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ALERTS

Limits On DOJ's Ability To Reach Foreign Bribery Highlighted By Recent Decision

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On Feb. 26, 2020, a federal court in Connecticut partially overturned jury verdicts in the criminal prosecution of a U.K. national who had allegedly bribed Indonesian government officials while working at a European subsidiary of Alstom SA. As criminal trials involving the Foreign Corrupt Practices Act (FCPA) are rare, the ruling is a significant setback to the Department of Justice (DOJ) in its effort to extend the global reach of the FCPA.

In *U.S. v. Hoskins*, U.S. District Court Judge Janet Bond Arterton held that because the DOJ had failed to present sufficient evidence that Lawrence Hoskins was an "agent" of Alstom's U.S. subsidiary, it could not prosecute him for acts taken wholly overseas. The decision, which applied the test for extraterritorial application of the FCPA used in the U.S. Court of Appeals for the Second Circuit, is expected to push prosecutors to secure more evidence regarding the extent of control exercised by U.S. subsidiaries over foreign nationals allegedly involved in overseas bribery.

In acquitting Hoskins, Judge Arterton relied heavily on traditional agency law principles captured in the Third Restatement of Agency – namely, that agency exists only if a principal manifests that the agent shall act for the principal, the agent accepts the undertaking, and there is an understanding between the parties that the principal is in control. Although Alstom's U.S. subsidiary had controlled portions of the project where the bribery occurred, Judge Arterton found that the company did not control the manner in which Hoskins carried out his assigned tasks. Moreover, the court found no evidence that Hoskins had agreed to such control, or that the U.S. subsidiary had the authority to terminate him.

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Without these critical indicia of agency, the jury's verdict that Hoskins was an "agent" of a "domestic concern" under the FCPA had to be reversed.

Although the Second Circuit's view of the FCPA has proven influential, federal courts around the country have varied in their interpretation of the FCPA's reach over foreign nationals acting outside the United States. For example, in 2019 a federal court in Chicago rejected a Ukrainian defendant's attempt to use the same test employed by the Second Circuit. The decision (*U.S. v. Firtash*) instead applied Seventh Circuit law, which the court interpreted as permitting the FCPA to reach extraterritorial conduct even if the defendant is not "controlled" by a U.S. company.

These lower court decisions highlight ambiguities in the FCPA's reach and emphasize the need for U.S. companies with overseas operations to carefully assess potential risks. While a robust anti-corruption compliance program remains the best defense against enforcement of the FCPA and foreign anti-bribery laws, companies should consider conducting particularly close due diligence on any foreign personnel who may arguably be acting as an "agent" of a U.S. entity.

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