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WHITE-COLLAR CRIME

Hoskins I, II, III: Implications for the FCPA and White-Collar Criminal Law

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Under the Foreign Corrupt Practices Act (FCPA), it is unlawful to make a corrupt payment to a foreign government official in order to obtain or retain business. Enacted in 1977, the law prohibits bribery by, among others, U.S. "domestic concerns," which includes U.S. companies and partnerships, and "officers, directors, employees, … agents, … or stockholders … acting on behalf of a domestic concern." 15 U.S.C. §78dd-2.

The range of individuals subject to prosecution under the law has been contested in recent years as criminal and civil enforcement of the FCPA has increased. The meaning of the word "agent" has generated particular controversy. Global companies routinely engage intermediaries in dealings with foreign government officials, so questions naturally arise as to who exactly may be treated as an "agent" of a "domestic concern." If given a broad construction, the statutory language would expose a wide range of individuals who live and work abroad to possible prosecution in the United States. This would, in turn, pose important questions of extraterritoriality and fairness.

For nearly 10 years, prosecutors, defense attorneys and judges have wrestled with these issues in the prosecution of Lawrence Hoskins—an employee of a U.K. subsidiary of Alstom, S.A., a global power and transportation company (Alstom)—for bribing Indonesian officials. Hoskins was originally charged as a co-conspirator or accomplice of Alstom Power, Inc. (API), a Connecticut-based U.S. subsidiary of Alstom, but that theory of prosecution was rejected in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) (*Hoskins I*). The government then prosecuted Hoskins on an alternate theory—that he was acting as an "agent" of a "domestic concern" (API). He was tried and convicted on that theory, but the district court then granted a post-trial motion of acquittal on the FCPA charges because the record did not establish that he was, in fact, an "agent" of API. *United States v. Hoskins*, 3:12cr238, 2020 WL 914302 (D. Conn. Feb. 26, 2020) (*Hoskins II*). The U.S. Court of Appeals for the Second Circuit recently affirmed the acquittal on FCPA charges in a 2-1 decision. *United States v. Hoskins*, 44 F.4th 140, 2022 WL 3330357 (2d Cir. Aug. 12, 2022) (*Hoskins III*).

In this article, after briefly expanding on the holdings in *Hoskins I*, *II* and *III*, we examine the impact on three issues of importance to white-collar practitioners: first, the scope of the FCPA—in particular, how far the FCPA may be extended to include non-citizens who live and work abroad; second, the interpretation of white-collar criminal statutes—in particular, the extent to which common law definitions control the meaning of words like "agent"; and, third, the authority of the district court to consider at the outset of a prosecution threshold questions of the reach of the law to foreign individuals. We will refer briefly to a case now pending in the Fifth Circuit, *United States v. Rafoi-*

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Bleuler, No. 21-20658 (5th Cir. 2021), which raises very similar issues. In that case, the district court dismissed an indictment, holding that the defendant could not properly be charged as an agent of a domestic concern.

'Hoskins'

The charges against Hoskins arose from a scheme in which API paid bribes to government officials in Indonesia to obtain a $118 million contract to build a power plant (the Tarahan Project). An employee of Alstom's U.K. subsidiary based in Paris, Hoskins provided operational support for projects in the Asia region, including API's Tarahan Project. According to the government, Hoskins's role in the Tarahan Project involved selecting, approving, and authorizing payments to consultants who made or facilitated the bribes.

In July 2013, Hoskins was charged with substantive FCPA and money laundering violations (and related conspiracies). The government argued that Hoskins was liable under the FCPA as an accomplice or co-conspirator of API, Alstom's U.S. subsidiary, even though he was not an American citizen and not employed by API, and he had not entered the United States in the course of the alleged FCPA violations. Hoskins moved to dismiss the FCPA conspiracy charge, arguing that liability was limited to a strictly defined set of persons—American business entities and their employees or other agents acting on their behalf or foreign nationals acting in the United States—and that he did not come within that definition. Hoskins argued, therefore, that he could not be liable under an accomplice or conspiracy liability theory. See, e.g., *United States v. Gebardi*, 287 U.S. 112, 123 (1932).

The district court and then the Second Circuit agreed, holding that unless a defendant falls within one of the FCPA's enumerated categories, the FCPA does not apply. See *Hoskins I*, 902 F.3d at 97. In this view, a foreign national who did not perform relevant acts in America and who was not employed by, or otherwise acting as an "agent" of, a U.S. "domestic concern" could not be prosecuted as a co-conspirator or accomplice.

The Second Circuit in *Hoskins I* recognized that the government could properly proceed on a different basis—namely, that Hoskins was "an agent" of "a domestic concern" who conspired with foreign nationals who had taken unlawful acts in the United States. See *Hoskins III*, 2022 WL 3330357, at *4.

These decisions address the scope of conspiracy liability and interpretation of common law concepts in criminal statutes and raise important issues regarding the authority of district courts to decide threshold questions before trial.

On remand, Hoskins was tried as an "agent" of API, and in 2019, he was convicted of FCPA violations (and money laundering). Hoskins then moved for a judgment of acquittal or for a new trial. As to the FCPA counts, Hoskins argued he was not an "agent" of API because, inter alia, that entity could not fire him and did not control his daily activities—features of an agency relationship at common law; moreover, he argued that API was parallel to Hoskins on Alstom's organizational chart. The district court granted the acquittal, holding that API lacked authority over Hoskins's actions, and could not change the basic terms of his employment—e.g., his compensation, promotion, or termination—or dictate his involvement with the Tarahan Project. *Hoskin/s II*, 2020 WL 914302, at *6-9.

The government appealed from the district court's FCPA ruling (Hoskins appealed other rulings), and Second Circuit affirmed the acquittal. The court held that Hoskins operated in a "separate, parallel employment structure[]" from individuals associated with API, and API did not control his employment or compensation. Likewise, the record lacked evidence that Hoskins had the authority to act on API's behalf—the "hallmark of a principal-agent relationship." The majority acknowledged that Hoskins "supported the Tarahan Project, which API had control over," but that did not support a "finding of a principal-agent relationship." In the majority's view, "Hoskins supported API's endeavors because of his role within the [International Network] department of Alstom, not because API granted him agency authority." *Hoskins III*, 2022 WL 3330357, at *6.

Dissenting in part, Judge Raymond Lohier questioned whether Hoskins's FCPA liability turned on common law principles of agency, but acknowledged that the parties had agreed on using the common law definition so that it governed the appeal. Judge Lohier focused on API's authority over Hoskins in the context of the particular bribery scheme; in contrast, the majority looked to Hoskins's relationship with API in the overall Alstom corporate hierarchy. Judge Lohier also disagreed with the majority's

interpretation of the trial record, noting that the "reality of the relationship between Hoskins and API on the ground" was one of agency, notwithstanding the absence of a line of reporting from Hoskins to API or Hoskins's formal ability to bind API.

The FCPA's Reach

The *Hoskins* decisions have clear implications for the reach of the FCPA. *Hoskins I* rejected conspiracy and other secondary liability for foreign nationals who do not fall within the categories of individuals specified by the law; and *Hoskins II* and *III* further constrained the FCPA's application by rejecting a broad interpretation of agency. Significantly, we note that the government is taking issue with these holdings in *Rafoi-Bleuler*, in which the government charged a Swiss financial advisor with facilitating bribes and money laundering as an agent of the U.S. affiliate of the state-owned Venezuelan oil company. In that case, the government is asking the Fifth Circuit to adopt more expansive theories of liability under the FCPA.

Under the Second Circuit's view of the FCPA in *Hoskins*, the government will be required to give particular attention to formal grants of authority to, and control over, individuals. These issues will be critical in FCPA prosecutions because multinational corporations often rely on a complicated structure of subsidiaries and diffuse lines of authority to conduct their business.

Common Law

Hoskins III also points to the jurisprudential question of when and how courts use common law principles to inform the interpretation of statutes. In *Hoskins III*, the Court of Appeals did not have to confront this issue because the parties had agreed that the common law definition of agency was dispositive. Yet the larger question remains as to whether common law principles are appropriate for defining the scope of liability under a criminal statute. Notably, common law doctrines, developed to resolve private disputes, might not fully reflect the policy judgments and legislative concerns underlying a complex statute like the FCPA. This tension was discussed by amicus briefs filed by the International Academy of Financial Crime Litigators in *Hoskins* and *Rafoi-Bleuler*. See, e.g., *Brief for* Amicus Curiae *International Academy of Financial Crime Litigators in Support of Defendant-Appellee* at 17-21, *United States v. Rafoi-Bleuler* (5th Cir. 2021) (No. 21-20658) (*Rafoi-Bleuler* Amicus Brief).

Judge Lohier's partial dissent implicitly recognized this tension when he noted that the FCPA was amended in 1998 to bring the United States into compliance with global anti-bribery treaties, which suggests that it was designed to "target more bad actors, not fewer." However, *Hoskins* did not have to resolve how best to apply the canon of imputed common-law meaning to the FCPA.

District Court Authority

The government typically maintains that so long as an indictment accurately alleges the statutory elements of a crime, the trial court may not dismiss an indictment, even when the issue concerns whether the defendant is a person to whom the statute applies. Yet in *Hoskins I*, the district court's dismissal of FCPA charges was affirmed, and in *Rafoi-Bleuler*, the district court dismissed FCPA charges because it found that the government could not establish that the defendant was an agent of a domestic concern, undermining the basis for the FCPA charges. *United States v. Rafoi-Bleuler*, 4:17cr514, Dkt. No. 255, at 13-18 (S.D. Tex. Nov. 10, 2021).

Concerns with international comity and extraterritoriality may warrant a trial court resolving dispositive threshold questions—e.g., whether a defendant is within the ambit of the FCPA—before a foreign defendant is required to stand trial in the United States. See *Rafoi-Bleuler* Amicus Brief at 24-25. Non-citizen defendants could contest such issues earlier in proceedings in the hopes of avoiding the lengthy battle that characterized the prosecution of Hoskins.

Conclusion

The significance of the legal issues addressed in *Hoskins I*, *II* and *III* is suggested by the nearly 10-year prosecution and its legacy of important court decisions. These decisions address the scope of conspiracy liability and interpretation of common law concepts in criminal statutes and raise important issues regarding the authority of district courts to decide threshold questions before trial. Based on positions taken by the government in *Hoskins*, and *Rafoi-Bleuler*, we should expect these issues to be remain sharply contested in the future.