In *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) the Second Circuit held that a non-resident foreign national cannot be criminally liable for aiding and abetting or conspiring to violate the FCPA unless the government can establish that such an individual acted as an agent of one of the categories of persons subject to liability as a principal. **Background** The DOJ charged Lawrence Hoskins, a British national and former Alstom UK executive based in Paris, with FCPA and money-laundering violations.

The government alleged that Hoskins had approved payments to consultants that were funneled to Indonesian officials to secure a $118 million infrastructure contract with a state-owned power company. Hoskins was never physically present in the U.S., but he called and emailed alleged conspirators who themselves were present in the U.S., and Hoskins authorized payments from Alstom S.A. to the consultants, one of whom had a Maryland bank account. Hoskins moved to dismiss charges alleging indirect FCPA violations—i.e., that he aided and abetted or conspired to violate the FCPA—arguing that he did not fall within the narrowly-circumscribed group of people for whom the FCPA prescribes liability: American companies, citizens, and their employees and agents, as well as foreign persons acting on American soil. The lower court agreed with Hoskins and dismissed Count I of the indictment. On appeal, the question for the Second Circuit was whether Hoskins could be charged as either a conspirator or an accomplice to the asserted FCPA violations, despite not falling within the categories of persons subject to liability as a principal. The Second Circuit concluded that the statute's text, combined with its legislative history and the presumption against extraterritoriality, compelled the conclusion that foreign nationals who act abroad and lack a direct connection to one of the categories of persons subject to principal FCPA liability cannot be liable as accomplices or conspirators. **Agency Liability Post-Hoskins** *Hoskins* creates some uncertainty regarding FCPA prosecutions of individuals or entities who could not be charged as principals. The decision creates a stronger jurisdictional defense for companies that are subject to DOJ or SEC actions solely based on their business association with a U.S. concern. Under the Second Circuit opinion, it will take more than mere conspiracy or assistance to bring such entities within the scope of liability. It is also likely that investigators will put more emphasis on developing evidence of agency relationships between principal violators and entities otherwise unreachable under *Hoskins*. Indeed, the court in *Hoskins* held that the government could present agency evidence and pursue Hoskins as an agent of, for example, Alstom S.A.'s U.S.-based subsidiary. Prosecutors may also attempt to broaden the traditional definitions of agency under the FCPA, particularly as agency theory becomes a critical link to reach now unreachable defendants. The DOJ and the SEC have a long history of utilizing traditional agency principles, including *respondeat superior* (wherein a company is liable for the acts of its agents), to prosecute FCPA actions. As noted in the FCPA Resource Guide, "the fundamental characteristic of agency is control," and the DOJ and the SEC will evaluate the degree of control between a principal and the potential agent to determine the scope of culpability. This analysis is not purely formalistic; per the Resource Guide, the "practical realities" of the interactions between the parent and the subsidiary (or principal and agent) are critical in the assessment. The DOJ and SEC have used this framework in past FCPA enforcement actions and utilized traditional agency principles and conspiracy and aiding-and-abetting theories to bring enforcement actions. For example, in 2017 the DOJ entered into a deferred prosecution agreement with Rolls-Royce regarding FCPA violations stemming over several decades. The DOJ predicated its action against several individuals on the basis of agency theory and accused them of engaging in a conspiracy. Similarly, in *U.S. v. Finley*, James Finley, a senior executive at Rolls-Royce who is a citizen of the United Kingdom and at the time was residing in Taiwan, was alleged to be an "agent" of a "domestic concern," Rolls-Royce Energy Systems, Inc., a United States company in Ohio, within the meaning of the FCPA. He was alleged to be an agent and co-conspirator, particularly through his knowledge of the conspiratorial acts and his participation in communications, including phone calls and emails, pertaining to the conspiracy. In a related case, *U.S. v. Zuurhout*, defendant Aloysius Johannes Jozef Zuurhout, a citizen of the Netherlands and employee of a Dutch subsidiary of Rolls-Royce, was considered to be an agent on the basis of his employee status with Rolls-Royce and a co-conspirator because of his communications with individuals engaged in FCPA violations within the United States and his actions in furtherance of that conspiracy outside of the United States. In total, the case led to a $170 million criminal penalty and a more than $800 million total penalty for the violations. *Hoskins* is instructive as to the likely direction the DOJ and SEC will take in prosecuting cases that could traditionally be prosecuted solely on the basis of conspiracy. First, to bring an FCPA claim on these facts, the government will now have to show agency in the Second Circuit (and would likely seek to do so in other jurisdictions as well). In prior proceedings Hoskins had argued that he could not be an agent of Alstom U.S. because he was a high-ranking executive and could not possibly be acting at the direction or under the control of the U.S. subsidiary. The government disagreed and stated that, regardless of the court's decision on the conspiracy basis of liability, it

planned to establish Hoskins's liability as an agent of Alstom U.S. at trial. The Second Circuit stated that the government was free to pursue such a basis of liability. As noted, the assessment of whether an agency relationship exists is not purely formal. Rather, the court will look to the "practical realities" of the interactions between Hoskins and Alstom U.S., including whether Alstom U.S. was directing Hoskins's activities and whether he was acting on behalf of the company with knowledge of the scheme in which he allegedly participated. Because agency relationships will be increasingly important after *Hoskins* and are determined using a fact-intensive inquiry, practitioners should expect prosecutors to try to develop this type of evidence even more so than they have in the past.

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