to limit the government's ability to charge foreign non-issuers not present in the United States. Earlier this month, former Alstom executive Lawrence Hoskins won his second appeal to the Second Circuit in his bid to have the court throw out the FCPA charges against him on jurisdictional grounds ("*Hoskins II*").[1]

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1. *United States v. Hoskins*, No. 20-842-cr(L) (2d Cir. Aug. 12, 2022) ("Slip Op.").

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Hoskins, a UK citizen working for an Alstom UK subsidiary's Paris office, previously prevailed at the Second Circuit in 2018 ("*Hoskins I*") on the grounds that DOJ could not bring FCPA charges against him on a theory of conspirator liability if he was outside the statutory definitions of persons who could be charged with a substantive offense.[2] As Hoskins could not be charged as an accomplice or conspirator, DOJ alleged that he fell within the statute as an "agent" of a domestic concern[3] (i.e., Alstom Power, Inc. ("API") – one of Alstom's U.S. subsidiaries and Hoskins's alleged co-conspirator)). Following the district court in applying the common law definition of agency to the word "agent" in the FCPA, a divided Second Circuit panel found that merely rendering support services (even if significant) does not constitute agency absent the common law requirement of control.

The Second Circuit's decision in *Hoskins II* (like *Hoskins I*) is likely to increase the challenges the government faces in bringing FCPA charges against foreign individuals and non-issuers allegedly involved in a bribery scheme abroad.[4] Notably, the agency issue addressed in *Hoskins II* (and the conspiracy issue addressed in *Hoskins I*) are still subject to ongoing litigation in other circuits, including the Fifth Circuit's consideration of an appeal by Swiss banker Daisy Rafoi-Bleuler, who the government alleged acted as an agent of PDVSA and its U.S. subsidiary in connection with a bribery and money laundering scheme.[5]

Factual and Procedural Background

The underlying alleged bribery scheme occurred from 2002 to 2009, during which time Hoskins was employed by the UK subsidiary of Alstom, S.A. ("Alstom"), a multinational power and transportation company based in France. The alleged scheme – to bribe Indonesian officials who would in turn help API land a $118 million contract to build a power plant – was carried out by API, Alstom's U.S. subsidiary, and several individuals associated with Alstom, including two local consultants.[6] Hoskins'

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2. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). *See also* Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett et al., "Second Circuit FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.

3. 15 U.S.C. §78dd-2.

4. For our initial assessment of the agency question as handled by the district court, *see* Kara Brockmeyer, Andrew M. Levine, Andreas A. Glimenakis, and Katherine R. Seifert, "District Courts Address Significant Aspects of Criminal Liability under the FCPA," FCPA Update, Vol. 11, No. 8 (Mar. 2020), https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020; *see also* Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020, at 22.

5. *United States v. Rafoi-Bleuler*, No. 21-20658 (5th Cir. 2022).

6. DOJ settled with Alstom and several of its subsidiaries in 2014. In addition to these entities, DOJ brought charges against several individuals allegedly involved in the scheme, all of whom, with the exception of Hoskins, settled. *See* Plea Agreement, *United States v. Frederic Pierucci*, Case No. 3:12-cr-238-JBA (filed July 29, 2013), https://www.justice.gov/criminal-fraud/case/united-states-v-frederic-pierucci-court-docket-number-12-cr-238-jba; Plea Agreement, *United States v. William Pomponi*, Case No. 3:12-cr-238-JBA (filed July 17, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/ 2014/07/23/pomponi-plea-agreement.pdf; Plea Agreement, *United States v. David Rothschild*, Case No. 3:12-cr-00223 (WWE) (filed Nov. 2, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/22/rothschild-guilty-plea.pdf.

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specific role was allegedly to select the two consultants and authorize payments to those consultants who then passed the funds along to the Indonesian officials.[7]

Hoskins is not an American citizen, he did not work directly for API, and he never entered the United States while the alleged scheme was ongoing – any of these might have provided a more traditional jurisdictional hook for DOJ to pursue FCPA charges. The FCPA prohibits three classes of defendants from corruptly offering, giving, promising to give, or authorizing the giving of anything of value to any foreign official in order to assist in obtaining or retaining business. These three classes are: "issuers" of securities in the United States; "domestic concerns" (i.e., U.S.-based companies, citizens or residents); and foreign entities or non-U.S. persons who take steps in furtherance of a corrupt payment "while in the territory of the United States." Officers, directors, shareholders, employees and *agents* of each of the above are also subject to FCPA liability.

"The Second Circuit's decision in *Hoskins II* (like *Hoskins I*) is likely to increase the challenges the government faces in bringing FCPA charges against foreign individuals and non-issuers allegedly involved in a bribery scheme abroad."

DOJ's initial jurisdictional theory for Hoskins relied on applying the substantive charges to API, Alstom's U.S. subsidiary and a "domestic concern" under the statute, and then charging Hoskins as API's co-conspirator. Hoskins moved to dismiss the count charging him with conspiracy to violate the FCPA, which the district court granted in part and denied in part. In particular, the court dismissed the count to the extent it relied on conspiracy to establish liability for Hoskins but allowed the count to remain to the extent that Hoskins fell within one of the statute's enumerated categories (i.e., an agent of a domestic concern).

DOJ appealed this ruling, but it was rebuffed by the Second Circuit in *Hoskins I*. Nevertheless, the district court permitted DOJ to proceed to trial under the theory that Hoskins was API's agent and thus subject to liability under both the substantive violations of the FCPA and conspiracy to commit the same.

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7. Third Superseding Indictment ¶ 8, United States v. Hoskins, No. 3:12-cr-238-JBA (D. Conn. Apr. 15, 2015).

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At trial, DOJ charged Hoskins with 12 counts: conspiracy to violate the FCPA under 18 U.S.C. § 371 (Count One); various substantive violations of the FCPA under 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2 (Counts Two-Seven); conspiracy to launder money under 18 U.S.C. § 1956(h) (Count Eight); and substantive money laundering under 18 U.S.C. § 1957 and 18 U.S.C. § 2 (Counts Nine-Twelve).[8] The jury found Hoskins guilty on eleven of the twelve counts in November 2019, acquitting him of one count of money laundering.

However, in February 2020, the district court partially granted Hoskins' motion for judgment of acquittal on the FCPA-related counts, concluding there was an insufficient factual basis to establish an agency relationship between Hoskins and API.[9] For the remaining counts, the district court sentenced Hoskins to fifteen months' imprisonment.

DOJ appealed the acquittal, which ultimately led to the Second Circuit's most recent ruling (discussed below). Hoskins cross-appealed with respect to the district court's ruling on issues related to the Speedy Trial Act, 6th Amendment violations, and errors within the jury instructions. The Second Circuit affirmed the district court's decision with respect to these issues.[10]

Hoskins II

On appeal, the crux of the "agency" issue was whether a jury could have found beyond a reasonable doubt that the factual record demonstrated that the support services Hoskins provided to API were sufficient to create a common law agency relationship.

Common Law Agency

Both Hoskins and DOJ agreed that the common law definition of "agency" governed the issue.[11] Judge Pooler writing for the majority, which also included Judge Newman, explained that the common law definition is the "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act."[12] The Court further identified three elements that create an agency relationship:

> "(1) a manifestation by the principal that the agent will act for him;

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8. *Id.* at 2.
9. *United States v. Hoskins*, 3:12-cr-238-JBA, 2020 WL 914302, at *7, *13 (D. Conn. Feb. 26, 2020).
10. Slip Op. at 19 (The applicability of the common law definition of agency to the FCPA was conceded by the government at the trial court. Judge Lohier's dissent notes that "the wisdom of the Government's concession on this point is debatable").
11. *Id.*
12. *Id.* at 17 (*citing In re 17 Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 79 (2d Cir. 2019)).

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(2) acceptance by the agent of the undertaking; and

(3) an understanding between the parties that the principal will be in control of the undertaking."[13]

The last of these factors emphasizes an assessment of control, and the Court centered its analysis on determining whether API could control Hoskins.

Hoskins's Role

In assessing whether API controlled Hoskins, the Court observed that Hoskins was employed by a separate subsidiary of Alstom, not API itself, and even then in an "inward facing support organization that provided operational business units with support on an as-needed basis."[14] As mentioned earlier, Hoskins allegedly played a role in selecting the two consultants who ultimately provided funds to the Indonesian officials. However, the Court noted that Hoskins's actions to secure these consultants "were all subject to the decision-making" of API Executives.[15] The Court emphasized that "[c]onspicuously missing" from the record was any indication that API directly controlled Hoskins' actions – API did not hire Hoskins, could not fire him, and had no control of his compensation.[16] The Court acknowledged that Hoskins supported API over the course of selecting and hiring the consultants and that Hoskins at time acted at API's direction, but found these on their own were insufficient indicia that an agency relationship had been formed.[17] Notably, the Court highlighted that "identifying consultants" and "reviewing contracts" for compliance with API standards did not make Hoskins API's agent.[18] Finally, the Court noted that Hoskins could not "bind" API to legal commitments such that he could hire the consultants without API's instruction, with an agent's ability to bind it principal being "a hallmark" of an agency relationship.[19]

Finding that Hoskins' relationship with API lacked many of the essential aspects of an agency relationship, the Court affirmed the district court's holding that a jury could not have found beyond a reasonable doubt that Hoskins was an agent of API and therefore Hoskins was not subject to FCPA liability.

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13. *Id.* at 18 (*citing Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 277 (2d Cir. 2013)). The Court enumerated further factors for consideration in the agency context as well, which include "the situation of the parties, their relations to one another, and the business in which they are engaged; the general usages of the business in question and the purported principal's business methods; the nature of the subject matters and the circumstances under which the business is done." *Id.* at 18–19 (*citing Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006)) (internal quotes removed).
14. *Id.* at 7 (internal quotes removed).
15. *Id.* at 19.
16. *Id.* at 20.
17. *Id.* at 20–22. The Court also highlighted API's inability to "revoke" Hoskins' authority as another strong indication that no agency relationship existed. *Id.*
18. *Id.* at 21.
19. *Id.* at 22.

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The Dissent

The Court was not unified in this holding. Judge Lohier dissented, suggesting a path that was more deferential to the jury's fact-finding, while acknowledging that the evidence of common law agency was "slim" but not insufficient.[20] The dissent observed that there were several facts that suggested control by API. For example, the dissent pointed to Hoskins' ability to negotiate with the consultants on API's behalf and to API's ability to direct Hoskins to negotiate with some potential consultants and not with others (which the dissent framed as an exercise of API's ability to "revoke" Hoskins' authority).[21]

When looking at the full range of facts before the jury, the dissent concluded that the jury reasonably could have determined that Hoskins was API's agent and therefore that their determination should be upheld.[22] The dissent further speculated that the majority's holding might cause the United States to run afoul of its obligations under the OECD Convention to establish criminal liability for "any person" to bribe a foreign government official.[23] Judge Lohier observed that the OECD provided commentary in its 2020 Phase 4 Report for the United States that to the extent *Hoskins I* created disparate application of conspiracy law to foreign and domestic bribery defendants it may have placed the United States in violation of its treaty obligations.[24] The dissenting judge opined that removing all avenues for prosecuting Hoskins, who participated in an alleged bribery scheme that took place at least in part on U.S. soil, would do little to assuage the OECD's concerns.

Takeaways

Two decades, one trial, and two appeals since the underlying alleged misconduct, *Hoskins I* and *II* have narrowed the government's ability to charge foreign non-issuers not present on U.S. soil using the jurisdictional categories established by Congress in the FCPA. Subject to what other circuits and ultimately the Supreme Court may decide, here are key takeaways as we see them:

- *Factual difficulties for charging foreign non-issuers*: As with *Hoskins I*, substantive liability for foreign non-issuers not present in the United States under the anti-bribery provisions of the FCPA will require that the government prove more

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20. *Id.* at 9.
21. Slip Op. Dissent at 4–9.
22. *Id.* at 8–9.
23. *Id.* at 10–11.
24. *Id.* at 12 (*citing* OECD, Implementing the OECD Anti-Bribery Convention: United States Phase 4 Report (2020), at 36–39, available at https://www.oecd.org/daf/anti-bribery/United-States-Phase-4- Report-ENG.pdf (last visited on Aug. 28, 2022) ("To the extent that recent U.S. case law developments create a divergence between how U.S. courts apply conspiracy law to those who conspire to bribe domestic and foreign officials, the lead examiners consider that this would violate the Convention.").

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than involvement in a bribery scheme, at least in the Second Circuit. Liability will depend on the relationship between the foreign non-issuer and issuers or domestic concerns. Establishing that relationship will be the government's burden, strengthening the position of foreign non-issuers, both in negotiations with the government and at trial. While the dissent raises the concern that multinational corporations could use *Hoskins II* to structure bribery schemes to allow participants to evade liability,[25] the case will also assist foreign entities and individuals with little or no connection to the United States from being swept up in FCPA prosecutions.

- *Likely increased use of non-FCPA charges against foreign non-issuers*: Although DOJ failed to meet its burden of proof in its FCPA charges against Hoskins, Hoskins was convicted on anti-money laundering offenses, leading to a 15-month sentence. DOJ likely will expand its use of money laundering laws, the Travel Act, and potentially other laws that may apply to foreign non-issuers.

"Disagreement between circuits will mean that the applicability of the *Hoskins* decisions will depend on where DOJ chooses to bring charges, providing little comfort to foreign non-issuers caught up in FCPA investigations."

- *More limited impact for multinational corporations given the factual nature of the agency inquiry*: *Hoskins II* applies the common law definition of agency to the FCPA. This definition, though subject to several Restatements, is highly fact specific and can be applied with varying degrees of rigor depending on the court and the context. Given the varied roles foreign non-issuers have played in historic FCPA cases (usually as a participant or intermediary), whether an agency relationship actually exists may remain a contentious matter. Although *Hoskins II* provides some guidance on factors that establish agency, for a foreign non-issuer to rebut such allegations ultimately may require going to trial, which international companies with significant U.S. exposure often are reluctant to do.

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25. *Id.* at 10.

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- *Potential impact for issuers and domestic concerns*: While *Hoskins II* dealt with statutory jurisdiction over foreign non-issuers, the concept of agency frequently appears in FCPA cases involving issuers and domestic concerns that the government seeks to hold liable for bribes paid by foreign third parties. This use of agency law, holding a principal liable for the acts of the agent, is more common than, and distinct from, its jurisdictional application in *Hoskins II*. Some of these third-party relationships, such as those with distributors, may not strictly fall under the common law definition of agency (indeed, distributor contracts frequently include a No Agency clause). *Hoskins II* could encourage an issuer or domestic concern to challenge FCPA charges under the more traditional agency law approach. However, the FCPA prohibits issuers and domestic concerns from "authoriz[ing]" a bribe, and rarely if ever has an entity been charged under the substantive anti-bribery provisions without an employee or actual agent providing such authorization.
- *The issues in Hoskins I and Hoskins II are subject to litigation elsewhere*: The Fifth Circuit will address the same issues in its upcoming decision in *Rafoi-Bleuler*, and a district court in Illinois already has declined to apply the Second Circuit's *Hoskins I* holding.[26] Disagreement between circuits will mean that the applicability of the *Hoskins* decisions will depend on where DOJ chooses to bring charges, providing little comfort to foreign non-issuers caught up in FCPA investigations.

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26. *United States v. Firtash*, 392 F. Supp. 3d 872, 877 (N.D. Ill. 2019). Note that the Seventh Circuit has not yet considered the issue, and the case has now been placed on the fugitive calendar while Firtash fights extradition in Austria.

U.S. Department of State Appoints Sanctions Expert as First Global Anti-Corruption Coordinator

On July 5, 2022, the U.S. Department of State announced the appointment of Richard Nephew as its first Coordinator on Global Anti-Corruption. In this position, Nephew will be tasked with "integrat[ing] and elevat[ing] the fight against corruption across all aspects of U.S. diplomacy and foreign assistance."[1]

Background

The creation of this new role is one of several key elements of last year's U.S. Strategy on Countering Corruption ("SCC") and appears intended as a signal to the international community of the State Department's commitment to combatting corruption by focusing government resources on a cross-border effort to strengthen alignment on anti-corruption issues.[2]

The SCC followed an earlier National Security Study Memorandum ("Memorandum") that determined combatting corruption is a core national security interest of the United States and advocated for enhanced anti-corruption efforts, including initiatives to apply additional enforcement resources.[3]

Sanctions and Corruption

Prior to this appointment, Nephew was the Biden Administration's Deputy Special Envoy for Iran and, earlier, was the Principal Deputy Coordinator for Sanctions Policy at the State Department and the Director for Iran on the National Security Council. He also is the author of "The Art of Sanctions," published by Columbia University Press, which "offers a much-needed practical framework for planning and applying sanctions that focuses not just on the initial sanctions strategy but also, crucially, on how to calibrate along the way and how to decide when sanctions have achieved maximum effectiveness."

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1. Press Release, U.S. Dep't of State, *Richard Nephew Named as Coordinator on Global Anti-Corruption* (July 5, 2022), https://www.state.gov/richard-nephew-named-as-coordinator-on-global-anti-corruption/.
2. *United States Strategy on Countering Corruption*, The White House (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.
3. *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, 2021 Daily Comp. Pres. Doc. 467 (June 3, 2021); see also Debevoise & Plimpton LLP, "President Biden Declares the Fight Against Corruption a National Security Priority and Directs Federal Agencies to Enhance Enforcement" (June 7, 2021), https://www.debevoise.com/insights/publications/2021/06/president-biden-declares-the-fight.

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At first blush, the selection of an expert in U.S. sanctions as the first Coordinator on Global Anti-Corruption may seem unusual, particularly considering the deep bench of U.S. anti-corruption experts that could fill this role. However, the appointment of Nephew appears to reflect the increasing promotion of economic and financial sanctions, together with visa restrictions, to target allegedly corrupt actors that operate primarily, if not exclusively, outside the jurisdiction of U.S. law enforcement.

The United States pioneered anti-corruption sanctions with the adoption of the Global Magnitsky Act and its implementation through Executive Order 13818,[4] and, in recent years, other governments have adopted similar measures (*e.g.*, the United Kingdom's Global Anti-Corruption Sanctions regime).[5]

Among the SCC's objectives is to hold corrupt actors accountable, not only through enforcement in the United States but also through coordinating and cooperating with other jurisdictions (Strategic Objective 3.3), including through the interagency Democracies Against Safe Havens Initiative, which is led by the State Department. Identified areas of cooperation include sanctions and visa restrictions, with the SCC noting that the "United States will continue to engage relevant stakeholders in foreign governments, parliament, and civil society to advance efforts to multilateralize economic sanctions and visa restriction tools designed to curtail corruption." The SCC further notes that, owing to collaborative efforts with the United Kingdom, almost all targets of U.K. anticorruption sanctions are also targets of U.S. sanctions, thereby "denying these corrupt individuals access to both the U.S. and U.K. financial systems."

Nephew's appointment as the first Coordinator on Global Anti-Corruption appears intended to support an expansion of these efforts to promote accountability and consequences for corrupt actors and their supporters.

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4. Debevoise & Plimpton LLP, "U.S. Sanctions and AML Measures Target Human Rights Abuses and Corruption" (June 21, 2018), https://www.debevoise.com/insights/publications/2018/06/us-sanct-antimoney-laund-target-human-r-corruption.

5. Debevoise & Plimpton LLP, "UK Introduces Global Anti-Corruption Sanctions Regime" (April 28, 2021), https://www.debevoise.com/insights/publications/2021/04/uk-introduces-global-anti.

FCPA Update

FCPA Update is a publication of
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