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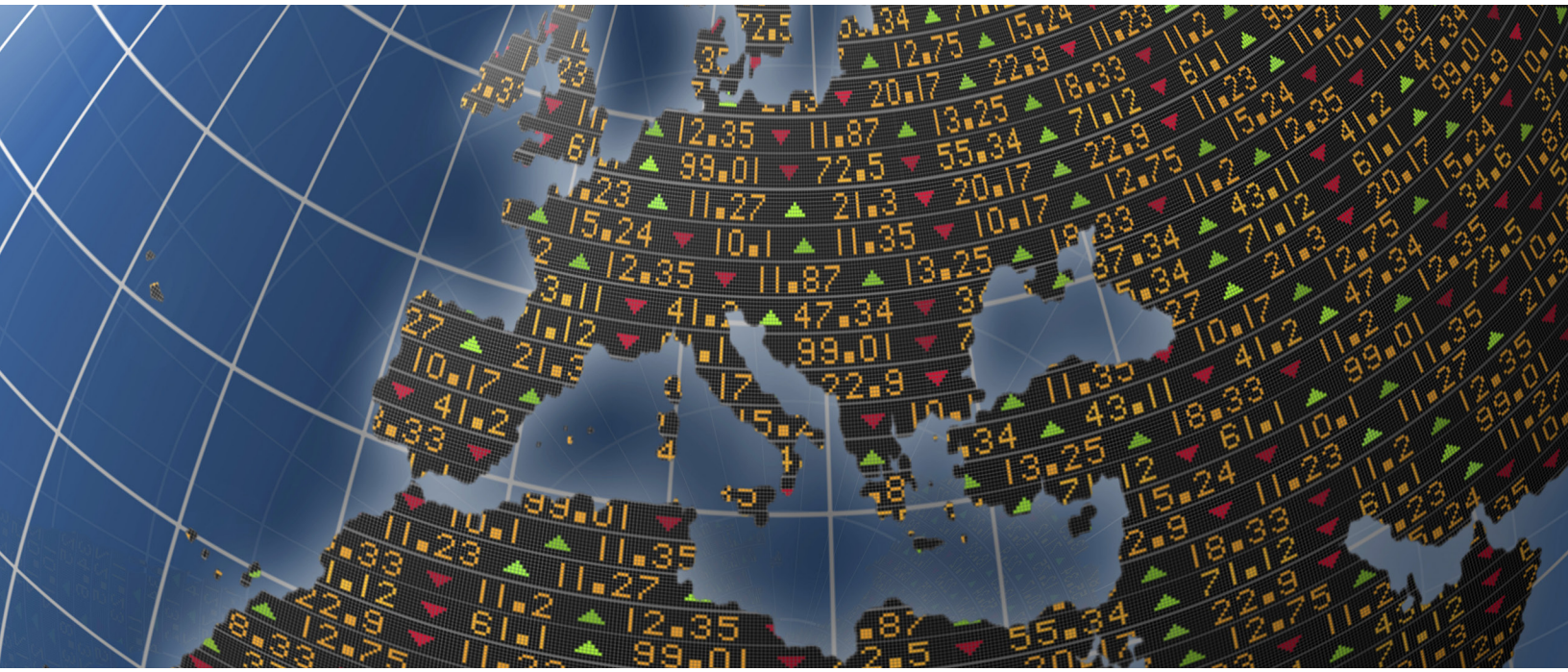

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District Courts Address Significant Aspects of Individual Criminal Liability under the FCPA

Two recent district court decisions provide important guidance on how courts may interpret key provisions of the FCPA. The first, in *United States v. Coburn*, expansively interpreted the statute by concluding that each use of interstate commerce could constitute a separate charge under the anti-bribery provisions.[1] The second, in the long-running saga of *United States v. Hoskins*, narrowly interpreted the FCPA's jurisdiction over foreign non-issuers by virtue of a close but fact-specific reading of the term "agent."[2]

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1. *See United States v. Coburn et al.*, Memorandum & Order, No. 2:19-cr-00120-KM, 2020 WL 806297, *12 (D.N.J. Feb. 14, 2020) [hereinafter "Coburn Order"].
2. *See United States v. Hoskins*, Ruling on Defendant's Rule 29(C) and Rule 33 Motions, No. 3:12-cr-238-JBA, 2020 WL 914302, *9 (D. Conn. Feb. 26, 2020) [hereinafter "Hoskins Order"].

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More specifically, in *Coburn*, Judge Kevin McNulty of the District of New Jersey ruled in favor of the government, denying a pre-trial motion to dismiss. The court agreed with the government that the "unit of prosecution" under the FCPA is each use of the means or instrumentalities of interstate commerce – in this case, emails – rather than each offer, promise, or authorization to give anything of value. This interpretation has potentially significant implications regarding the possible multiplication of individual charges, among other considerations, though seems unlikely to impact significantly total penalties.

Meanwhile, in a stunning development in *Hoskins*, Judge Janet Bond Arterton of the District of Connecticut partially overturned Lawrence Hoskins's conviction, which the government now has appealed. The court narrowly interpreted the legal definition of agency and determined that, on the facts provided at trial, no jury could have found such a relationship beyond a reasonable doubt. This decision significantly limits the U.S. government's ability to hold an employee of a foreign company liable as the agent of a sister company subject to the FCPA. It also signals a willingness on the part of U.S. courts to place limits on the use of agency theory to establish liability under the FCPA and similar laws.

Both of these decisions involve cases brought against individuals, but have broader applications under the statute. Although neither ruling creates binding precedent on other courts, they are noteworthy examples of relatively rare judicial interpretations of the FCPA and therefore merit careful consideration.

I. *United States v. Coburn*

In *Coburn*, the government charged two former executives of Cognizant Technology Solutions Corporation – Gordon J. Coburn and Steven E. Schwartz – in a twelve-count indictment for alleged roles in a scheme to pay approximately $2 million in bribes to government officials in India. These charges included conspiracy to violate the FCPA and substantive violations of the FCPA's anti-bribery, books and records, and internal controls provisions.[3]

Coburn and Schwartz challenged the *number* of charges brought, moving to dismiss several counts.[4] Schwartz argued that two of the anti-bribery counts did not clearly charge him with wrongdoing, because the two emails on which those charges

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3. *See generally* Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020, at 12, 18; Andrew M. Levine, Andreas A. Glimenakis, & Alma M. Mozetič, "Individual Accountability and the First FCPA Corporate Enforcement Actions of 2019," FCPA Update, Vol. 10, No. 8 (Mar. 2019), https://www.debevoise.com/insights/publications/2019/03/fcpa-update-march-2019, at 1–5.

4. Coburn and Schwartz also moved to dismiss the count of circumvention of internal controls, arguing that it is inconsistent for a person to circumvent a system of controls if the person is also alleged to have failed to implement such controls in the first place. The court rejected this argument, reasoning that an indictment may allege alternative grounds and that the allegations were not so inconsistent that they both could not be alleged. *See* Coburn Order at *12–13.

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were based did not list him as a party to the correspondence.[5] Coburn challenged the same two bribery counts on the basis that the multiple emails he sent to the alleged co-conspirators were in furtherance of a single alleged offer or authorization of a payment to a foreign official and therefore could not support separate bribery counts.[6]

The court reviewed these challenges to the sufficiency of the indictment under a deferential standard, acknowledging that a charging document need only contain the facts constituting the charged offense.[7] The defendants also requested a bill of particulars, which was granted in part.[8]

A. The Unit of Prosecution

1. Communications by Others

The indictment included three counts of violating the FCPA's anti-bribery provisions, based on three individual emails. Schwartz challenged two of these three counts because he – unlike his co-defendant – was not identified in the indictment as being on two of the three emails.[9]

"The [*Coburn*] court agreed with the government that the 'unit of prosecution' under the FCPA is each use of the means or instrumentalities of interstate commerce – in this case, emails – rather than each offer, promise, or authorization to give anything of value."

As a matter of first impression in the criminal context,[10] the court addressed the question of what it means for a defendant to "willfully use the mails and means and instrumentalities of interstate commerce." The use of the "mails or any means or instrumentality" of interstate commerce in the FCPA context can mean international travel through the United States, use of the U.S. mail, phone calls to or from the United States, emails through a U.S. server, and directing bank transfers through the United States.

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5. Coburn Order at *2.
6. *See id.* at *5.
7. *See id.* at *1.
8. *See id.* at *13–17.
9. *See id.* at *2.
10. A different district court reached the same conclusion in an FCPA civil case. *See SEC v. Straub*, No. 11-civ-9645-RJS, 2016 WL 5793398, *11–12 (S.D.N.Y. Sep. 30, 2016) (applying *Pereira* to the FCPA's jurisdictional element).

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Relying on case law interpreting the U.S. mail fraud statute, the court held that a defendant charged with participating in a bribery scheme need not personally "use" interstate commerce, so long as such use by another was a foreseeable part of the scheme.[11] Additionally, the court ruled that Schwartz could be charged under the theory of accomplice liability or conspiracy liability under the *Pinkerton* doctrine. This doctrine provides that a conspirator may be liable for a co-conspirator's acts in furtherance of a conspiracy if those acts are reasonably foreseeable.[12] The court further concluded that the question of "use" is an issue of fact and not grounds to dismiss the indictment, leaving the question to the jury.[13]

2. Multiple Communications Regarding a Single Bribery Scheme

The court next examined Coburn's argument that the three emails related to a single alleged offer, promise, or authorization of a payment and thus could support only a single bribery count, not three separate violations of the law.[14] The court first looked to the text of 15 U.S.C. § 78dd-1(a), which provides that "[i]t shall be unlawful . . . *to make use* of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of *the payment of* any money . . . ."[15]

Based on the statutory language, the court agreed with the government that "make use of" (interstate commerce facilities) is the "operative verb" in section dd-1(a) of the FCPA. The court therefore held that the use of interstate commerce (in this case, email) – rather than the "offer, promise, or authorization" of a bribe – is the prohibited act.[16] In its ruling, the court acknowledged that bribery is the overall subject matter of the statute. However, the court rejected the argument that the alternative jurisdiction provision for the FCPA[17] – providing for liability without the "use of the mails or any means or instrumentality of interstate commerce" – demonstrated that the offer, promise, or authorization was the "unit of prosecution." Rather, the court reasoned that this alternative offers a "backstop" for cases not involving interstate commerce.[18]

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11. *See* Coburn Order at *4, *4 n.7.
12. *See id.* at *4–5 (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).
13. *See id.* at *4.
14. *See id.* at *5.
15. (emphases added).
16. *See* Coburn Order at *6–7.
17. 15 U.S.C. §78dd-1(g).
18. *See* Coburn Order at *7–8.

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Absent direct authority on the issue, the court analogized the FCPA to the mail and wire fraud statutes,[19] noting the laws' similar grammatical structure in elevating the "means" element (the use of mails or wires) over the "substantive offense" (fraud). Given the "well-settled" tendency to charge each mailing or wire communication for violations of these statutes, the court found it "suggestive" that this charging scheme would apply similarly to the FCPA.[20]

For further confirmation, the court looked to the Travel Act, which penalizes travel, or the use of mails or facilities, in interstate commerce with the intent to further unlawful activity.[21] The court reasoned that the Travel Act's "operative verb" of "travel[] in interstate or foreign commerce" comprises the wrongful act, and thus the unit of prosecution, under the law and enables prosecutors to reach criminals who intentionally commit unlawful acts in a second state to avoid prosecution. As a result, the court ruled that each of several interstate acts in furtherance of an FCPA scheme is itself a "permissible, if not inevitable, unit[] of prosecution."[22]

This ruling on the unit of prosecution represents a broad and pro-prosecution reading of the FCPA and also clearly presents practical problems, as the court acknowledged in a footnote.[23] In particular, this construction of the statute is subject to prosecutorial abuse and raises the potential for jury confusion that may result from a large number of multiple counts, all of which relate to the same scheme. The court noted that it would address this in instructing the jury, if requested, in order not to prejudice the defendant due to the existence of multiple counts related to a single bribe.[24] The practical effect of such an instruction in limiting a jury's inference of guilt remains to be seen.

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19. *See* 18 U.S.C. § 1341 (mail fraud statute); 18 U.S.C. § 1343 (wire fraud statute).
20. *See* Coburn Order at *9.
21. *See id.* at *9–10 (analyzing 18 U.S.C. § 1952).
22. *See id.* at *10–12. On the other hand, the FCPA targets a specific form of criminal activity, foreign bribery, going to great lengths to describe what kind of intent and conduct behind an offer to pay is prohibited. In contrast, the mail and wire fraud statutes target a vague "scheme or artifice to defraud," and the Travel Act penalizes broadly defined "unlawful activity" that involves interstate commerce.
23. *See* Coburn Order at *12 n. 17.
24. *See id.*

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B. Key Takeaways

Potentially significant impacts of the *Coburn* ruling include the following:

- *Foreseeability rule*: As had been previously addressed in the civil context, *Coburn* indicates that a defendant need not personally "use" the mails or interstate commerce so long as it is foreseeable that such communications would occur.
- *Potential for multiple charges*: The most direct implication of *Coburn* is the ability of prosecutors to charge a defendant with multiple counts of bribery relating to a single bribe, one for each use of interstate commerce made in furtherance of that bribe. Given the court's ruling on foreseeability, a defendant potentially could be charged with multiple counts of bribery despite limited participation in a scheme, leading to broader exposure under the statute.
- *Statute of limitations considerations*: While the court did not specifically address statute of limitations considerations, its expansive reading of the FCPA's unit of prosecution raises questions about when the statute of limitation begins (and ceases) to run. If not connected to the offer, promise, or authorization of a bribe, which use "of the mails or any means or instrumentality of interstate commerce" triggers the statue? The *Coburn* ruling leaves open the possibility that an email or bank transfer sent long after an improper payment is complete could possibly serve as the basis of an FCPA charge, leaving the government potential room to plead the statute's five-year limitations period into irrelevance.
- *Limited impact on penalty amounts*: Although the *Coburn* decision makes it more likely that prosecutors may charge defendants with multiple FCPA counts for conduct made in furtherance of the same bribe, the quantum of any penalties likely will continue to be driven by the bribe amount or the profits earned from the bribe. This may be a persuasive, but not decisive, reason for future courts to disagree with the *Coburn* ruling and connect the unit of prosecution with the sentencing considerations under the statute.
- *Potential reputational consequences*: Even if the penalty amount remains the same, and despite the *Coburn* decision's footnote on prejudice, corporate defendants face significant reputational concerns arising from the view that an email can constitute the unit of prosecution of an FCPA case. Under *Coburn*, regardless of the number of bribes offered, prosecutors will have the discretion (whether or not likely to be exercised) of merely counting emails, enabling press releases announcing a maximally embarrassing number of FCPA charges from a minimal number of illicit payments.

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II. *United States v. Hoskins*

In November 2019, a jury convicted U.K. national Lawrence Hoskins, a former employee of Alstom S.A.'s U.K. subsidiary, of substantive and conspiracy violations of the FCPA and the money laundering statute. These charges stemmed from Hoskins's alleged role in a conspiracy by the U.S. Alstom entity to bribe Indonesian government officials to secure a contract with an Indonesian state-owned electricity company.[25] The jury found that Hoskins had acted as an agent of Alstom S.A.'s U.S. subsidiary when he facilitated improper payments to government officials through two consultants hired to provide legitimate services to the company.

"[The *Hoskins* decision] signals a willingness on the part of U.S. courts to place limits on the use of agency theory to establish liability under the FCPA and similar laws."

On February 26, 2020, in a surprising ruling, the district court granted in part Hoskins's motion for judgment of acquittal, concluding that the evidence did not support his conviction as an "agent of a domestic concern" under the FCPA.[26]

A. Appellate Context

The trial and conviction of Hoskins followed a Second Circuit decision in the same case in 2018. The Second Circuit held that a non-resident foreign national could not be held liable for violations of the FCPA under a conspiracy theory where that person is not an officer, director, employee, shareholder, or agent of a U.S. issuer or domestic concern or did not commit an act prohibited by the FCPA in the territory of the United States.[27]

However, the Second Circuit's decision left open the question of whether Hoskins had been an "agent" of a domestic concern, namely Alstom's Connecticut-based subsidiary, Alstom Power Inc. ("API"), a sister company to the Alstom U.K. subsidiary that employed Hoskins.

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25. *See* Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020, at 22.

26. *See* Hoskins Order at *9.

27. *See* Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, et al., "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/insights/ publications/2018/08/20180830-fcpa-update-august-2018, at 1 (discussing *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018)).

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B. Scope of Agency

Drawing on traditional principles of agency law, the trial court instructed the jury that an agency relationship is formed where there is (i) "a manifestation by the principal that the agent will act for it"; (ii) "acceptance by the agent of the undertaking"; and (iii) "an understanding between the agent and the principal that the principal will be in control of the undertaking."[28]

Section 78dd-2 of the FCPA provides that a non-resident foreign national may be held liable for violations under the statute if the defendant is found to have acted as an "agent" of a "domestic concern."[29] Although "agent" is not defined in the statute, it is well established that "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[30]

"Agency" is a quintessentially legal concept, the parameters of which have been discussed in multiple restatements and case law going back centuries.[31] It is also undoubtedly a fact-specific inquiry. The court's ruling is a serious attempt by a judge to examine that legal relationship, using centuries of authority to go beyond the mere question of whether one party is acting on another's behalf.

The operative definition of agency, according to the court, is a relationship where a "principal" manifests assent that an "agent" will "act on the principal's behalf and subject to the principal's control," and the agent likewise "manifests assent or otherwise consents so to act."[32] The court distinguished between agency, a specific relationship between agent and principal, and other forms of contractual relationship, where one party agrees to perform acts on behalf of the other. According to the court, the factor that distinguishes agency from a mere contractual relationship is the principal's right to control not only the purported agent's act, but also how the act is performed.[33] To form an agency relationship, a principal therefore must retain the

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28. Hoskins Order at *2 n.1. The jury also considered whether Hoskins was guilty of conspiracy to commit money laundering and of money laundering based on his knowledge that the funds used in the bribery scheme would be paid from a location within the United States. *Id.* at *9.
29. *See* 15 U.S.C. § 78dd-2(a) ("It shall be unlawful for any . . . officer, director, employee, or agent of such domestic concern . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay . . .").
30. *Neder v. United States*, 527 U.S. 1, 21 (1999) (internal quotations omitted).
31. *See, e.g.*, Restatement (First) of Agency (1933); Restatement (Second) of Agency (1958); Restatement (Third) of Agency (2006); *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Willcox & Gibbs Sewing-Mach. Co. v. Ewing*, 141 U.S. 627 (1891); *Nicholson's Lessee v. Mifflin*, 2 U.S. 246 (1796).
32. Hoskins Order at *2 (quoting Restatement (Third) of Agency § 1.01 (2005)).
33. *Id.* at *3.

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right to assess an agent's performance and terminate an agent, and the agent must consent to do the work the principal directs on behalf of the principal and subject to the principal's instructions.[34]

According to the indictment, Hoskins was employed by Alstom's U.K. subsidiary, was assigned to a French subsidiary, and worked as a senior vice president for the Asia Region in an Alstom department that supported subsidiaries (including API, the domestic concern) in securing contracts around the world.[35] According to Hoskins, his role was "oversight and approval" in selecting consultants and approving their terms of engagement after the domestic concern (*i.e.*, relevant subsidiary) had negotiated them.[36] Hoskins provided testimony, which the government failed to counter, that the domestic concern's representative with whom he worked to secure the Indonesian power contract did not have the ability to fire, reassign, or demote him.[37]

The government's evidence was sufficient to show that the domestic concern controlled the hiring of consultants for the project, including who should be retained, how much they were paid, and the terms of their agreements. However, the evidence fell short of showing beyond a reasonable doubt that the domestic concern had interim control over the actions of Hoskins in approving contracts with the consultants.[38] The court also focused on the fact that the relationship between Hoskins and the domestic concern lacked the typical "indicia of control," such as the principal's capacity to instruct and assess the agent's performance or to revoke an agent's authority, thereby terminating the agency relationship.[39]

The court declined, however, to overturn the three money laundering counts. It rejected Hoskins's argument that there is a need to distinguish between the use of a U.S. company to make the payments and the use of U.S. bank accounts to make the payments.[40] The court concluded that the government's evidence – which included the consultancy agreements providing that API would pay the consultants directly and emails referring to the consultancy payments – was sufficient for the jury to conclude that Hoskins was aware the payments would pass through the United States.[41]

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34. *Id.* at *4.
35. *United States v. Hoskins*, Third Superseding Indictment, No. 3:12-cr-238-JBA, 2 (D. Conn. Apr. 15, 2015).
36. Hoskins Order at *4.
37. *Id.* at *4, *8.
38. *Id.* at *7–8.
39. *See id.* at *8.
40. *See id.* at *9.
41. *See id.* at *9–11.

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On March 6, 2020, Hoskins was sentenced to fifteen months in prison and fined $30,000.[42]

C. Key Takeaways

Only after Hoskins's conviction could the court so thoroughly address the agency arguments based on the evidence adduced at trial. Of course, many defendants in FCPA cases (and more broadly) do not hold the government to its burden of proof.

Subject to the Second Circuit's future ruling, and assuming courts in other circuits follow this decision, *Hoskins* is significant for foreign nationals and foreign non-issuers, including:

"The [*Hoskins*] court articulated narrower grounds for holding foreign nationals liable under the FCPA, requiring an examination – in cases where the individual has not acted within the United States – of the exact relationship with the relevant issuer or domestic concern."

- *Increased focus on the relationship of a foreign national to an issuer or domestic concern:* The court articulated narrower grounds for holding foreign nationals liable under the FCPA, requiring an examination – in cases where the individual has not acted within the United States – of the exact relationship with the relevant issuer or domestic concern. Regulators likewise should be attentive to where an issuer or domestic concern sits in a broader corporate scheme, relative to individuals implicated in foreign bribery schemes. Under *Hoskins*, it will be insufficient merely to identify an issuer or domestic concern somewhere in the chain of alleged bribery.
- *More traditional interpretation of agency theory*: The *Hoskins* case involved agency theory as a jurisdictional hook for liability of a foreign national employee of a sister company who had not set foot in the United States. Most agency cases (within and beyond the FCPA context) deal with circumstances in which the purported principal – often a corporate parent – is liable for the actions of an agent, typically an employee of a foreign subsidiary. The court's decision might be relevant here as well, and prosecutors and regulators may take greater care to substantiate their bases for the alleged principal-agent relationship before bringing charges.

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42. *See* DOJ Press Release, No. 20-287, *Former Senior Alstom Executive Sentenced to Prison for Role in Money Laundering Scheme to Promote Foreign Bribery* (Mar. 6, 2020), https://www.justice.gov/opa/pr/former-senior-alstom-executive-sentenced-prison-role-money-laundering-scheme-promote-foreign.

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III. Conclusion

Coburn and *Hoskins* are district court cases that lack binding authority on other courts, and both are subject to appeal. In fact, in *Hoskins*, the government already has appealed to the Second Circuit in an effort to preserve its trial conviction in this long-running prosecution.[43]

Nevertheless, these rulings still may have outsized influence on how judges interpret the FCPA and how the government prosecutes future cases, especially given the paucity of case law defining the statute's parameters. As DOJ continues its focus on prosecuting individuals, these cases also may foreshadow an increase in available FCPA precedent.

In addition to *Coburn* and *Hoskins*, other FCPA challenges are making their way though district courts. On March 11, 2020, Judge Allison Burroughs of the U.S. District Court for the District of Massachusetts granted a new trial on the basis of ineffective assistance of counsel to Haitian-American businessmen Joseph Baptiste and Roger Boncy.[44] Baptiste and Boncy were found guilty last June of conspiracy to violate the FCPA and Travel Act, among other charges, in connection with a scheme to bribe Haitian officials to obtain authorizations for a port development project in Môle Saint Nicolas.

More broadly, there remains a greater likelihood that individuals proceed to trial and engage in related motion practice, including in FCPA cases, compared to corporate defendants that typically negotiate settlements. The rulings in these individual cases can be highly relevant also in the enforcement context, as companies seek to defend themselves against potential charges by DOJ and the SEC.

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43. On March 9, 2020, the Government filed an appeal in *United States v. Pierucci (Hoskins)* with the Second Circuit.

44. *United States v. Baptiste*, Memorandum and Order on Defendants' Motions for Judgment of Acquittal and for a New Trial, 17-cr-10305-ADB (Mar. 10, 2020), ECF No. 286.

The SFO's Failed *Barclays* Prosecutions: The Limitations of English Corporate Liability Exposed?

The investigation by the UK Serious Fraud Office into Barclays led to high-profile charges against two corporate entities and four very senior executives. Those prosecutions have ended following the equally high-profile dismissal of the charges against the corporate entities and the speedy acquittal of the individual defendants.

In dismissing the charges against the corporate entities, the courts adopted a very strict interpretation of the identification principle governing the attribution of corporate criminal liability in English law. The outcome left the SFO wrong-footed and will force the UK's main fraud prosecutor to reassess its approach to corporate prosecutions. In addition, it will no doubt intensify the discussion on reform of the English corporate criminal liability regime generally.

The Barclays Cases

At the height of the global financial crisis in 2008, the UK Treasury was in the process of bailing out the UK banking sector. Barclays, however, worked hard to avoid falling under public ownership and to obtain investment from other sources in order to meet capital requirements. The SFO case arose out of Barclays' capital raising arrangements in June and October 2008 when the Prime Minister of Qatar was persuaded to invest in Barclays via various entities associated with the Qatari government, as well as a personal investment vehicle. As is customary, Barclays paid commissions to new investors, the market practice being that all investors would be paid the same percentage commission. The Qatari investors, however, insisted on receiving significantly higher commissions. Given its dire need of the Qatari funds, Barclays put in place a mechanism whereby the Qatari investors were paid additional sums under two Advisory Service Agreements, dated June 25, 2008 ("ASA 1") and October 31, 2008 ("ASA 2"). Under the ASAs, the Qataris would provide broadly defined "advisory services" in return for fees of £42 million under ASA 1 and £280 million under ASA 2, sums calculated to provide the Qatari investors with the additional investor commissions demanded. The ASAs were intended to generate business for Barclays in the Middle East. The ASAs were negotiated by senior Barclays executives, and approved by a committee of its board.

On June 25, 2008 Barclays announced that it had raised £4.5 billion from the Qatari investors and three further sovereign wealth funds. The announcement mentioned the fact of ASA 1, but not the fee paid under it. On October 31, 2008

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Barclays announced that it had raised a further total of £7.3 billion from the Qatari investors and from Abu Dhabi. ASA 2 was not mentioned at all. The terms of both capital raisings were sent out to Barclays' investors in prospectuses and the relevant subscription agreements. Within these documents it was stated that all investors would receive equal commissions, and no link was made to either of the two ASAs.

Following a further request made near to the closing of the second capital raising, Barclays made available a loan of almost $3 billion to the Qatari sovereign wealth fund, an amount almost exactly the same as the one this entity invested in Barclays.

A. Allegations

The Serious Fraud Office ("SFO") contended that ASA 1 and ASA 2 were dishonest means to pay the Qataris additional investor commissions, and that there were no services envisaged or provided.[1] In particular, the SFO alleged that John Varley (the former chief executive officer and a director of Barclays), Roger Jenkins (the former executive chairman of investment banking and investment management for the Middle East), Thomas Kalaris (the former chief executive of wealth and investment management), and Richard Boath (the former head of financial institutions group in Europe, Middle East, and Africa) conspired to use the ASAs to hide the additional fees paid to the Qataris from other investors. Chris Lucas, the former Barclays finance director, was alleged to be key to the conspiracy but was not charged due to his ill health.

Specifically, the SFO alleged that the statement in the documents Barclays publicized setting out the terms of the capital raising to the effect that all investors would be paid the same commission relative to their investment amounted to a fraudulent representation.

The SFO also alleged that it had been agreed for the Qataris to use the loan from Barclays to invest in Barclays shares, propping up the Barclays' share value. The loan would thus have amounted to unlawful financial assistance.

The SFO proceeded to charge two Barclays corporate entities and the above four senior executives in relation both to the allegedly fraudulent misrepresentations in the capital raising prospectuses, and the allegedly unlawful loan.

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1. *R v Barclays plc* (unreported), ruling of May 21, 2018, Annex.

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B. Proceedings Against the Corporate Entities

i. The Charges and Their Dismissal

The SFO charged both Barclays PLC and, subsequently, Barclays Bank PLC (the entity holding Barclays' UK banking licences) with conspiracy to commit fraud by false representation (contrary to s1 of the Criminal Law Act 1977) in respect of the commission statements in the capital raising prospectuses, and with providing unlawful financial assistance (contrary to s151(1) and (3) of the Companies Act 1985; since superseded) by lending money to the Qatari sovereign wealth fund that it then used to invest in Barclays.[2]

In May 2018, all charges against Barclays Bank and Barclays PLC were dismissed by Mr Justice Jay, sitting at Southwark Crown Court, on the basis that "a correct application of legal principles governing corporate liability in a criminal context lead inevitably to the conclusion that these charges cannot be maintained."[3]

"The SFO's failure to get charges to 'stick' to the corporation raises concerns about its ability to hold companies to account [and] highlights the difficult legal framework within which corporate criminal enforcement operates in the United Kingdom."

The SFO then applied to the High Court to reinstate the criminal charges against the bank through a rarely used procedure known as "a voluntary bill of indictment," only available where there is new evidence or if the trial judge had erred in law, or if there had been a procedural irregularity.

Lord Justice Davis, who heard the application in the High Court, agreed with Mr Justice Jay that none of the individual defendants could be regarded as directing minds for Barclays in respect of the particular acts charged, and so rejected the SFO's application in October 2018.[4] In relation to the then-applicable law on unlawful financial assistance, corporate liability was predicate to any personal liability of officers responsible and, following Davis LJ's ruling, the SFO therefore had to abandon also the individual charges in relation to the $3 billion loan.

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2. *R v Barclays plc* (unreported), ruling of May 21, 2018, Annex.
3. *R v Barclays plc* (unreported), ruling of May 21, 2018, para 6.
4. *SFO v Barclays PLC* [2018] EWHC 3055 (QB), para 3.

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ii. The Courts Adopt a Very Restrictive Reading of an Already Restrictive Corporate Liability Regime

Under English law, prosecutors have to demonstrate that the "directing mind and will" of a company was involved in alleged criminality in order to prove that the company itself is liable. Referred to as the identification principle, this means that a company will only be criminally liable if very senior executives or directors commit an offense, the conduct and culpability of which are attributed to the company.[5]

The charges against the Barclays corporate entities therefore turned on whether the alleged criminal dishonesty of the bank's senior officers (the individual defendants) could be attributed to the bank in order for the bank itself to be criminally liable.

Although there is no fixed definition of which roles or functions qualify as a directing mind of a company, the SFO reasonably assumed that as its CEO, John Varley would qualify to fix Barclays with corporate criminal liability.

Barclays, however, argued that while the executives (i.e., the individual defendants) had been given the authority to negotiate the terms of the capital raisings, including the ASAs and the loan, it was only the board that had the authority to conclude the ASAs, and Barclays' General Credit Committee that had the authority to agree the loan. Despite their obvious seniority, Barclays argued, these individuals did not have the authority formally to commit Barclays to these particular acts.

Agreeing with the substance of these arguments, Mr Justice Jay found that "… [John Varley, Richard Jenkins and Chris Lucas] were not the directing mind and will of Barclays. The constitutional position is as clear as it is narrow: the directing mind and will of Barclays was the board, subject to express delegation by the board to a relevant committee."[6]

Mr Justice Jay found that this position was unaffected by the individuals' autonomy in negotiating the deals. He found that the company, and no individual person, made the relevant representations to the market, which meant that not even Varley's participation in setting up the transaction – which the SFO argued resulted in the fraudulent misrepresentation to the market – could fix the company with criminal liability. Although, on the SFO's case, the negotiation of the deal with Qatar was part of the conspiracy which would ultimately lead to the misleading statement to the market, Varley could not make the statement as Barclays and so Barclays could not be part of the conspiracy.

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5. The leading authority on this is generally considered to be *Tesco v Nattrass* [1971] UKHL 1.
6. *R v Barclays plc*, para 167.

In his ruling refusing the SFO's application for a voluntary bill of indictment, Lord Justice Davis relied upon Lord Reid's summary in the leading authority on corporate criminal liability, *Tesco v Nattrass: that "normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not… it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them… it may not always be easy to draw the line but there are cases where the line must be drawn."*

Crucially, Lord Justice Davis noted that it is not enough simply to consider what the status of an individual within a company is, but that the focus should be on the authority that the individual has with regard to the specific act or acts which give rise to criminal culpability. Critically, Lord Justice Davis found that despite their undeniable seniority, none of the individual defendants were ultimately authorized either to make the statements in the prospectuses for the capital raisings, or agree to make the loan to the Qatari sovereign wealth fund. Consequently, as they did not have full discretion to act independently, they could not be regarded as the directing mind and will for the purpose of the specific acts giving rise to the alleged criminal offences.

C. Failed Proceedings Against the Individuals

Four executives were charged with fraud and conspiracy to defraud in relation to the two capital raisings: Varley, Jenkins, Kalaris, and Boath. All four defendants pleaded not guilty.

The SFO asserted that the defendants never intended that valuable advisory services would be provided, and that they concealed this from the board and from Barclays' lawyers. The defense case was that the ASAs were genuine vehicles for Barclays to leverage their connection with the Qatari sovereign entities to generate lucrative business in the Middle East. The court heard evidence that the Barclays board of directors knew about the ASAs and that the bank had been advised by its lawyers that they were legal, even given their obvious links to the capital raisings, as long as the bank received genuine services from the Qataris. The defense could also draw the court's attention to the fact that the SFO had not called any evidence to demonstrate that Barclays did not generate business from the ASAs, in particular there was no evidence on the subject from Barclays' Qatari counterparts.

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In June 2019, Mr Justice Jay dismissed the cases against all four defendants at the conclusion of the prosecution case, finding that the SFO had failed to apply the law correctly, and that there was insufficient evidence of dishonesty against Varley.[7]

However, the Court of Appeal overturned Mr Justice Jay's findings in relation to all individuals except for Varley[8] which led to a retrial of the three remaining defendants in front of a new trial judge, Lord Justice Popplewell.

At the re-trial the SFO did not call any live witnesses, relying almost entirely upon emails and recorded telephone calls between the defendants and other Barclays employees. Both Jenkins and Kalaris gave evidence, explaining how business with Qatar, as well as potential transactions referred to Barclays by the Qataris then in the pipeline (in particular a lucrative oil and gas price hedging mandate), justified paying the fees.

On February 28, 2020, the jury acquitted each of Jenkins, Kalaris and Boath, having deliberated for less than six hours.[9]

D. Analysis and Conclusions

The complete failure of its long-running and costly[10] investigation into Barclays' 2008 capital raisings is a huge blow to the SFO. It was the first, and probably only, example of criminal charges bought in the UK against a major bank and its senior executives in relation to conduct during the global financial crisis.

In terms of the trials of the individuals, the jury may well have struggled to convict on evidence which suggested that the defendants had negotiated agreements with legitimate counterparties, on which Barclays' lawyers had advised, and which senior Barclays bodies had approved. The SFO failed to call any live witnesses to support its claim that Barclays' lawyers had been duped into signing off the agreement, while none of the lawyers involved were charged. Moreover, the trial was complex, with large spreadsheets and financial information presented to the jury. It may be that it was simply too complex for a jury to follow. The delay of the prosecution, over 10 years since the conduct took place, may have added to the jury's sympathy for the defendants.

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7. *R v Varley and others*, unreported, ruling of April 3, 2019, para 626.
8. *R v Varley and others* [2019] EWCA Crim 1074, para 172.
9. *See* https://www.sfo.gov.uk/2020/02/28/former-barclays-executives-acquitted-of-conspiracy-to-commit-fraud/.
10. According to an answer to a freedom of information request, the SFO spent over £12.2 million to investigate and prosecute the *Barclays* cases; *see* https://globalinvestigationsreview.com/article/1216267/sfo-barclays-qatar-investigation-costs-revealed.

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The SFO's failure to get charges to 'stick' to the corporation raises concerns about its ability to hold companies to account. Importantly, however, it also highlights the difficult legal framework within which corporate criminal enforcement operates in the United Kingdom.

The courts' restrictive interpretation of the identification principle means that corporate decision-making structures may provide an effective shield to corporate criminal liability as a result of the *prima facie* criminal acts of senior executives. Indeed, following *Barclays*, if a formal decision has been conferred to a particular body, there is now an argument that the company will not be criminally liable in circumstances where a senior executive (potentially as senior as its CEO), but not the body itself, is aware of the underlying criminal design.

"Specifically in relation to enforcement under the Bribery Act 2010, the impact of *Barclays* may be legally significant, but practically limited. Proceeding against companies for substantive bribery offenses will now likely be considerably more difficult."

Specifically in relation to enforcement under the Bribery Act 2010, the impact of *Barclays* may be legally significant, but practically limited. Proceeding against companies for substantive bribery offenses will now likely be considerably more difficult. If, for instance, a dedicated committee is responsible for approving a payment to a public official which only the senior executive who negotiated it knows is corrupt, the company may well now be shielded from substantive liability for the corrupt payment itself. Even corporate liability on the basis of the corrupt *promise* by the senior executive is unclear; on one analysis she/he could not actually promise to make the payment, but only, in reality, to use best efforts to procure the committee to make it. This would point away from corporate liability.

This will mean that the SFO will have to fall back on the corporate, "failure to prevent" offence under section 7. Even here, however, the SFO will need to be rigorous with its analysis of the acts by the "associated person" for which the company is to be held liable. In the above scenario, there can be no liability on the basis that the senior executive paid the bribe because she/he did not; the committee did. However, even though an argument to the contrary could be made, it would seem tolerably clear that even a promise which needs to be analyzed as one to use

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best efforts to procure the committee to make a corrupt payment would result in individual liability under sections 1 or 6. This would satisfy the test for corporate liability for failing to prevent the senior executive from making the corrupt promise.

It is yet to be seen what impact *Barclays* will have on the way that charges are brought against companies. The SFO is likely still to be digesting the *Barclays* rulings and what they mean for its investigations into corporate misconduct and approach to corporate prosecutions. As an illustration of the limitations of the English corporate liability regime, *Barclays* certainly strengthens the already strong clamor, not least from successive SFO directors, for overall reform of corporate criminal liability in English law. In the meantime, corporate advisers will have taken note and likely been emboldened by the courts' decision to take a firm line on the issue of corporate attribution.

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