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United States v. Hoskins: An Opportunity for the Second Circuit to Limit the Abusive Reach of the FCPA

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A critical question now before the Second Circuit in *United States v. Hoskins* concerns the scope of the word "agent" as used in the Foreign Corrupt Practices Act (FCPA). In a prior appeal involving the same case (*Hoskins I*), the Second Circuit held that the United States Department of Justice (DOJ) could not prosecute foreign national Lawrence Hoskins under the FCPA for conduct committed abroad on a conspiracy or aiding-and-abetting theory. The court found that Congress was concerned with the extraterritorial reach of the FCPA and endeavored to limit its application by carefully delineating the categories of included foreign nationals and conduct. It held that Hoskins could not be prosecuted under the FCPA unless he fell within one of those enumerated categories, which includes officers, directors, employees, and agents of a company with a sufficient U.S. nexus to be subject to the FCPA, and that the government could not use conspiracy and aiding-and-abetting liability theories to expand those categories.

Hoskins was employed by a U.K. subsidiary of the French power company, Alstom S.A. (Alstom) and seconded to another subsidiary based in France, Alstom Resources Management. While the FCPA did not reach the foreign subsidiaries, the Second Circuit remanded the case, at the government's urging, so the prosecution could seek to prove that Hoskins was guilty as an "agent" of Alstom's U.S. subsidiary, Alstom Power Inc. (API). On remand, the jury agreed with the government and convicted Hoskins for violating the FCPA's anti-bribery provisions. Nevertheless, the district court set aside the conviction, finding that the record failed to establish that API had sufficient control over Hoskins to establish an agency relationship. The government appealed (*Hoskins II*), arguing that the district court erred by construing the term "agent" too narrowly.

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