

# 5th Circ. Ruling Leaves Open Questions On FCPA Liability

By **Bruce Yannett, Winston Paes and Philip Rohlik** (March 24, 2023)

In a much-awaited ruling, the U.S. Court of Appeals for the Fifth Circuit declined to join the U.S. Court of Appeals for the Second Circuit in rejecting the application of conspiracy or aiding and abetting liability to foreign nonissuers not otherwise covered by the Foreign Corrupt Practices Act.

While the FCPA's anti-bribery provisions clearly prohibit the bribery of foreign officials, the statute's extraterritorial application to foreign bribe payers has been subject to judicial review in recent years.

The FCPA specifies three categories of persons covered by the prohibition on foreign bribery: (1) issuers; (2) domestic concerns; and (3) any other person while in U.S. territory, as well as any officer, director, employee, agent or stockholder thereof.[1]

Historically, the U.S. Department of Justice also invoked conspiracy and aiding and abetting liability to cover foreign nonissuers acting outside the U.S. in concert with issuers or domestic concerns.[2]

However, the Second Circuit rejected that approach in 2018 in *U.S. v. Hoskins* — i.e., *Hoskins I* — and further limited the practical scope of the statute last year in *Hoskins II*, when it narrowly interpreted "agent" by confining it to its common law meaning.

In *U.S. v. Rafoi*, the Fifth Circuit on Feb. 8 reversed two district court rulings dismissing FCPA indictments due to a lack of showing that foreign nonissuers were agents of a domestic concern.[3]

Although the Fifth Circuit explicitly avoided ruling on whether the defendants could be tried as co-conspirators, and did not address the definition of an agent under the FCPA — both of which were addressed by the Second Circuit in its *Hoskins* decisions — the ruling leaves open the question of whether either *Hoskins* decision applies outside of the Second Circuit.[4]

## Background

Rafoi stems from an alleged kickback scheme in which U.S. companies bribed Venezuelan officials for preferential payment of invoices by *Petróleos de Venezuela SA*, the Venezuelan state-owned and state-controlled oil company.[5]

Daisy Teresa Rafoi Bleuler is a Swiss partner of a Swiss wealth management company, and Paulo Jorge Da Costa Casquerio Murta is a Swiss and Portuguese employee of a different Swiss wealth management company.

They are alleged to have aided other co-defendants execute the bribery and money laundering scheme by, among other things, opening foreign bank accounts in the co-defendants' names for the purpose of hiding the illegal proceeds.



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Rafoi is not alleged to have committed any of the alleged corrupt acts in the U.S.; Murta allegedly traveled to Miami once to meet with a co-defendant.

Both were charged with conspiracy to violate the FCPA and money laundering.[6]

The indictment alleged that Rafoi and Murta were agents of their U.S. co-defendants and that Murta committed a corrupt act while on U.S. territory.

Rafoi and Murta moved separately to dismiss the indictment. Both argued that the U.S. District Court for the Southern District of Texas lacked subject matter jurisdiction on the conspiracy to violate the FCPA charge because the indictment failed to demonstrate that they belonged to any of the categories of defendants to which the FCPA applies.

Both also asserted that the indictment did not sufficiently plead that either was in an agency relationship with the U.S. co-defendants.[7]

Rafoi claimed that the services provided by her wealth management company were pursuant to a professional, not an agency, relationship.[8]

Unsurprisingly, Rafoi and Murta also asserted that the term agent was unconstitutionally vague.[9]

In separate opinions, U.S. District Judge Kenneth Hoyt dismissed the FCPA conspiracy charges as to Rafoi and Murta.

In a Nov. 10, 2021, opinion granting Rafoi's motion to dismiss the indictment, the court held that a defendant can only be an agent of a domestic concern if the agency relationship exists in the U.S.

The court articulated the principle that when the government charges a non-U.S. defendant as an agent of a domestic concern but does not allege that the defendant committed an unlawful act in the U.S., the government must establish in the indictment that there was an agency relationship in the U.S. with "undisputed evidence of mutual assent" to invoke subject matter jurisdiction.[10]

The district court found that the government did "not present direct evidence that the defendant was an agent," and thus "no agency relationship [was] established in the United States." [11]

In a July 11, 2022, opinion granting Murta's motion to dismiss the indictment, the district court similarly held that it lacked jurisdiction because the indictment only alleged Murta's conduct abroad to establish the agency relationship, and therefore failed to show that Murta was in an agency relationship in the U.S.[12]

As to both defendants, the district court also found that the term "agent" as applied to Rafoi and Murta was unconstitutionally vague.[13]

The court noted that the application of the term "agent" as a basis for jurisdiction was "such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses" how the term should be applied to establish jurisdiction.[14]

The DOJ appealed both dismissals.

## The Fifth Circuit's Decision

In a unanimous opinion written by U.S. Circuit Judge Kurt Engelhardt, the Fifth Circuit reversed the district court's dismissal of the superseding indictment as to Rafoi and Murta on every ground.

As an initial matter, the opinion noted that a court's subject matter jurisdiction is a separate question from whether a statute covers a particular defendant.[15]

Subject matter jurisdiction, permitting a federal court to hear a case, exists where the indictment alleges a violation of the laws of the U.S. Whether a statute reaches extraterritorial acts — i.e., whether the defendants or their conduct are covered by the FCPA — is a question on the merits.[16]

Regarding the conspiracy to violate the FCPA, the Fifth Circuit rebuffed the district court's imposition of heightened pleading requirements at the commencement of a case, and explained that simply alleging agency is sufficient for an indictment.

The court noted that the purpose of an indictment is to put defendants on notice of a charge. As the indictment "specifically allege[d] that both Rafoi and Murta acted as 'agent[s] of a domestic concern,'" it met the "minimal constitutional standards" of putting the defendants "on notice of the charge." [17]

As a result, the court declined to rule on the issue of whether the defendants could be charged with conspiracy even if they were not agents. The Fifth Circuit instructed the district court to address those issues on remand.[18]

In a footnote, the court clarified that it

neither accepts nor rejects the theory that an individual who falls outside of the actors enumerated in the FCPA can be held liable as a conspirator under a secondary-liability theory.[19]

The Fifth Circuit applied the same logic to Murta's claim and found that the indictment sufficiently linked his presence in the U.S. to a corrupt act.

Because of the superseding indictment's "express characterization of his status as a person acting while in the United States," the court noted that the indictment was sufficient to put him "on notice of the charge asserted against him such that he may prepare a defense." [20]

The court rejected Murta's argument that the government had to show "'a sufficient nexus between the conduct condemned and the United States'" to satisfy due process because he was a non-U.S. citizen.[21]

The court explained that there were no due process concerns because "Murta had fair warning that his" alleged activities — unlawfully transmitting money through the U.S. to foreign bank accounts, and committing bribery and money laundering — are "condemned universally by law-abiding nations" and could result in criminal charges.[22]

Finally, the Fifth Circuit rejected the district court's argument that the term "agent" was unconstitutionally vague as applied to Rafoi and Murta. The court explained that even though the FCPA does not define the term "agent," the term is governed by the common law definition, and therefore not vague.

The court did not expand on what that common law definition was, explaining that a statute is only unconstitutionally vague if it does not define the "'criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"[23]

According to the Fifth Circuit, a "person of common intelligence would have understood" that setting up bank accounts for other people so that they could hide the proceeds of a bribery scheme was "'treading close to a reasonably-defined line of illegality' under an agency theory." [24]

## **The Hoskins Decisions**

Lawrence Hoskins was indicted on charges of conspiracy to violate the FCPA, substantive violations of the FCPA, and money laundering in 2013.

Hoskins' motion to dismiss the indictment was granted in part by the U.S. District Court for the District of Connecticut, based on the district court's review of the FCPA's legislative history and conclusion that the FCPA was not intended to cover defendants other than those specified in the statute.[25]

In 2018, in *U.S. v. Hoskins* — i.e., the *Hoskins I* decision — the Second Circuit affirmed the district court's dismissal.[26] The Second Circuit held "'that Congress did not intend for persons outside of the [FCPA's] carefully delimited categories to be subject to conspiracy or complicity liability.'"[27]

Both the district court and Second Circuit left open the possibility that a foreign person who was an agent of an issuer or domestic concern could be liable directly under the FCPA, or under conspiracy or aiding and abetting theories.

The DOJ proceeded to trial under an agency theory and presented evidence that Hoskins carried out instructions received from employees of a domestic concern.

The jury returned guilty verdicts against Hoskins on the FCPA charges and most of the money laundering charges.

Thereafter, Hoskins moved under Federal Rule of Criminal Procedure 29(a) for a judgment of acquittal, which was granted as a matter of law by the district court.

The court found that no evidence was presented showing actual control of the agent by the principal or an agreement between the agent and principal providing for such control.[28]

The district court's definition of agency, which followed the Third Restatement of Agency, was affirmed by the Second Circuit in August 2022 — i.e., *Hoskins II*. [29]

The deadline for the appeal of that ruling recently passed, meaning that it is now settled law in the Second Circuit.

## **The Impact of Hoskins Outside the Second Circuit**

Rafoi is procedurally distinct from the various rulings that made up the Hoskins saga,[30] so it does not create a circuit split. Should Rafoi proceed to trial and ever return to the Fifth Circuit, however, it would be a good vehicle to reassess — or reaffirm — both Hoskins

cases.

In Rafoi, the district court started with the question of agency in evaluating the indictment, something not addressed in Hoskins until after trial. After deciding that the defendants were not agents, the district court — citing Hoskins I — concluded that they were not covered by the FCPA.

The Fifth Circuit rejected a heightened pleading standard for agency at the indictment stage, and had no reason to examine the question of whether nonagent foreign persons could conspire to violate the FCPA.

That said, the Fifth Circuit expressly left open the question, addressed in Hoskins I, of whether conspiracy liability could apply to defendants who are otherwise outside the scope of the FCPA.[31]

On the question of agency, Rafoi would be a more typical defendant than Hoskins to examine the question presented in Hoskins II if Rafoi returns to the Fifth Circuit after trial.

Hoskins was a non-U.S. citizen acting outside the U.S., allegedly in concert with employees of a domestic concern, a U.S. subsidiary of Alstom SA.

Hoskins was employed by the U.K. subsidiary of the same parent company and had no employment with or reporting relationship to the U.S. subsidiary.[32]

After trial, the district found — and the Second Circuit affirmed — that the complicated sister-company relationship and lack of actual control over Hoskins' actions meant that Hoskins was not an agent as a matter of law.[33]

Rafoi, according to the allegations in the indictment and her pleadings, was a wealth management professional who was allegedly working for her co-defendants as a service provider and money manager.[34]

This type of arms-length professional relationship is much more common than the complicated arrangement in Hoskins II.

A ruling on whether Rafoi's relationship amounted to agency under the FCPA would clarify the reach of the FCPA's definition of agent and just how far into ordinary contractual relations it extends.

Should Rafoi return to the Fifth Circuit, or should another court of appeals be confronted with a similar case, the term "agent" may remain sufficiently malleable to cover most situations, and Hoskins II might remain limited to its complicated facts.

Regardless of whether the Fifth Circuit revisits these issues in Rafoi or elsewhere, open questions concerning the scope and reach of the Hoskins decisions will likely remain the most fertile ground for judicial rulings in FCPA trials.

The key question of whether a defendant not otherwise covered by the FCPA can be charged under conspiracy and aiding and abetting theories is now an open issue in the Fifth Circuit as well as the U.S. Court of Appeals for the Seventh Circuit, where the U.S. District Court for the Northern District of Illinois declined to follow Hoskins in U.S. v. Firtash.[35]

Should the Second Circuit's interpretation of that issue prevail, many FCPA defendants will

have the opportunity to litigate agency under a variety of fact patterns, including the sister-company situation presented in Hoskins II and the contracted service provider situation presented in Rafoi.

The Rafoi fact pattern will undoubtedly present its own issues, including how much weight a court will assign to independent contractor clauses in such contracts.

That said, all of these questions will only come into play after the government has been put to its burden of proof, not at the indictment stage.

Although individuals are more likely to put the government to its burden of proof than corporations, doing so is a long and unpleasant experience, which both Hoskins and Rafoi suggest cannot be avoided.

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[1] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[2] See e.g., Document No. 4, Deferred Prosecution Agreement at ¶1, United States v. JGC Corp., Case No 4:11-cr-00260 (S.D. Tex. filed Apr. 6, 2011) (acknowledging charge of conspiracy with domestic concern to violate the FCPA), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-dpa.pdf>.

[3] United States v. Rafoi, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921 (5th Cir. Feb. 8, 2023).

[4] A district court in Illinois also examined the reasoning in Hoskins I and declined to follow it, although the issue has not yet been addressed by the Seventh Circuit. See United States v. Firtash, 392 F. Supp. 3d 872, 890-91 (N.D. Ill. 2019).

[5] Rafoi, at \*1; United States v. Rafoi-Bleuler, No. 4:17-CR-0514-7, 2021 WL 9884704, at \*1-2 (S.D. Tex. Nov. 10, 2021), rev'd and remanded sub nom. United States v. Rafoi, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921 (5th Cir. Feb. 8, 2023).

[6] Superseding Indictment at 12, 38, 48, 53, 65, 73, United States v. Rafoi-Bleuler, No. 4:17-CR-0514-7, 2021 WL 9884704 (S.D. Tex. Nov. 10, 2021), United States v. Leon-Perez, No. 4:17-CR-00514, 2022 WL 4002321 (S.D. Tex. July 11, 2022).

[7] Rafoi-Bleuler, at \*3; United States v. Leon-Perez, No. 4:17-CR-00514, 2022 WL 4002321, at \*3 (S.D. Tex. July 11, 2022), rev'd and remanded sub nom. United States v. Rafoi, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921 (5th Cir. Feb. 8, 2023).

[8] Rafoi-Bleuler, at \*3.

[9] Rafoi-Bleuler, at \*3; Leon-Perez, at \*3.

[10] Rafoi-Bleuler, at \*6.

[11] Id.

[12] Leon-Perez, at \*3.

[13] Rafoi-Bleuler, at \*9; Leon-Perez, at \*3.

[14] Rafoi-Bleuler, at \*9.

[15] United States v. Rafoi, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921, at \*2 (5th Cir. Feb. 8, 2023).

[16] Id.

[17] Id. at \*3.

[18] Id. at \*4. Although the Fifth Circuit stated that the district court did not rule on whether conspiracy liability could apply to individuals not otherwise covered by the statute, the district court discussed the issue and cited Hoskins I as authority. See Rafoi, at \*4; Rafoi-Bleuler, at \*7 (citing United States v. Hoskins, 902 F.3d 69, 78 (2d Cir. 2018)); Leon-Perez, at \*3 n.10 (citing Hoskins I, at 97).

[19] Id. at \*4 n.6.

[20] Id. at \*4.

[21] Id.

[22] Id.

[23] Id. at \*5 (internal quotation omitted).

[24] Id. at \*5-6 (internal quotation omitted).

[25] United States v. Hoskins, 123 F.Supp.3d 316, 327 (D. Conn. 2015).

[26] United States v. Hoskins, 902 F.3d 69, 72-73 (2d Cir. 2018).

[27] Id. at 83-84.

[28] United States v. Hoskins, 2020 WL 914302, \*9 (D. Conn. 2015).

[29] United States v. Hoskins, 44 F.4th 140, 145 (2d Cir. 2022).

[30] For a recap of the Hoskins case, see Kara Brockmeyer, Andrew M. Levine, Philip Rohlik et al., End of the Hoskins Saga: Implications for the Future, FCPA Update, Vol. 14, No. 4 (Nov. 2022), <https://www.debevoise.com/insights/publications/2022/11/fcpa-update->

november-2022; Andrew M. Levine, Winston M. Paes, Philip Rohlik et al., Revisiting Hoskins: Second Circuit Holds Foreign Non-Issuers not Present in the United States are not Subject to the FCPA Absent Common Law Agency Relationship, FCPA Update, Vol. 14, No. 1 (Aug. 2022), <https://www.debevoise.com/insights/publications/2022/08/fcpa-update-august-2022>; 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/-/media/files/insights/publications/2018/08/fcpa-update\\_august-2018\\_v2.pdf?rev=9c17028eb1604fbf8982cabbaf7d1ec6](https://www.debevoise.com/-/media/files/insights/publications/2018/08/fcpa-update_august-2018_v2.pdf?rev=9c17028eb1604fbf8982cabbaf7d1ec6).

[31] Rafoi, at \*4 n.6.

[32] United States v. Hoskins, 902 F.3d 69, 72-73 (2d Cir. 2018); United States v. Hoskins, 44 F.4th 140, 145 (2d Cir. 2022).

[33] Hoskins, 44 F.4th at 150.

[34] Rafoi at \*13.

[35] United States v. Firtash, 392 F. Supp. 3d 872 (N.D. Ill. 2019).