

DOJ Clarifies Position on Agency Liability under the FCPA post-*Hoskins*; New FCPA Chief Named

December 9, 2019

On December 4, 2019, Assistant Attorney General Brian Benczkowski, the head of DOJ's Criminal Division, provided remarks at the ACI Foreign Corrupt Practices Act ("FCPA") Conference near Washington, DC. In particular, Mr. Benczkowski clarified that DOJ will not automatically seek to impose agency liability on parent companies for FCPA violations by subsidiaries, joint ventures, and affiliates. Mr. Benczkowski also announced a new permanent chief of the Fraud Section's FCPA Unit, and in response to questions from the audience, he stressed the Criminal Division's desire to reduce protracted negotiations over corporate resolutions.

2019 Enforcement Trends & Leadership Changes

Mr. Benczkowski began by noting the record number of FCPA cases against individual defendants in 2019: 34 publicly announced charges and 31 publicly announced guilty pleas, both the highest figures ever. He further announced that prosecutor Christopher Cestaro, the current Acting Chief of the Fraud Section's FCPA Unit, has been promoted to become the Unit's permanent Chief. Mr. Cestaro replaces Daniel Kahn, who has become Senior Deputy Chief of the Fraud Section.

Developments in FCPA Agency Liability

Mr. Benczkowski then turned to the impact of the Second Circuit's decision and the subsequent guilty verdicts in *United States v. Hoskins*.¹ In *Hoskins*, a British national was charged under the FCPA for facilitating a bribery scheme for the American subsidiary of a French company. Specifically, the government alleged that Hoskins retained consultants who bribed Indonesian officials to secure a \$118 million contract for the American subsidiary. Hoskins moved to dismiss the indictment, arguing that as a former employee who had never worked for an American company and had never been to the United States, he could not be prosecuted under the FCPA, even as a co-conspirator. The district court agreed, dismissing the FCPA conspiracy charges. On the government's interlocutory appeal, the Second Circuit affirmed in part and reversed in part. As we noted in a [prior client alert](#), the Second Circuit agreed with the district court that DOJ could not expand the FCPA's jurisdictional reach by alleging that Hoskins was a co-conspirator, but disagreed that Hoskins could not be prosecuted for FCPA charges at all, and held that the government *could* prosecute Hoskins if it could show that he was acting as an agent of a U.S. domestic concern. On remand, the government sustained that burden, and the jury found Hoskins guilty on each of the FCPA charges.

In his remarks, Mr. Benczkowski clarified that despite the result in *Hoskins*, DOJ would not "suddenly be taking the position that every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status," nor would DOJ argue "that every parent company should automatically be held liable for the acts of its subsidiaries, joint ventures, or affiliates based on an agency theory." Mr. Benczkowski instead pointed to the District Court's jury instructions, which required the jury

¹ 902 F.3d 69, 72 (2d Cir. 2018); Jury Verdict, *United States v. Hoskins*, No. 3:12-cr-00238 (D. Conn. Nov. 8, 2019), ECF No. 583.

“to evaluate Hoskins’ conduct to look for proof of an agency relationship and control by the principal,” and made clear that “a person or entity may be an agent for some business purposes and not for others.” Accordingly, “[b]efore pursuing an FCPA case based on an agency theory . . . the Department will need to measure the facts against the legal standard articulated by the court.” Finally, Mr. Benczkowski noted that DOJ would likely favor prosecution in cases where agency structures were used to try to shield a parent or individual from liability, and added that decisions to bring an FCPA case under an agency theory would—like all prosecutions—be guided by the exercise of prosecutorial discretion and the factors embodied in DOJ’s Corporate Enforcement Policy and principles for prosecuting business organizations.

Increased Transparency

Mr. Benczkowski then turned to the importance of corporate compliance programs and cast **DOJ’s recent compliance guidance** as part of an ongoing effort by the Department to increase the transparency of and build trust in its enforcement decisions, alongside other efforts such as the DOJ’s revised voluntary self-disclosure guidance, policy against piling-on, and FCPA Corporate Enforcement Policy. Mr. Benczkowski concluded his prepared remarks by noting that the Criminal Division would continue “to demonstrate [its] adherence to and application of [its] policies by [its] actions, including in press statements, public resolution documents, and program-related declinations.”

In response to a question from the audience, Mr. Benczkowski was also critical of past practice for the resolution of corporate criminal matters, where, at times, parties might start from unreasonable positions and lengthy negotiations would result. He stressed a desire to end such long, protracted negotiations over the form and amount of a resolution and to have negotiations start at a place tethered objectively to the law and the facts—an obligation he stressed was shared by both prosecutors and defense counsel.

Potential Impact

Mr. Benczkowski’s statements highlight a continuation of the Criminal Division’s policy of adopting more transparent measures and a more nuanced approach to corporate resolutions. The speech comes after a string of developments—including the implementation of the **Corporate Enforcement Policy, clarifications** to that Policy, updated **guidance on corporate compliance programs**, among **others**—that collectively may help corporations better address concerns raised by DOJ in corporate investigations and facilitate their resolution.

In this vein, Mr. Benczkowski’s remarks on agency-based culpability make clear that each case will require a fact-intensive analysis of a putative agent’s role relative to its principal, rather than a formalistic assessment of corporate structure. A determination will need to be made not only as to whether an agency relationship exists, but also whether that relationship extends to the particular conduct at issue.

In total, recent developments signal that a diverse set of factors may be relevant to assessing corporate culpability, and that DOJ may take a more contextual approach to corporate criminal resolutions.

Mr. Benczkowski’s remarks are available [here](#).

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

New York

Greg D. Andres	+1 212 450 4724	greg.andres@davispolk.com
Martine M. Beamon	+1 212 450 4262	martine.beamon@davispolk.com
Angela T. Burgess	+1 212 450 4885	angela.burgess@davispolk.com
Tatiana R. Martins	+1 212 450 4085	tatiana.martins@davispolk.com

Washington, DC

Robert A. Cohen*	+1 202 962 7047	robert.cohen@davispolk.com
Neil H. MacBride	+1 202 962 7030	neil.macbride@davispolk.com
Paul J. Nathanson	+1 202 962 7055	paul.nathanson@davispolk.com
Linda Chatman Thomsen	+1 202 962 7125	linda.thomsen@davispolk.com
Kenneth L. Wainstein	+1 202 962 7141	ken.wainstein@davispolk.com

Hong Kong

Patrick S. Sinclair	+852 2533 3305	patrick.sinclair@davispolk.com
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*Mr. Cohen is admitted to practice in New York and Maryland, and is practicing in DC under the supervision of partners of the firm.

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