New York Law Journal
Corporate Update
WWW.NYLJ.COM
An ALM Publication
VOLUME 263—NO. 20
THURSDAY, JANUARY 30, 2020

WHITE-COLLAR CRIME

Agency: A New Frontier For FCPA Jurisdiction

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The U.S. Department of Justice's November 2019 trial conviction of Lawrence Hoskins, a U.K. citizen employed by the French energy company Alstom, for violating the Foreign Corrupt Practices Act (FCPA) drew increased attention to the global reach of U.S. law and DOJ policy in pursuing targets who have had little or no contact with the United States. The *Hoskins* case highlighted the manner by which the DOJ (and the SEC, which has civil enforcement jurisdiction under the FCPA) can harness the common-law doctrine of agency to expand the reach of the statute.

There are two primary legal concepts U.S. companies operating overseas need to understand with respect to agency and its relevance to the FCPA. First, the text of the statute makes the "agents" of U.S. issuers and U.S.-based companies liable. As the government has interpreted it, this means that the foreign subsidiaries (and employees or other third parties acting for those subsidiaries) of a U.S. company can be charged under the statute where the parent entity exercises sufficient control over their conduct, even if they would be otherwise outside the jurisdiction of U.S. law. Second, the related common-law doctrine of respondeat superior makes companies liable for the acts of their agents, if those acts are taken in the scope of their agency and for the benefit of the principal. As the government has applied the doctrine in this context, if a foreign subsidiary of a U.S. company has violated the FCPA, and if the subsidiary is deemed the "agent" of the company, the U.S. company may be charged directly as well, even if U.S. personnel had no knowledge of or involvement in the misconduct. Despite the profound effect that these two concepts—agency and respondeat superior—can have on the scope of FCPA jurisdiction, the courts have just begun to grapple with their application and limits.

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In brief, the FCPA forbids bribe payments to foreign government officials.

To limit interference with foreign jurisdictions arising from its extraterritorial application, and to provide fair notice to potential defendants, Congress delineated specific categories of individuals and entities subject to FCPA jurisdiction. The FCPA subjects the following to penalties for wrongful conduct under the statute: (1) foreign persons who have committed violations while in the United States; (2) U.S. citizens, nationals, and residents; (3) companies that have issued publicly traded securities in the United States or have reporting obligations under the Securities Exchange Act; and (4) companies organized under the laws of, or with their principal place of business in, the United States. For these latter two categories, jurisdiction extends to a U.S. company's officers, directors, employees, *agents* and stockholders acting on the company's behalf, regardless of

whether violations occur in the United States or abroad. 15 U.S.C. §§78dd-1, 778d-2.

The terms officer, director, employee, and stockholder have a relatively discrete meaning. But the meaning of "agent" is more open to interpretation, and the FCPA contains no definition of the term. The legislative history suggests that in adding this term to the statute, Congress may have had in mind third-party intermediaries engaged to pay bribes to foreign officials. The term "agent," however, without further textual context, has a much broader legal meaning under the common law.

The DOJ and SEC FCPA Resource Guide describes the circumstances under which a subsidiary will, in the government's view, be deemed an "agent" of its parent. According to the Resource Guide, "the fundamental characteristic of agency is control" and in determining whether the subsidiary is an agent, it will evaluate the parent's control, "including the parents' knowledge and direction of the subsidiaries actions, both generally and in the context of the specific transaction." The Resource Guide states that both the "formal relationship" and the "practical realities" of the interaction between the parent and the subsidiary are important to the analysis, but gives few specifics beyond that. The Resource Guide notes the government's position that, once a subsidiary had been deemed its parent's agent, the subsidiary's conduct and knowledge can be imputed to the parent under the doctrine of respondeat superior. Resource Guide at 27-28.

Over the last several years, the DOJ and SEC have pursued a number of FCPA cases under an agency theory, sometimes against the subsidiaries (or their employees) of a parent U.S. company or issuer, and sometimes against the parent itself, using the doctrine of respondeat superior. For example, in 2014, the SEC alleged that subsidiaries of the Pennsylvania-based aluminum company Alcoa, acting as Alcoa's agents, had violated the FCPA by paying bribes to officials in Bahrain. On this basis, the SEC charged Alcoa, which, in settling the case, agreed to pay $175 million in disgorgement. In the administrative order resolving the case, the SEC stated "[t]his Order contains no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme," and explained that Alcoa had violated the FCPA "by reason of its agents," which were "acting within the scope of their authority when participating in the bribe scheme." *In the Matter of Alcoa, Respondent*, Release No. 3525, *9 (Jan. 9, 2014).

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The Alcoa order set forth the apparent basis for the SEC's decision to invoke the doctrine of respondeat superior against a parent corporation for the acts of its subsidiaries. Most of the cited factors simply demonstrated Alcoa's general control over the subsidiaries that had engaged in the wrongdoing—for example, Alcoa's involvement in setting the subsidiaries' business and financial goals, providing strategic direction, and coordination of the subsidiaries' legal, audit and compliance functions. With regard to the specific transactions at issue, the SEC noted that senior Alcoa executives in the United States had reviewed and approved contracts relating to the dealings between the subsidiary, the consultant who had facilitated the bribes, and the Bahranian company involved, even if they did not know of the bribes themselves.

The DOJ elected not to charge Alcoa criminally, choosing instead to indict one of the subsidiaries involved the wrongdoing. This may have reflected the DOJ's hesitancy, at that time, to rely on respondeat superior in a criminal matter, or perhaps was the result of significant cooperation by Alcoa, which according to the SEC order, self-reported "certain" of the issues in the case to both the SEC and the DOJ, and "undertook extensive remedial actions." Id.

In any event, in the years since Alcoa, the DOJ has not always shown the same reluctance to hold a parent entity accountable based on the conduct of its "agent" subsidiaries, even where, as in Alcoa, the parent had no knowledge of wrongdoing. In 2018, the DOJ announced that the investment management company Legg Mason, based in Maryland, had agreed to pay $64 million, cooperate with the government, and enhance its compliance program, to resolve FCPA allegations pursuant to a non-prosecution agreement. The agreement reached with the DOJ reflects that the penalty imposed was based on illegal conduct by two "mid-to-low level" employees of a Legg Mason subsidiary, and that Legg Mason

itself had no knowledge of the conduct. Legg Mason NPA at 2.

While these settlements reflect the evolving views of the SEC and DOJ regarding the role of agency in FCPA enforcement, they do not give us insight into the views of the courts. Indeed, the issue is so rarely litigated that, until 2019, as far as we can tell, no court had explored the limits of the word "agent" as it is used in the FCPA statute, or the parameters of respondeat superior in this context. Last year, however, agency was at the heart of the DOJ case against former Alstom executive Lawrence Hoskins, who was tried and convicted in November 2019 in the U.S. District Court in Connecticut. *United States v. Hoskins*, No. 3:12-cr-238 (JBA) (D. Ct. 2012). Hoskins was a U.K. citizen employed by a British subsidiary of Alstom S.A., a French energy company. The government alleged that a different Alstom subsidiary, based in the United States, had engaged "consultants" to bribe Indonesian officials to help secure contracts with an Indonesian power company. As the result of earlier litigation, by the time the parties reached trial, the DOJ's sole remaining theory of liability was that Hoskins—who was otherwise outside the jurisdiction of the FCPA—had acted as the U.S. Alstom subsidiary's agent in connection with the bribes. The problem for the government was that the U.S. subsidiary did not own or control the U.K. subsidiary for which Hoskins worked, and did not have general supervisory authority over Hoskins.

To overcome this impediment, the government argued that, even if the U.S. subsidiary had no general supervisory authority over Hoskins, Hoskins had acted as its agent for the limited purpose of helping to secure the Indonesian contracts through bribery, working to retain and oversee the so-called consultants who facilitated bribe payments. Over the defense's objection, the DOJ asked the court to instruct the jury that it could find Hoskins to have been the U.S. subsidiary's agent for some business purposes but not others. The government also cited the "well-established" common-law rule that the control exercised by a principal over its agent "need not include control at every moment; its exercise may be very attenuated, and as where the principal is physically absent, ineffective." *United States v. Hoskins*, No. 3:12-cr-238 (JBA), 2019 WL 3996634, at *2 (D. Conn. Aug. 23, 2019). The district court ultimately agreed with the government, and focused the jury on the specific role Hoskins played in connection with the Indonesian transactions, rather than his more general relationship with the U.S. subsidiary. So instructed, the jury convicted.

The result in 'Hoskins' caused concern among the defense bar.

The result in *Hoskins* caused concern among the defense bar. In prior agency cases, the DOJ and the SEC had focused primarily on subsidiaries and employees, in particular on the generalized control exercised by the parent entity. The government's position, and the court's ruling, in *Hoskins* made the parameters of agency less certain and suggested an effort to push the jurisdictional bounds of the statute to reach foreign persons and entities with few ties to the United States. If respondeat superior is invoked, that effort could expose U.S. companies and issuers to criminal liability based on business relationships that are not well defined. Indeed, within a month of the conviction, Brian Benczkowski, the head of the DOJ Criminal Division, attempted to allay those concerns during his remarks at an industry conference, stating that the DOJ "is not looking to stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges." AAG, Brian A. Benczkowski, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019). The defense community found little reassurance in Benczkowski's remarks, which did not provide specific guidance and adverted to limits imposed by prosecutorial discretion.

The fact is, if the government's view prevails, by authorizing the prosecution of the "agents" of U.S. companies and issuers, Congress undermined the careful calibration it had achieved in drafting the statute. With one word, it imported into the FCPA common-law concepts that do not fit comfortably in the criminal context, and added substantial uncertainty to the task of assessing the statute's jurisdictional reach. It took many years, and the recent trend toward global expansion by U.S. law enforcement, to lay bare the consequences of this decision.

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