

Court Reverses Foreign National's FCPA Conviction, Setting a High Bar to Establish an Agency Relationship

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A ruling issued on Wednesday, February 26 by a Connecticut federal court details the type of control necessary to find that a foreign national acted as an agent of a U.S. domestic concern for purposes of falling within the coverage of the Foreign Corrupt Practices Act (FCPA). The decision curtails the U.S. Department of Justice's ability to take an expansive approach to the extraterritorial reach of the FCPA under an agency theory.

We have addressed the significant case of *United States v. Hoskins* in prior alerts:

The Second Circuit Narrows the Extraterritorial Reach of the FCPA

Jury Finds Executive Acted As An Agent, Giving DOJ New Leverage To Pursue Foreign Nationals

The Department of Justice (DOJ) initially alleged Lawrence Hoskins, a British national and former executive of the British subsidiary of Alstom, violated the FCPA under an aiding abetting or conspiracy theory. On pretrial motions, the court rejected DOJ's long held theory, finding that criminal liability could only attach under the circumstances if DOJ could prove that Hoskins acted as an agent of a domestic concern. DOJ went to trial on the theory that Hoskins qualified as an agent of Alstom's U.S. subsidiary, despite no employment relationship between the two. The jury accepted this theory and convicted Hoskins of violating the FCPA. Hoskins thereafter moved for a judgment of acquittal, which the court granted on the FCPA counts.

DOJ had proved at trial that Alstom's U.S. subsidiary, Alstom Power, Inc. (Alstom Power), hired two consultants to facilitate a bribery scheme to acquire a \$118 million contract from the Indonesian government. However, Hoskins was never employed by Alstom Power, but rather by a different subsidiary, Alstom UK Ltd, and never set foot in the United States. DOJ nevertheless relied upon the fact that Hoskins, through his position at Alstom UK, approved the bribe payments at issue under Alstom Power's direction in asserting that he acted as an agent of Alstom Power.

The arguments turned on one critical question — whether the evidence proved that Alstom Power had control over Hoskins, a core element required to establish an agency relationship. DOJ argued that Alstom Power had control over Hoskins throughout the hiring of the consultants because Alstom Power had final sign-off on whether to hire the consultants, how much to pay, and the terms of the agreement. It further asserted that Alstom Power gave Hoskins instructions relating to retention of the consultants that Hoskins in fact carried out. Hoskins argued that Alstom Power did not have control over him because he worked for Alstom UK, not Alstom Power. Hoskins observed that he did not report, for employment purposes, to anyone at Alstom Power. Alstom Power thus had no ability to terminate or penalize Hoskins if he defied their instructions. Hoskins argued, moreover, that the parent company, Alstom SA, had final approval over the hiring of consultants, not Alstom Power.

The court ultimately concluded that even though there was sufficient evidence that Alstom Power controlled the process of hiring the consultants and gave Hoskins instructions, which he followed, there was not enough evidence that Hoskins had acted as an agent of Alstom Power. Specifically, it concluded that there was insufficient proof that Alstom Power controlled Hoskins' actions relating to the hiring of the consultants. It stressed the importance of proving that the purported principal maintained interim control over how the purported agent performs the assigned tasks, and whether the principal has the ability to remove an agent who fails to perform adequately. The court relied upon the fact that Alstom Power had no ability to issue employment consequences if it found Hoskins' performance unsatisfactory, such as demoting, reassigning, or firing him.

The court's ruling is significant because it diminishes the ability of DOJ to take an expansive view of the extraterritorial reach of the FCPA under the agency theory and provides concrete guidance on the level of control necessary to establish an agency relationship. The ruling sets an appropriately high bar, carefully anchored in well-established agency principles. Under this ruling, it will be increasingly difficult for DOJ to argue that every employee of a subsidiary, joint venture, or affiliate is an agent of the parent company, or of other subsidiaries and affiliates, by virtue of shared ownership status. The court has added welcomed clarity on the type of relationship necessary to establish that a foreign national who never enters the United States nor works for a U.S. company is an agent for purposes of falling within the coverage of the FCPA, which in turn will help to guide international companies on establishing relationships and reporting lines among their U.S. and non-U.S. subsidiaries and affiliates.
