Anti-Corruption Report
An Acuris company

anti-corruption.com

April 15, 2020

JUDICIAL DECISIONS

After *Hoskins*: Critical Takeaways from the Most Important FCPA Trial in Years

By Ephraim "Fry" Wernick, Christopher James and Peter Thomas, *Vinson & Elkins*

In a dramatic turn of events in what was the most publicly scrutinized FCPA case in years, a federal judge recently overturned a jury verdict finding Lawrence Hoskins guilty for violating the FCPA. The court entered a judgment of acquittal on the FCPA counts and found that no reasonable juror could have concluded that Hoskins, a U.K. citizen and executive of a French parent company, had acted as an "agent" of the French company's U.S.-based subsidiary that bribed officials in Indonesia.

Given the unique facts of the case and controlling case law in the Second Circuit, the trial judge's ruling likely was a faithful application of the law. However, the court's decision to overturn the jury's verdict demonstrates a glaring weakness in the government's ability to prosecute foreign nationals for violations of the FCPA. Specifically, the FCPA enables federal law enforcement to prosecute low-ranking employees for foreign bribery so long as they work for U.S. companies or are domiciled in the U.S., but prosecutors often cannot use the statute to pursue foreign executives if they orchestrated the bribery scheme from abroad.

While the result of the Hoskins case exposes a critical flaw in the FCPA itself and will have some effect on how DOJ investigates and prosecutes foreign bribery cases in the future, the biggest takeaway may be that we see little noticeable change in the government's pursuit of foreign executives more generally. After all, DOJ still retains its ability to charge foreigners with myriad other offenses, including money laundering and wire fraud, and Hoskins himself was convicted and sentenced to 15 months for money laundering.

See "The History and Reach of dd-3 Jurisdiction and Lessons for Companies Investigating Potential Violations" (Apr. 18, 2018).

Alstom Bribery Leads to Hoskins' Prosecution

The Hoskins case stemmed from DOJ's 2014 prosecution of Alstom S.A. (Alstom), a French power and transportation company, which remains one of the largest-ever FCPA cases. Alstom pleaded guilty to violating the books-and-records and internal controls provisions of the FCPA, and agreed to pay a $772,290,000 fine to resolve charges related to a widespread scheme involving tens of millions of dollars in bribes in countries around the world, including Indonesia, Saudi Arabia, Egypt and the Bahamas. As part of the agreement, three of Alstom's subsidiaries, including Alstom's U.S. subsidiary Alstom Power, Inc. (Alstom Power), also pleaded guilty or entered into deferred

prosecution agreements with DOJ. According to Alstom's sworn statement of facts, Alstom and its subsidiaries paid over $75 million in bribes to secure over $4 billion in contracts, leading to profits to the company of approximately $300 million.

See "Recordbreaking Alstom Criminal FCPA Settlement Results From Wide-Ranging Bribery Scheme and Lack of Cooperation" (Jan. 7, 2015).

DOJ Charges Hoskins

Hoskins was a senior Alstom executive with oversight over certain projects in Asia, including an Indonesian project where Alstom and Alstom Power paid bribes through an intermediary to a high-ranking member of the Indonesian Parliament and senior members of Indonesia's state-owned electricity company in return for their assistance securing $375 million in contracts. In 2013, DOJ charged Hoskins and four others, including three other Alstom executives, in connection with the Indonesian bribery scheme. Hoskins was charged with conspiracy to violate the FCPA, substantive violations of the FCPA and money laundering.

Hoskins moved to dismiss the conspiracy charge against him, arguing that he could not be charged with violating the FCPA if he did not fall within one of the specifically enumerated classes of defendants set forth in the FCPA, 15 U.S.C. §§ 78dd-1–78dd-3, which include (1) securities "issuers"; (2) "domestic concerns," including U.S. citizens, nationals, residents, and companies; (3) foreign persons who act in furtherance of a foreign bribery scheme while within the United States, and (4) any officer, director, employee or agent of the three above-mentioned categories.

Hoskins Wins in the District and Appellate Court

The district court agreed with Hoskins' argument, and DOJ appealed, arguing that Hoskins could be charged as an aider and abettor or co-conspirator even if he did not fall under one of the specifically named classes of defendants. In 2018, the Second Circuit affirmed the district court and rejected DOJ's theory for extraterritorial jurisdiction, but the Second Circuit left open the possibility that Hoskins could be convicted under the FCPA if the government could prove that he had been acting as an agent of the U.S. subsidiary Alstom Power, which is a domestic concern.[1] DOJ proceeded to trial in October and November 2019 against Hoskins, charging him as an agent of Alstom Power, in addition to related money laundering offenses.

Hoskins' Conviction at Trial

The government introduced evidence at trial demonstrating Hoskins' involvement in the bribery scheme, including evidence that Hoskins helped select and approve agreements with two consultants on behalf of Alstom Power that were used to bribe Indonesian officials. In doing so, Alstom Power instructed Hoskins on certain matters, Hoskins acted in accordance with those instructions, and the U.S. company relied on Hoskins for "support" and in carrying out the bribery scheme. DOJ argued that this was sufficient to qualify him as an agent of Alstom Power under the FCPA. The jury ultimately agreed and convicted Hoskins of six FCPA counts, a related conspiracy to violate the FCPA, and several counts of money laundering.

See "Sentencing in Micronesian Bribery Case Highlights DOJ's Commitment to Individual Prosecutions" (Jun. 26, 2019).

Judgment of Acquittal

After the trial, Hoskins moved for a judgment of acquittal. The court granted Hoskins's motion and acquitted Hoskins of the FCPA-related offenses but denied the motion and maintained his conviction on the money laundering counts. The court specifically found that the government failed to prove that Hoskins was an agent of Alstom Power, reasoning that "[a]n essential element of agency is the principal's *right to control the agent's actions*." Notably, the court set forth factors that it considered important for identifying an agency relationship, including (i) the degree of oversight over the purported agent's decision-making, (ii) any fiduciary duty owed to the purported principal, and (iii) the purported principal's authority to fire the purported agent.

The court found that the government's evidence supported the contention that Alstom Power exercised control over the Indonesian project as a whole, and that Hoskins assisted to retain the consultants, but Alstom Power did not *control* Hoskins as an agent. Assisting Alstom Power and acting on its behalf, even where Alstom Power dictated the terms it wanted for the consultant agreements, was not enough. The court found it particularly compelling that Alstom Power was not in Hoskins' reporting hierarchy and did not have authority to fire, reassign, demote, or impact the compensation paid to Hoskins – those rights all belonged to Alstom Power's parent company in France. On March 6, 2020, Hoskins was sentenced to 15 months in prison on the money laundering counts.[2]

Critical Takeaways

There are several important takeaways from the *Hoskins* case and what it portends for FCPA enforcement in the future.

Trial Capability

As we have noted previously, the *Hoskins* jury verdict was significant because it demonstrated the ability of DOJ's FCPA Unit to build and win difficult cases at trial. With the Hoskins guilty verdict, DOJ has now won seven of its last eight jury trials in foreign bribery cases. Notably, the jury took less than 24 hours to return a guilty verdict on the FCPA issue notwithstanding the extraordinary attention that the defense paid to the question of agency at trial and during closing argument.

See "Jury Convicts Two U.S. Citizens for Bribing Haitian Officials" (Jul. 24, 2019).

More Modest Approach to Agency Allegations

The case provides a roadmap for how DOJ will now approach agency and the issue of control in FCPA cases moving forward. One of the more significant, but less discussed, features of the government's approach to the trial in *Hoskins* was that DOJ voluntarily adopted a higher standard of proof to show agency than it has taken in the past. In previous cases, including *United States v. Ho*, which was the first FCPA case to charge a defendant as an agent under the FCPA following the Second Circuit's *Hoskins* decision, DOJ vehemently argued against the need to establish "control" to show agency, instead positing that "[j]oint participation in a partnership or joint venture . . . suffices to make each partner or joint venture an agent of the others."[3]

In *Hoskins*, however, the government ceded the issue and agreed pretrial that the government would have to prove "control" by Alstom Power in order to find that Hoskins was an agent of the U.S. subsidiary. The jury verdict seemed to vindicate DOJ's approach and the strategic tactic to adopt a more defense-friendly instruction could have been useful for the government in cementing the conviction on appeal. However, in light of the judgment of acquittal on the control issue, the decision may have cost the government the conviction since the evidence at trial otherwise would have sufficed to find that Hoskins was an agent if all that was needed was to prove his participation in a joint venture.

Moving forward, DOJ will be unlikely to revert to the lower standard in future agency cases, and indeed, it is now all but Department policy that the government will no longer assert that "every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status," nor will it take a position at trial that "every parent company should automatically be held liable for the acts of its subsidiaries, joint ventures, or affiliates based on an agency theory."

In the aftermath of the jury's verdict, it seemed likely that if the conviction stood, DOJ would continue to aggressively use the agency theory to charge foreign individuals who, like Hoskins, fall outside the FCPA's jurisdictional reach unless proven to be the "agent" of a U.S. issuer or domestic concern. However, in light of Hoskins' acquittal on the FCPA counts and notwithstanding the government's pending appeal filed on March 9, 2020,[4] we are likely to see a more modest approach to allegations of agency in FCPA cases and we should expect the government to bring cases only when it can establish strong indicia of control by a principal issuer or domestic concern.

Practically, this means prosecutors will pay closer attention to developing facts that show who the decision makers are, which individuals are required to follow directions, whether an alleged agent's role goes beyond merely assisting the principal or acting on its behalf and whether the principal has authority to terminate or impact the agent's position or compensation.

Continued Individual Prosecutions

That being said, even if DOJ is less likely to bring FCPA charges, law enforcement has a number of arrows in its quiver beyond the FCPA statute itself, and foreign nationals still should expect to be charged with other crimes, including money laundering and fraud, in those cases where a substantive FCPA charge is less likely to be pursued. The end result is that we may notice little, if any, effect on the actual quantity of individual cases that are brought against foreign nationals in foreign bribery cases by DOJ's FCPA Unit.

See "Firing on All Cylinders: U.S. Enforcement Efforts Against Venezuela State-Owned Oil Company PDVSA" (Apr. 17, 2019).

Potential FCPA Amendments

Finally, given the level of attention on the *Hoskins* case, one less likely, but potentially useful outcome, would be a renewed interest by lawmakers in amending the FCPA statute. Earlier this year, White House economic advisor Larry Kudlow raised eyebrows when he said that the Trump Administration was "looking at" making changes to the FCPA, concerning many anti-corruption activists about the Administration's intentions. In 2012, Donald Trump made statements to CNBC suggesting that the FCPA was a "horrible law and it should be changed" and that it puts U.S.

business at a "huge disadvantage" in places like Mexico and China. However, the hyperbolic reactions to Kudlow's remarks have ignored the Administration's aggressive enforcement of the FCPA, which has seen more enforcement activity since January 2017 than all previous administrations combined.

The reality is that FCPA enforcement is a relatively recent phenomenon, and much has changed in the 22 years that have passed since Congress last amended the FCPA's anti-bribery provisions. There are obvious gaps and weaknesses in the FCPA, including among other things, the effective immunity to prosecution for foreign officials who solicit bribes, the indecipherable carve-out for "facilitation payments," the failure to address commercial bribery and the sorely needed inclusion of an affirmative defense for corporations with strong compliance programs. Many countries have learned from the United States' experience with foreign bribery cases and have passed laws that affirmatively address these holes and inconsistencies in U.S. law, such as the U.K. Bribery Act. There is good reason for Congress to remedy these issues now.

Added to these statutory problems, the Hoskins case is likely to leave many feeling unsatisfied. After all, Hoskins was found guilty for his role in orchestrating a bribery scheme from abroad, yet his conviction for FCPA counts was reversed while the FCPA convictions for his underlings will stand. There is a certain level of unfairness to such an outcome. Given that it is the result of what was the most heavily scrutinized FCPA trial ever, perhaps Hoskins will serve to open the door for some welcome changes to the statute.

See "How Companies Can Respond to the Boom in FCPA Enforcement Fueled by International Cooperation" (Oct. 30, 2019).

Fry Wernick is a white collar defense and government investigations partner in the Washington, D.C., office of Vinson & Elkins. Wernick previously served as a federal prosecutor for 11 years, including as Assistant Chief of DOJ's Criminal Division, Fraud Section, where he led and supervised numerous FCPA cases. This article is based only on an analysis of publicly available information.

Christopher James is a senior associate in the complex commercial litigation practice group, based in San Francisco. His principal areas of practice include government and internal investigations, white collar criminal defense, antitrust, and corporate risk and compliance.

Pete Thomas is an associate in the Washington, D.C., office of Vinson & Elkins. His principal area of practice is complex commercial litigation, with a focus on white collar civil and criminal litigation and government investigations, including the FCPA.

[1] *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

[2] On April 13, 2020, former Alstom executive Larry Puckett, a sales manager for the Connecticut subsidiary and a cooperating witness in the case, was sentenced by videoconference to two years of supervised release, ordered to pay a $5000 fine and required to complete 100 hours of community service. Puckett is the third individual

defendant to be sentenced in the case – in addition to Hoskins, former Alstom executive Frederic Pierucci was sentenced to 30 months less time served in October 2017 after pleading guilty to FCPA charges. Two other cooperating defendants, David Rothschild and Edward Thiessen, are scheduled to be sentenced in June and July 2020, respectively.

[3] *United States v. Ho*, 17-cr-779-LAP (S.D.N.Y. Oct. 16, 2018) (proposed jury instructions), ECF 141, Request 14; see also, ECF 168, Request 14 ("The defendant's proposal that he must have been under the 'control' of the principal is wrong . . . agents—including executives, directors of organizations, and other professionals—act within the scope of their delegated agency, without each or any action being 'control[led]' by the principal.")

[4] *See United States v. Hoskins*, Case 3:12-cr-00238, Notice of Appeal (D. Conn. Mar. 9, 2020).