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United States v. Hoskins & *Scoville v. SEC*: DOJ & SEC extend their extraterritorial reach for FCPA & securities fraud charges

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The SEC and DOJ recently received positive news in two enforcement actions that had been challenged on grounds of extraterritoriality. These cases illustrate the ongoing judicial efforts to define the extraterritorial reach of the US enforcement laws, and provide insight into how US enforcement agencies may approach these matters going forward.

US v. Hoskins

On November 8, 2019, a jury found Lawrence Hoskins, a senior executive at a French power and transportation company, guilty of Foreign Corrupt Practices Act ("FCPA") violations. The US Department of Justice ("DOJ") had alleged that Hoskins violated the FCPA by directing and authorizing corrupt payments by a US subsidiary of the French company to Indonesian officials. Last year, the US Court of Appeals for the Second Circuit ruled that Hoskins—a non-US citizen who was employed by a UK subsidiary of the French company, and who acted entirely outside the United States—could not be found liable for violating the FCPA unless he came within the jurisdictional scope of the statute. *US v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). This meant that he had to have acted as an employee, officer, director, or agent of the US subsidiary or in furtherance of the violation while in the United States. When the case was returned to the District Court for trial, the DOJ persuaded the jury that Hoskins had acted as an agent of the US subsidiary.

As the FCPA does not define "agent," the parties sharply disagreed about the jury instruction defining the agency relationship. Based on Second Circuit precedent, the District Court issued a pretrial ruling describing the three elements necessary to an agency relationship as "(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." *US v. Hoskins*, Ruling on Def's Mot. for Agency Instr., No. 3:12-cr-00238-JBA, ECF No. 532, at 4 (D. Conn., Aug. 23, 2019) (quotations omitted). The District Court rejected the defendant's proposed instruction that the principal must control the agent, concluding that it would wrongly suggest to the jury that a higher level of control over the agent is required. *Id*. On the contrary, "the control need only be over 'the agent's actions taken on the principal's behalf.'" *Id*. (quoting the Defendant's Reply Brief).

The DOJ's theory was that, even though he was employed by a non-US entity, Hoskins nevertheless acted as an agent of the US subsidiary because his role in the bribery scheme was controlled by that subsidiary. To this end, the indictment alleged that Hoskins oversaw the hiring of certain third-party consultants, knowing that these consultants would share a portion of their payments with Indonesian officials in exchange for their assistance in obtaining and retaining contracts for the US subsidiary with the Indonesian government. The US subsidiary had to

approve the payments to the consultants that Hoskins had identified. The US subsidiary was not alleged to have "controlled" Hoskins, only that it controlled the conduct that Hoskins helped further.

The jury apparently agreed with the prosecutors' argument, that although Hoskins worked abroad and for the UK subsidiary, he nevertheless acted as an agent of the US subsidiary. The jury convicted Hoskins on six counts of violating the FCPA, three counts of money laundering, one count of conspiracy to violate the FCPA, and one count of money laundering conspiracy. He was acquitted on one money laundering count.

The November 8 guilty verdict is a significant victory for the Government in light of its setback before the Second Circuit last year. This verdict demonstrates that a non-US individual involved in the bribery of a foreign official while acting outside of the United States may nevertheless be subject to US enforcement if he is found to have acted as an "agent" of a US entity. It is likely that the defendant will appeal the jury verdict in Hoskins, so the final chapter of the law has yet to be written. For now, the District Court's definition of "agency" provides useful guidance on how the SEC and DOJ will approach these matters in the future.

Scoville v. SEC

On November 4, 2019, the US Supreme Court denied Charles Scoville's petition for a writ of certiorari to the US Court of Appeals for the Tenth Circuit. This denial left in place the Tenth Circuit's holding that the 2010 Dodd-Frank Act allows the Government to pursue securities laws violations that occur largely outside of the United States even if they involve only foreign investors. It affirmed the Government's ability to bring enforcement actions where there is sufficient conduct or effects in the United States: the so-called "conduct-and-effects" test.

On July 28, 2016, the US Securities and Exchange Commission ("SEC") charged Traffic Monsoon LLC and the company's only member, Charles Scoville, with violating the antifraud provisions of the federal securities laws. The SEC alleged that defendants' sale of $207 million worth of "Adpacks" to investors over an internet traffic exchange was effectively an Internet-based Ponzi scheme. Approximately 90% of the "Adpacks" were sold to investors outside of the United States, but Scoville operated the business from Utah. Scoville and the company challenged the District Court's emergency orders on multiple grounds, including that the antifraud provisions of the federal securities laws do not apply to their sales outside of the United States.

While the Tenth Circuit began its analysis by noting the presumption that a statute applies only to violations occurring within the United States, unless Congress has "affirmatively and unmistakably" indicated that it should apply extraterritorially, it concluded that, in fact, Congress had done just that. *Scoville v. SEC*, 913 F.3d 1204, 1215 (10th Cir. 2019). Specifically, in 2010, Congress enacted the Dodd-Frank amendments (15 U.S.C. §§77v(c), 78aa(b)) which state, in relevant part, that courts have jurisdiction over securities fraud actions involving either:

1) conduct within the Unites States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside of the United States and involves only foreign investors; or

2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

The Tenth Circuit found in Scoville that "Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied." *Scoville*, 913 F.3d at1218.

The Court then found that defendants' actions easily satisfied the first prong of the conduct-and-effects test because defendants took significant steps in furtherance of the violation while in the United States. Scoville created the company and promoted the investments over the Internet while he was in the United States. In addition, the company's servers were physically located within the United States. Apparently satisfied that the facts met the "conduct" prong, the Court did not discuss the second prong, the "effects" test.

The Supreme Court's denial of Scoville's petition for writ of certiorari brings finality to his challenge to the Tenth Circuit's interpretation of the scope of extraterritoriality in the securities laws. While one can view the decision narrowly as a logical application of Dodd-Frank's express language providing for extraterritorial reach to Scoville's unique conduct, the SEC and DOJ may see it as broad support for their securities enforcement efforts that involve even slight connections to the United States and perhaps test the bounds of the conduct or effects test. Thus,

non-US companies that have some US operations, but do not list on a US stock exchange or otherwise sell securities in the United States, and non-US individuals could be vulnerable under the Government's expansive theory, as could non-US companies or individuals who are alleged to have solely defrauded victims outside of the United States if some conduct occurred here.

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