CLIENT ALERT

Trial Court Overturns FCPA Conviction, Undercutting the DOJ's Aggressive Application of Agency Principles to Expand the Reach of the FCPA

March 3, 2020

AUTHORS

Martin J. Weinstein | Robert J. Meyer | Jeffrey D. Clark | Michael S. Schachter
William J. Stellmach | Randall Jackson

On February 26, 2020, a federal judge in Connecticut granted the post-trial motion of Lawrence Hoskins for judgment of acquittal, overturning a jury's guilty verdict on six counts of violating the anti-bribery provisions of the Foreign Corrupt Practices Act (the "FCPA") and one count of conspiring to violate the FCPA. The court held that the U.S. Department of Justice (the "DOJ") failed to prove that Hoskins—a non-U.S. citizen working for a non-U.S. company who committed no acts within the United States—was subject to the FCPA as an agent of a U.S. affiliate of his employer. The court's ruling was a setback for the DOJ's aggressive interpretation of the jurisdictional reach of the FCPA.

I. Background

Hoskins's prosecution arose from the DOJ's investigation of Alstom SA, a French transportation company. In 2014, Alstom pleaded guilty to FCPA charges relating to bribery in Indonesia, Saudi Arabia, Egypt, Taiwan, and the Bahamas. Alstom paid $772 million to settle the FCPA charges.

Consistent with its much-publicized efforts to hold culpable individuals accountable for FCPA violations, the DOJ also charged eight former Alstom employees with FCPA-related offenses. Five of the eight former employees pleaded guilty. Hoskins chose to go to trial.

Hoskins, a British national, was the Senior Vice President of the Asia region for Alstom’s International Network. He was employed by Alstom UK Limited, a UK subsidiary of Alstom SA, and worked primarily for Alstom Resource Management SA, a French subsidiary of Alstom SA. According to the indictment, from 2002 to 2009, Hoskins approved the hiring of consultants and authorized payments to them knowing that some of the funds would be paid to Indonesian government officials in order to secure a $118 million contract known as the Tarahan Project. Hoskins was charged with one count of conspiracy to violate the FCPA, six counts of violating the FCPA, one count of conspiracy to commit money laundering, and four counts of money laundering.

II. Procedural History

Prior to trial, Hoskins had moved to dismiss the FCPA conspiracy count on the grounds that he was not among the categories of individuals statutorily subject to the FCPA: (i) he was not a director, officer, employee, or agent of an “issuer” that had securities traded on a U.S. exchange, nor was he a director, officer, employee, or agent of a company or other “domestic concern” organized under the laws of the United States; (ii) he was not a U.S. citizen or resident and, therefore, not a “domestic concern” in his individual capacity; and (iii) he was not alleged to have taken any act in furtherance of the scheme while in the territory of the United States.

The district court granted Hoskins’s motion in part, holding that Hoskins could not be subject to the FCPA solely by conspiring with others who were subject to the law. However, the court did not dismiss the FCPA conspiracy charge in its entirety; rather, the court held that Hoskins could still be subject to the FCPA if the DOJ could prove that he had acted as an agent of Alstom Power Inc. (“API”), a Connecticut-based subsidiary of Alstom that was involved in the bidding on the Tarahan Project. If the DOJ could so prove, the trial court held, then he was covered by the FCPA as an agent of a domestic concern. On interlocutory appeal, the Second Circuit affirmed the district court, holding that a foreign national could only violate the FCPA for conduct committed outside of the United States if he or she was acting as an agent of an issuer or domestic concern. The Second Circuit remanded the case for trial on the theory that Hoskins had acted as an agent of API.

III. Trial and Conviction

At trial, the DOJ sought to prove that Hoskins had acted as an agent of API, in that he was carrying out API’s instructions in hiring the two consultants in connection with the Tarahan Project and that he discussed details of a bribe scheme with employees of Alstom, its consortium partners, and the consultants who were to pay bribes to a member of the Indonesian Parliament and other Indonesian officials. After a two-week trial, the jury found Hoskins guilty of one count of conspiring to violate the FCPA, six counts of violating the FCPA's anti-bribery provisions, one count of conspiring to commit money laundering offenses, and three substantive counts of money laundering. He was acquitted on one money laundering count.

IV. Judgment of Acquittal

After his conviction, Hoskins moved for a judgment of acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure, which requires the court to view the evidence in the light most favorable to the government and draw all reasonable inferences in favor of the jury's verdict. Notwithstanding the jury's verdict, the trial court found that the evidence was insufficient as a matter of law to establish that Hoskins had acted as an agent of API.

Under Second Circuit precedent, an agency relationship exists only if three elements are met: "(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." *Cleveland v. Caplaw Enter.*, 448 F.3d 518, 522 (2d Cir. 2006) (emphasis in original). The government argued that the evidence showed that Hoskins assented to and carried out API's instructions on hiring consultants for the Tarahan Project, and the fact that Hoskins had the power to hire the consultants without seeking any additional approval from API did not undercut API's ultimate decision-making power or Hoskins's status as an "agent" of API.

In its decision, the trial court focused on "the right of interim control" as the critical factor distinguishing an agency relationship from a contractual relationship. A principal has interim control when the principal has the ability to control the agent's performance beyond the initial instructions, including the ability to provide interim instructions on how the agent should perform his or her duties as well as the ability to terminate the agency relationship.

The court found that, although the evidence demonstrated that API exercised broad control of the project and that Hoskins was willing to follow API's instructions, neither of these was sufficient to prove that Hoskins was an agent of API. It noted that API "could not fire, reassign, demote, or impact the compensation" of Hoskins. Nor was there evidence that API had the power to terminate Hoskins's authority to participate in the hiring of consultants or otherwise exert control over his actions.

Finding no agency relationship between Hoskins and API, the district court granted Hoskins's motion for acquittal on all six FCPA anti-bribery charges and on the charge of conspiracy to violate the FCPA. The trial judge also conditionally granted Hoskins's motion for a new trial under Rule 33 with respect to the seven FCPA-related counts in the event that the trial court's judgment of acquittal were later vacated or reversed. The court allowed the jury's verdict on the money laundering counts to stand, finding that a reasonable jury could conclude that Hoskins knew that corrupt funds would flow through the United States.

V. Analysis

The Hoskins prosecution is an example of the aggressive jurisdictional theories that are sometimes used by the DOJ in FCPA cases. The court's ruling is a setback for the government's efforts to use these theories to apply the FCPA to non-U.S. citizens. The fact that the DOJ was able to obtain a conviction on such a thinly supported theory of agency could have emboldened federal prosecutors to continue to pursue, and even expand, such theories. Unlike corporate defendants, who often have business-related motives to settle FCPA matters, even in the face of defensible facts or overly aggressive theories of liability, individuals charged with FCPA offenses are more likely to put the government to its burden of proof. That, in turn, provides opportunities for trial and appellate judges to rule on the DOJ's interpretation of the FCPA and, where appropriate, scale back theories that they find unsupported by the law.

Although the DOJ still may pursue prosecutions through agency theories, the trial court's ruling in Hoskins's case should be a check on an overly aggressive use of such theories. The court's ruling also may help corporations under investigation push back on the use of such theories against corporate defendants. The decision also gives prosecutors a clearer roadmap of the kind of evidence they will need in the future to establish agency-based liability. The key factors in the court's agency analysis, such as the entity's right to assess performance, impact compensation, and terminate a putative agent's authority, may become flash points in future investigations. Finally, in light of the fact that the court allowed the money laundering convictions to stand, the DOJ may increasingly seek to rely on money laundering charges alongside FCPA charges, consistent with a trend that has emerged in recent years.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Martin J. Weinstein
202 303 1122
mweinstein@willkie.com

Robert J. Meyer
202 303 1123
rmeyer@willkie.com

Jeffrey D. Clark
202 303 1139
jdclark@willkie.com

Michael S. Schachter
212 728 8102
mschachter@willkie.com

William J. Stellmach
202 303 1130
wstellmach@willkie.com

Randall Jackson
212 728 8216
rjackson@willkie.com