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2020 FCPA Developments: A Judge Overturns Hoskins's FCPA Guilty Verdict Under an Agency Theory; Cardinal Health Resolves FCPA Investigation with the SEC

On February 26, 2020, the U.S. District Court for the District of Connecticut entered a judgment of acquittal for Lawrence Hoskins on all Foreign Corrupt Practices Act ("FCPA") charges.[1] The ruling partly overturns a jury's verdict from November 2019, by which Hoskins was convicted under an agency theory for participating in a scheme to bribe Indonesian officials in violation of the FCPA and anti-money laundering statutes, despite being a foreign national working for a French company who had not been physically present in the United States. Hoskins was sentenced on March 6, 2020 on the money laundering charges to one year and three months in prison. On March 9, 2020, the Justice Department filed a notice of appeal with respect to the judge's decision to overturn the foreign bribery convictions.[2]

Separately, on February 28, 2020, the SEC accepted a settlement with Cardinal Health, Inc. for $8.8 million to resolve allegations that the company's internal accounting controls failed to protect sufficiently against the risk that improper payments would be redirected to Chinese government officials, and that the company inaccurately recorded such expenses in its books and records, all in violation of the FCPA's accounting provisions.[3]

We summarize these recent developments below.

Hoskins Wins Acquittal on FCPA Convictions

U.S. District Court Judge Janet Bond Arterton raised the bar for the DOJ to prosecute foreign companies and individuals for foreign bribery, reversing the FCPA convictions of Lawrence Hoskins, a U.K. citizen and former executive of the French power and rail transportation company, Alstom S.A.[4] Hoskins was charged with participating in a scheme to bribe Indonesian officials to secure an infrastructure project, the Tarahan

1 *United States* v. *Hoskins*, No. 3:12-CR-238 (JBA), 2020 WL 914302 (D. Conn. Feb. 26, 2020).

2 Notice of Appeal, *United States* v. *Hoskins*, No. 3:12-CR-238 (JBA) (D. Conn. Mar. 9, 2020).

3 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Cardinal Health with FCPA Violations* (Feb. 28, 2020), *available* here (hereinafter "SEC Press Release").

4 *United States* v. *Hoskins*, No. 3:12-CR-238 (JBA), 2020 WL 914302 (D. Conn. Feb. 26, 2020).

Project, valued at $118 million.[5] To conceal the bribes, Alstom Power, Inc. ("API"), Alstom's Connecticut-based U.S. subsidiary, retained two consultants to serve as conduits for the payments to the Indonesian government officials.[6]

Under the FCPA, the DOJ may only prosecute defendants who have a specific nexus to the U.S.: (i) "issuers" of securities listed on U.S. stock exchanges that use any "instrumentality of interstate commerce" in furtherance of the illicit conduct;[7] (ii) "domestic concerns," or American individuals or companies and their employees, officers or directors;[8] or (iii) foreign persons who were physically present within the U.S. when the violation occurred.[9] Hoskins was never physically present in the U.S. while the bribery scheme was ongoing and was not directly employed by API, but the DOJ charged Hoskins under the FCPA on the ground that he was an agent of API, a "domestic concern." Hoskins was also charged with money laundering and money laundering conspiracy.

The DOJ's prosecution of Hoskins led to a seminal decision by the Second Circuit in 2018, holding that foreign nationals who do not engage in acts on American soil cannot be directly liable under the FCPA based on secondary liability theories, such as conspiracy and aiding and abetting.[10] The Second Circuit, however, allowed the government to proceed to trial against Hoskins under the theory that Hoskins acted as an agent of API in connection with the alleged bribery scheme.[11]

On November 8, 2019, after a single day of deliberation, Hoskins was convicted on all FCPA charges and all but one count of money laundering by a jury in the District of Connecticut.[12] During the two-week trial, the central issue was whether Hoskins acted as an agent of API in connection with the bribery scheme. Hoskins argued that he could not be an agent of API because his reporting hierarchy was entirely distinct from API; no one from API reported to Hoskins, and Hoskins did not report to anyone from API.[13] The DOJ argued

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5 *See* Press Release, U.S. Dep't of Justice, *Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy* (Nov. 8, 2019), *available* here (hereinafter "DOJ Trial Press Release").

6 *Id.*

7 15 U.S.C. § 78dd-1.

8 15 U.S.C. § 78dd-2.

9 15 U.S.C. § 78dd-3.

10 *See United States* v. *Hoskins*, 902 F.3d 69, 97–98 (2d Cir. 2018); Paul, Weiss Client Memorandum, "The Second Circuit Rejects FCPA Liability for Foreign Persons under Accessory Liability Theories" (Nov. 21, 2019), *available* here (hereinafter "Paul, Weiss Hoskins Trial Memorandum").

11 *Hoskins*, 902 F.3d at 98.

12 *See* DOJ Trial Press Release; Paul, Weiss Client Memorandum, "Jury Convicts Foreign National of FCPA Violations under Agency Theory" (Nov. 21, 2019), *available* here (hereinafter "Paul, Weiss Hoskins Trial Memorandum").

13 *See* Transcript of Jury Trial at 1380–82, *United States* v. *Hoskins*, No. 3:12-CR-238 (D. Conn. Oct. 28, 2019).

that by itself, Alstom's formal corporate structure, which showed Hoskins working for API's parent company, did not demonstrate which employees were in control of the bribe scheme.[14] Rather, the prosecution portrayed Hoskins as an agent of API because he played a vital role in choosing the consultants who carried out the bribes and negotiating the consultant contracts under API's direction.[15]

In instructing the jury regarding the meaning of agency, the court relied on the traditional definition, as cited in the Second Restatement of Agency and Connecticut common law, instructing that to find that Hoskins acted as an agent of API, the jurors needed to conclude that "there must be, one, a manifestation by the principal that the agent will act for it; two, acceptance by the agent of the undertaking; and, three, an understanding between the agent and the principal that the principal will be in control of the undertaking."[16] The jury found Hoskins guilty of the FCPA charges.

Hoskins filed a post-trial motion for a judgment of acquittal on all counts or alternatively a new trial.[17] Hoskins asserted that the government did not prove Hoskins was an agent of API because there was no evidence showing that API had control over Hoskins's work, "let alone in connection with the retention of consultants on the Tarahan project."[18]

In a highly fact-based opinion, the Court granted Hoskins's motion for acquittal on all FCPA counts, concluding that prosecutors failed to prove beyond a reasonable doubt that Hoskins was API's agent.[19] In determining whether a principal-agent relationship existed between API and Hoskins, the Court considered whether API had authority to instruct Hoskins, control his performance and terminate his employment.[20] The Court found that there was no evidence showing that Hoskins agreed to act subject to API's control, that API controlled Hoskins's actions to hire consultants, or that API could terminate Hoskins's authority, which the Court considered "especially important."[21] Thus, the Court overturned Hoskins's convictions on all FCPA charges.

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14 *Id.* at 1339–43.

15 *Id.*

16 *Id.* at 1246–47.

17 *See* Mem. of Law in Support of Hoskins's Rule 29(c) Mot. for a Judgment of Acquittal & Rule 33 Mot. for a New Trial, *United States* v. *Hoskins*, No. 3:12-CR-238 (D. Conn. Nov. 29, 2019).

18 *Id.* at 6.

19 *Hoskins*, 2020 WL 914302, at *18.

20 *Id.* at 5–7.

21 *Id.* at 14–18.

The Court found, however, that prosecutors had presented sufficient evidence to support the jury's guilty verdicts on the money laundering charges and allowed those convictions to stand.[22] Prosecutors subsequently argued for a prison sentence of between seven and nine years, contending that the Court should consider Hoskins a bribery co-conspirator under the sentencing guidelines for money laundering, in part because the money laundering convictions rested on the underlying bribery allegations.[23] On March 6, 2020, Judge Arterton sentenced Hoskins to fifteen months' imprisonment and fined him $30,000, rejecting the government's argument for a steeper sentence and noting that it would be inappropriate for the Court to consider bribery violations on which Hoskins was acquitted.[24]

Judge Arterton's ruling and the Second Circuit's earlier decision serve as significant constraints on the DOJ's attempts to expand the FCPA's extraterritorial reach based on secondary theories of liability. Assistant Attorney General Brian Benczkowski previously pronounced that the DOJ "is not looking to stretch the bounds of agency principles beyond recognition" and will not automatically seek to impose agency liability on parent companies for FCPA violations by subsidiaries, joint ventures, and affiliates.[25] AAG Benczkowski explained that the DOJ instead will favor prosecution in cases where corporate structures are used to try to shield a parent or a high-level individual executive from liability. Because agency analysis is highly factual and nuanced, it remains to be seen whether Hoskins's acquittal will meaningfully impact the DOJ's ability to rely on agency theories of liability to extend the reach of the FCPA. Moreover, it remains to be seen whether the DOJ files its appeal, and if so, what further views the Second Circuit has.

Cardinal Health Settles FCPA Charges

The charges against Cardinal Health, Inc., an Ohio-based healthcare services and products company, arose from alleged violations of the FCPA's books and records and internal controls provisions for failure to detect improper payments made to Chinese government officials by employees at Cardinal China, Cardinal Health's former Chinese subsidiary, and for mischaracterization of payments made to third-party vendors.[26]

According to the SEC's Order, in November 2010, Cardinal Health acquired a Chinese pharmaceutical distribution subsidiary that was later branded as "Cardinal China."[27] The SEC alleged that, between 2010 and 2016, Cardinal China acted as the exclusive distributor in the Chinese market for a large European

22 *Id.* at *13.

23 *See* Gov'ts Mem. in Aid of Sentencing, *United States* v. *Hoskins*, No. 3:12-CR-238 (D. Conn. Mar. 2, 2020).

24 *See* Press Release, U.S. Dep't of Justice, *Former Senior Alstom Executive Sentenced to Prison for Role in Money Laundering Scheme to Promote Foreign Bribery* (Mar. 6, 2020), *available* here.

25 *See* Brian A. Benczkowski, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), *available* here.

26 *See In the Matter of Cardinal Health, Inc.*, Exchange Act Release No. 88303 (Feb. 28, 2020), *available* here.

27 *Id.* at 2.

dermocosmetic supplier.[28] As part of its commercial agreements with the company, Cardinal China retained approximately 2,400 sales and marketing employees and managed marketing accounts on behalf of the dermocosmetic supplier. Although Cardinal China entered into employment contracts with the sales and marketing employees, the dermocosmetic company controlled their day-to-day actions and directed the employees to use marketing account funds to promote its products. Cardinal China employees made payments totaling over $250 million from these marketing account funds, some of which were redirected to individuals at Chinese government-employed healthcare providers and state-owned retail companies.[29] The improper payments—including cash, smart phones, luxury goods, gift cards and travel—were made through third-party vendors and were often mischaracterized as "production fees" paid to printing companies.[30] As the dermocosmetic company's exclusive distributor in China, Cardinal Health allegedly received a distribution margin from the sales of the company's products.[31] The SEC alleged that, between 2013 and 2016, Cardinal Health was unjustly enriched by approximately $5.4 million.[32]

According to the SEC, Cardinal China did not subject the marketing employees to its full internal accounting controls, such as providing FCPA and anti-bribery training.[33] In addition, the marketing employees conducted business using e-mail accounts and computer systems that belonged to the dermocosmetic company and were inaccessible to Cardinal Health's compliance personnel. Cardinal Health also failed to maintain sufficient internal controls by allowing the marketing employees to execute payments without requiring sufficient supporting documentation to verify the purpose of the transactions. Anita B. Bandy, an Associate Director in the SEC's Division of Enforcement, said that Cardinal China's "high-risk business practices . . . undermined the integrity of Cardinal's books and records and heightened the risk that improper payments would go undetected."[34]

Without admitting or denying the SEC's findings, Cardinal Health consented to a cease-and-desist order requiring the company to pay $6.3 million in disgorgement and prejudgment interest, and a civil penalty of $2.5 million.[35] In determining to accept the cease-and-desist offer, the SEC considered that Cardinal Health voluntarily disclosed its conduct and subsequently cooperated with the SEC. Cardinal China took significant remedial measures, including adding anti-bribery representations and obligations to relevant

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28 *Id.* at 4.

29 *Id.*

30 *Id.* at 4–5.

31 *Id.* at 2, 4.

32 *Id.* at 3, 6.

33 *Id.* at 4.

34 *See* SEC Press Release.

35 *In the Matter of Cardinal Health*, at 7.

contracts, terminating the marketing accounts at issue and limiting and monitoring the use of the remaining balance of the dermocosmetic company's funds.[36]

The Cardinal Health resolution highlights the SEC's continued enforcement under the FCPA's accounting provisions, even where it is unable to establish, or chooses not to charge, violations of the FCPA's anti-bribery provisions. This settlement also reflects the importance of companies evaluating and implementing anti-corruption compliance controls and supervisory procedures with respect to marketing employees and their use of marketing funds in high-risk countries, such as China. In 2018, the DOJ announced the "China Initiative," which is an effort to counter perceived national security threats to the U.S. from China, including by identifying FCPA cases involving Chinese companies.[37] Recently, on February 26, 2020, U.S. Senator Marco Rubio wrote a public letter to Attorney General William Barr and SEC Chairman Jay Clayton, warning them that "China's economy and financial system are plagued by corruption and illegal activity" and urging them to "vigilantly identify and enforce" FCPA cases in China.[38] Last year, China featured in the largest number of FCPA cases of any country.[39] This may be a trend that continues in 2020.

We look forward to providing you with further updates on these and other developments.

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[36] *Id.*

[37] *See* William P. Barr, Attorney Gen., U.S. Dep't of Justice, Opening Remarks at the U.S. Attorney's Conference (June 26, 2019), *available* here.

[38] Letter from Marco Rubio, U.S. Senator, to William Barr, Attorney Gen., U.S. Dep't of Justice (Feb. 25, 2020), *available* here.

[39] *See* Paul, Weiss Client Memorandum, "FCPA Enforcement and Anti-Corruption Developments: 2019 Year in Review" at 5 (Jan. 24, 2020), *available* here.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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