The Curious Case of Lawrence Hoskins: Evaluating the Scope of Agency Under the Anti-Bribery Provisions of the FCPA

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The Foreign Corrupt Practices Act (FCPA) explicitly defines the categories of entities subject to its provisions. One such category refers to any "agent of a domestic concern." But what exactly is an agent of a domestic concern? In United States v. Hoskins*, the Second Circuit decidedly refused to answer that question. This Note argues that, in the context of cross-border bribery, an agent of a domestic concern has a specific definition: a local third-party contracted by a non-local supplier to serve as a representative and to facilitate the movement of bribe payments between that supplier (the briber) and a local consumer (the bribee).*

In making this argument, this Note underscores the significance of the Organisation for the Economic Co-operation and Development's (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and its effect on FCPA enforcement. Part II provides background information to the FCPA and examines the Second Circuit's decision in United States v. Hoskins*. Part III explores the importance of the OECD Anti-Bribery Convention and juxtaposes this Note's proposed definition of an agent of a domestic concern with traditional principles of agency. Part IV applies this Note's proposed definition of an agent of a domestic concern to the facts of* United States v. Hoskins *and explains why courts should adopt this definition as well.*

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I. INTRODUCTION

Enacted in 1977, the Foreign Corrupt Practices Act (FCPA)[1] is a revolutionary statute aimed at regulating domestic business conduct with foreign governments and markets.[2] Through the FCPA's anti-bribery provisions, Congress sought to forbid corporations from knowingly offering bribes to foreign government officials for the purpose of acquiring or retaining business.[3] Although the FCPA applies extraterritorially, encompassing both U.S. and non-U.S. persons and businesses, it explicitly lists the categories of entities subject to its provisions.[4]

Until recently, the Securities & Exchange Commission (SEC) and the Department of Justice (DOJ) have been able to charge entities with FCPA violations even when such entities did not fall within the FCPA's categories of jurisdiction. For example, the Resource Guide to the FCPA, issued by the DOJ and SEC in 2012, states "[i]ndividuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA — i.e., for agreeing to commit an FCPA violation — even if they are not, or could not be, independently charged with a substantive FCPA violation."[5]

However, on August 24, 2018, the Second Circuit held in *United States v. Hoskins* that prosecutors could "not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes."[6] In other words, prosecutors could no longer

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1. 15 U.S.C. § 78dd-1(a) (2012).

2. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 930 (2012) (explaining that the FCPA was the first law in the world governing domestic business conduct with foreign governments and foreign markets).

3. *See infra* Part II.A.2 for a detailed discussion of the anti-bribery provisions and the entities subject to it.

4. For example, and as relevant here, the FCPA explicitly states that it applies to domestic concerns, which include U.S. citizens, nationals, or residents, and corporations organized under the laws of the U.S. or whose principal place of business is in the U.S. *See* 15 U.S.C. §§ 78dd-2(a), -2(h)(1)(A) (2012). *See infra* Part II.A.2 for more information about the categories of entities subject to the FCPA.

5. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 34 (2012), https:/www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https:/perma.cc/6ZEG-7PHL]. *See also* Kristen Savelle, *The FCPA's (Narrowing?) Extraterritorial Reach: Implications of* United States v. Hoskins, 3 CHINA LAW CONNECT 1, 4 (2018), https:/cgc.law.stanford.edu/commentaries/clc-3-201812-25-kristen-savelle [https:/perma.cc/JD63-PY67] ("The DOJ has long used conspiracy and aiding and abetting charges to extend the jurisdiction of the FCPA to reach foreign nationals not otherwise covered by the Act.").

6. 902 F.3d 69, 97 (2d Cir. 2018).

bring enforcement actions against entities beyond the expressly delineated categories subject to the FCPA. Consequently, the court found that Lawrence Hoskins, a "foreign national who never set foot in the United States or worked for an American company," could not be held liable for an FCPA violation because he was incapable of committing such a violation as a principal.[7] That is, because Hoskins did not fall under any of the FCPA's explicit categories, he could not be held liable. In coming to its decision, however, the Second Circuit assumed arguendo that Hoskins was not an "agent of a domestic concern"[8] and asserted that he could still be liable under the FCPA if the DOJ could make such a demonstration.[9] The court decidedly refused to express any views on the scope of agency[10] under the FCPA, leaving open the question of what constitutes an agent of a domestic concern.[11]

The Second Circuit's decision in *Hoskins* offers a rare judicial interpretation of the FCPA.[12] The DOJ and SEC often enforce the FCPA through non-prosecution agreements (NPAs)[13] and de-

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7. *Id.* at 76.

8. That is, not an agent of (1) "any individual who is a citizen, national, or resident of the United States;" or (2) "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." *See* 15 U.S.C. § 78dd-2(h)(1) (2012).

9. *Hoskins*, 902 F.3d at 76, 97–98.

10. The law of agency concerns the "principal"-"agent" relationship: a relationship where the agent has been granted legal authority to act on behalf of the principal. *See Agency*, LEGAL INFO. INST., https:/www.law.cornell.edu/wex/agency [https:/perma.cc/37AA-4JJY]. *See also infra* Part III.A for a discussion on agency theory.

11. *Hoskins*, 902 F.3d at 104 n.1. The court states that it expresses no views on this subject and only assumes for the sake of the arguments advanced by the parties that Hoskins is not an agent of a U.S. corporation. *Id.*

12. *See generally What Others Are Saying About* U.S. v. Hoskins, FCPA PROFESSOR (Aug. 31, 2018), http:/fcpaprofessor.com/others-saying-u-s-v-hoskins [https:/perma.cc/X4E4-H6DL]. Various law firms, including Paul Weiss, Arnold Porter, Goodwin, and others, issued statements recognizing the rarity of an FCPA case, like *Hoskins*, given the limited number of appellate decisions interpreting the FCPA. *See id.*

13. The basic features of an NPA entered into by a prosecutor and corporate defendant are as follows: the corporate defendant agrees to (1) accept responsibility for "an agreed upon statement facts, that absent an agreement, would have been part of the case against" the defendant, (2) make a specified payment, (3) engage in various remedial measures, and often (4) submit to supervision by a court-appointed monitor. If the corporation satisfactorily performs its agreement for a specified period of time, it is assured that it will not face prosecution based on the agreed upon facts. *See* FREDERICK T. DAVIS, AMERICAN CRIMINAL JUSTICE: AN INTRODUCTION 75 (2019).

ferred prosecution agreements (DPAs),[14] which are not subject to any meaningful judicial scrutiny.[15] Consequently, there are relatively few trial and appellate court decisions regarding the FCPA.[16] In fact, the Supreme Court has referenced the FCPA in only four cases, and in none of these cases is the statute interpreted.[17] Given the scarcity of FCPA interpretations, it is noteworthy that the Second Circuit's decision limits the DOJ's and SEC's expansive interpretation of FCPA liability.[18] This decision could signal the beginning of a trend towards increased FCPA

14. The features of a DPA are substantially identical to that of an NPA, with one main difference: in a DPA formal charges are filed with a court against the corporate defendant and then dismissed with prejudice at the request of the prosecutor upon the corporate defendant's satisfactory performance of its agreement for a specified period of time. In an NPA, nothing is filed with the court. *See id.* at 75–76.

15. *See id.* at 76 ("One aspect of both DPAs and NPAs is that they are virtually free of any judicial supervision or review."); *see also Supreme Court Questions Whether Dollar-Denominated Transactions or Other Financial Transactions in the U.S. Are Sufficient to Assert Jurisdiction Over Foreign Corporations*, FCPA PROFESSOR (May 8, 2018), http:/fcpaprofessor.com/supreme-court-questions-whether-dollar-denominated-transactions-financial-transactions-u-s-sufficient-assert-jurisdiction-foreign-corporations [https:/perma.cc/FE5G-HAWF] ("Largely because of how the DOJ and SEC have chosen to enforce the Foreign Corrupt Practices Act (that is resolution vehicles not subjected to any meaningful judicial scrutiny), the Supreme Court has never been presented with an opportunity to interpret the FCPA . . . "). NPAs are not filed with a court, so there is no judicial review of NPAs. DPAs are filed with a court; however, the Speedy Trial Act, which allows judges to approve the deferral of prosecution pursuant to a written agreement between the government and the defendant, does not specify any other role for judicial involvement in DPAs. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 12, 25 (2009).

16. *See generally What Others Are Saying About* U.S. v. Hoskins, *supra* note 12.

17. WESTLAW, "Foreign Corrupt Practices Act," https:/1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default) [https:/perma.cc/2CF8-6PJW] (In the search bar type, in quotation marks, "Foreign Corrupt Practices Act" and limit the search to U.S. Supreme Court cases.). This search results in only four U.S. Supreme Court cases in which the FCPA is mentioned: W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990); Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680 (1980); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003); S. Union Co. v. United States, 567 U.S. 343 (2012). *Id. See also Supreme Court Questions Whether Dollar-Denominated Transactions or Other Financial Transactions in the U.S. Are Sufficient to Assert Jurisdiction Over Foreign Corporations*, *supra* note 15 ("[T]he Supreme Court has never been presented with an opportunity to interpret the FCPA (and likely never will so long as the current state of affairs continues).").

18. *But see* United States v. Firtash, 392 F. Supp. 3d 872, 889-92 (N.D. Ill. June 21, 2019). The district court in *Firtash* declined to follow the Second Circuit's approach in *Hoskins*, stating that Seventh Circuit precedent has already rejected the Second Circuit's rationale in reaching its conclusion in *Hoskins*. *Id.* That is, the Seventh Circuit has rejected the notion adopted by the Second Circuit that courts may look to legislative history to determine an affirmative legislative policy. *Id.*

litigation as defendants become more willing to test the government's interpretation of the statute and its reach.[19]

In light of this changing landscape, this Note evaluates the scope of agency under the anti-bribery provisions of the FCPA. Specifically, it addresses the Second Circuit's unanswered question: what constitutes an agent of a domestic concern under the FCPA? In addressing this question, this Note recognizes the paramount significance of the Organisation for the Economic Co-operation and Development's (OECD)[20] Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention)[21] in strengthening and expanding FCPA enforcement. This Note follows from the premise that the OECD Anti-Bribery Convention[22] should guide future courts in interpreting the FCPA.

Part II of this Note offers a brief introduction to the FCPA, providing an overview of its history and relevant provisions. It also further analyzes the *Hoskins* decision, paying particular attention to both the DOJ's allegations against Hoskins and the Second Circuit's extraterritorial analysis of the FCPA. Part III then shifts to an analysis of agency theory as it is traditionally used in the U.S. This analysis serves as a point of comparison for what this Note argues to be the definition of agent put forth by the signatories to the OECD Anti-Bribery Convention. This Part also underscores the significance of the OECD Anti-Bribery Convention, highlighting its effect on FCPA enforcement. Furthermore, Part III demonstrates that application of the signatories' definition of agent to the FCPA would not demonstrably disrupt the DOJ's ability to enforce it, therefore making adoption of this definition not only appropriate, but also workable.

Finally, Part IV argues that, in light of the OECD Anti-Bribery Convention's effect on FCPA enforcement, the signatories' definition of agent should guide defining the term "agent of a domestic concern." Consequently, Part IV argues that an agent

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19. *See* Savelle, *supra* note 5, at 5 ("The *Hoskins* decision may encourage more defendants to litigate FCPA claims, which could lead to a further narrowing of the statute's scope and jurisdictional reach.").

20. *About the OECD*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., https:/www.oecd.org/about [https:/perma.cc/3NUU-2JS5] (last visited Oct. 19, 2019).

21. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

22. This Note uses "OECD Anti-Bribery Convention" and "Anti-Bribery Convention" interchangeably.

of a domestic concern should be defined as a local third-party, contracted by a non-local supplier to serve as a representative and to facilitate the movement of bribe payments between that supplier (the briber) and a local consumer (the bribee). This definition should be limited to the local representatives that offer bribes and exclude any "higher up" officials who, without more, simply authorize them. This Part also argues that adopting this narrowed definition of an agent of a domestic concern will limit the FCPA's reach and ultimately result in stronger enforcement of anti-bribery laws by other signatories to the OECD Anti-Bribery Convention. Lastly, this Part returns to the *Hoskins* decision and argues that Lawrence Hoskins should not be considered an agent of a domestic concern for purposes of FCPA enforcement, notwithstanding his recent conviction for violating the FCPA.[23]

II. AN OVERVIEW OF THE FCPA AND THE *HOSKINS* DECISION

To more fully understand why this Note presumes that the OECD Anti-Bribery Convention is instructive in interpreting the FCPA and the exact issue left open by the Second Circuit in *Hoskins*, Part II.A provides a detailed discussion of both the history and relevant provisions of the FCPA. Part II.B then presents the pertinent factual and legal frameworks underlying the *Hoskins* decision.

23. After the Second Circuit's decision in *Hoskins*, the DOJ proceeded to prosecute Hoskins for violating the FCPA as an agent of a domestic concern. *See* Dylan Tokar, *Jury Finds Former Alstom Executive Guilty of Foreign Bribery*, WALL ST. J. (Nov. 8, 2019), https:/www.wsj.com/articles/jury-finds-former-alstom-executive-guilty-of-foreign-bribery-11573234651 [https:/perma.cc/Z8YD-WQZA]. The jury concluded that Hoskins was indeed an agent of a domestic concern and convicted him of six counts of violating the FCPA. *See* Richard L. Cassin, *Jury Convicts Hoskins of Multiple FCPA and Money Laundering Offenses*, FCPA BLOG (Nov. 8, 2019), https:/fcpablog.com/2019/11/08/jury-convicts-hoskins-of-multiple-fcpa-and-money-laundering-offenses/ [https:/perma.cc/PUL5-XBMP]. As further explained in Part IV.C, *infra*, the trial court's jury instructions reflected traditional notions of agency theory. Yet, even under this traditional theory of agency, this Note argues that Hoskins should not be considered an agent of a domestic concern.

A. THE FCPA

1. *Watergate and the Origins of the FCPA*

The relevant history of the FCPA begins with the aftermath of the Watergate Scandal.[24] The Office of the Special Prosecutor investigated and charged several American corporations and executive officers with using overseas slush funds[25] to make illegal domestic campaign contributions and corrupt payments to foreign officials.[26] Recognizing that these allegations were of potential significance to public investors, the SEC decided to conduct its own investigations into American corporations for potential violations of federal securities laws.[27]

The investigations revealed massive amounts of falsified corporate financial records and verified the existence of secret slush funds that were being used, in part, for corrupt foreign payments.[28] As part of these efforts, the SEC established an amnesty program in which corporations could conduct their own internal investigations and voluntarily report the results.[29] Over four hundred companies took advantage of the amnesty program.[30] One such company, the Lockheed Aircraft Corporation, had made over $100 million in payments to foreign government officials despite being the recipient of a $250 million loan from the federal government in order to avoid declaring bankruptcy.[31] Ultimately,

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24. *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act — 1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 92–93 (2010). Although the focus of the Watergate hearings was on the Nixon administration's failed attempt to burglarize the Democratic National Committee's headquarters in 1972, SEC chief Stanley Sporkin also investigated numerous illegal contributions made by public companies to Nixon's reelection campaign and other U.S. political campaigns. *Id.*

25. *Id.* at 93. Slush funds are secret mislabeled accounts used to make illicit payments like bribes and illegal campaign contributions. *Id.*

26. U.S. SEC. & EXCH. COMM'N, Sec. Reg. & L. Rep. (BNA) No. 353, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976).

27. Heather L. Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 3 (1998).

28. U.S. SEC. & EXCH. COMM'N, *supra* note 26.

29. *See* Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L. L. & COM. 235, 237 (1982); *see also* Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848, 1851–52 (1976).

30. *See* Koehler, *supra* note 2, at 935, 940.

31. Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1622 (2017) ("Among the most shocking disclosures was Lockheed's revelation that it had distributed over $100 million to various government officials[.]").

the SEC's investigations culminated in the *Report on Questionable and Illegal Corporate Payments and Practices*.[32] This report revealed that over three hundred American companies, including 117 of the top Fortune 500, had made corrupt foreign payments involving "hundreds of millions of dollars."[33]

The SEC submitted the report to Congress, which had already begun its own investigations after learning of disclosures made by corporations like the Lockheed Aircraft Corporation.[34] After evaluating the SEC's report, the Senate Committee on Banking, Housing, and Urban affairs concluded that the illegal payments described in the report had "severe adverse effects."[35] The committee further remarked that corporate bribery was "fundamentally destructive" to a free market system and that these illegal payments had "tarnished" the "image of American democracy abroad."[36] Recognizing the fundamentally immoral and un-American nature of corporate bribery, Congress sought to create new legislation that specifically addressed this issue.[37]

The result was the enactment of the FCPA. Through it, Congress declared that American corporations should act "ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest transparent business practices."[38]

2. *The Anti-Bribery Provisions*

To that end, the FCPA serves to dissuade U.S. corporations from using bribes to influence foreign officials while conducting business abroad by making it "unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business."[39] In addition to

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32. U.S. SEC. & EXCH. COMM'N, *supra* note 26.

33. S. REP. NO. 95-114, at 3 (1977). *See also* U.S. SEC. & EXCH. COMM'N, *supra* note 26.

34. *See* Koehler, *supra* note 2, at 935, 940.

35. S. REP. NO. 95-114, at 3 (1977).

36. *Id.* at 3–4.

37. *See id.* at 4. The Senate Committee on Banking, Housing, and Urban Affairs determined that a "strong antibribery law" was "urgently needed." *Id. See also*, H.R. REP. NO. 95-640, 4–5 (1977) (The House Committee on Interstate and Foreign Commerce noted that the payments of foreign bribes by American corporations eroded "public confidence" and created "severe foreign policy problems for the United States.").

38. S. REP. NO. 105-277, at 1 (1998).

39. *Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE, https:/www.justice.gov/criminal-fraud/foreign-corrupt-practices-act [https:/perma.cc/GB9R-BGDS] (last visited

its record keeping and accounting provisions,[40] the FCPA addresses the issue of cross-border bribery through its anti-bribery provisions. These provisions prohibit the corrupt[41] offering, promising, authorizing, or paying[42] of anything of value[43] to any foreign official,[44] to obtain or retain business or to secure any improper business advantage.[45]

As for the entities subject to the FCPA, the statute explicitly states that its provisions apply to the following: (1) issuers of securities pursuant to 15 U.S.C. § 78*l* or issuers required to file reports under 15 U.S.C. § 78o(d);[46] (2) any domestic concern[47] re-

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Oct. 20, 2019). The DOJ and SEC are both responsible for enforcing the FCPA. The SEC may bring civil enforcement actions for violations of the record keeping and accounting provisions while the DOJ may bring criminal enforcement actions for violations of the anti-bribery provisions. Unless corporations knowingly fail to comply with the record keeping and accounting provisions, or knowingly falsify their books and records, the FCPA does not impose criminal liability for violations of the record keeping and accounting provisions. *See id.*; *see also Spotlight on Foreign Corrupt Practices Act*, U.S. SEC. & EXCH. COMM'N, www.sec.gov/spotlight/fcpa.shtml [https:/perma.cc/BMF8-BSP6] (last visited Oct. 19, 2019).

40. *See* 15 U.S.C. § 78m (2012). These provisions require companies to generate and implement certain bookkeeping, accounting, and internal control and compliance procedures to sufficiently identify and prevent potential FCPA violations. *See also* Brown, *supra* note 27, at 11; S. REP. NO. 95-114, at 7 (1977). These provisions were an attempt by Congress to make the use of secret slush funds by corporations more difficult and were drafted to work in tandem with the anti-bribery provisions. *Id.*

41. 15 U.S.C. §§ 78dd-1(a), -2(a) (2012). *See also* Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755, 760 (1989). The FCPA was amended in 1988 to include, among other things, a "knowing" requirement to the anti-bribery provisions. *Id.*

42. *See* 15 U.S.C. §§ 78dd-1(a), -2(a) (2012).

43. *Id.*; *but see* 15 U.S.C. §§ 78dd-1(b), -1(c), -2(b) -2(c), -2(c)(1) (2012). Not all forms of payments to foreign officials are prohibited by the FCPA. Payments that are lawful under the laws of the foreign country receiving the payment are not prohibited, nor are payments intended to "expedite or to secure the performance of routine governmental action by a foreign official, political party, or party officer" (known as "grease payments"). *See* S. REP. NO. 95-114, at 10 (1977). The Senate Committee on Banking, Housing, and Urban Affairs explicitly noted that the FCPA would not prohibit grease payments. *Id.*

44. *See* 15 U.S.C. §§ 78dd-1(f)(1), -2(h)(2) (2012).

45. *See* H.R. REP. NO. 100-576, at 916–25 (1988) (Conf. Rep.). The legislative history demonstrates that the prohibitions of the FCPA are not limited to acquiring new business or renewing existing business relationships. *See id.* at 918 ("The Conferees wish to make clear that the reference to corrupt payments for 'retaining business' in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment."). The committee members, however, did not intend for the FCPA to cover lobbying of government officials. *Id.* at 918–19 ("The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.").

46. *See* 15 U.S.C. § 78dd-1 (2012).

gardless of where such person happens to be in the world; and (3) foreign persons or businesses taking acts to further corrupt schemes, including ones causing the payments of bribes, while present in the United States.[48] Additionally, and most relevant to this Note, the anti-bribery provisions also apply to any "officer, director, employee, or *agent*" of any issuer or domestic concern.[49] The precise scope of what constitutes an agent of a domestic concern for criminal liability under the anti-bribery provisions has not yet been defined. This is the exact issue left open by the Second Circuit in *Hoskins*.[50]

B. *UNITED STATES V. HOSKINS*

1. *Lawrence Hoskins and the Many Subsidiaries of Alstom S.A.*

At the center of this case is Lawrence Hoskins and Alstom S.A. (Alstom France), a business headquartered in France.[51] Alstom France and its subsidiaries provide power generation and transportation related services to countries around the world, including Indonesia.[52] Hoskins was an employee of Alstom U.K. Ltd., a subsidiary of Alstom France, but he worked for a department in Alstom France named International Network.[53] International Network "supported its subsidiaries' efforts to secure contracts around the world"[54] and was organized by geographic region.[55] Hoskins served as the senior vice-president for the Asia region.[56] Among other things, he was responsible for overseeing the hiring of consultants in connection with Alstom France's and its subsidiaries' efforts to obtain and/or retain contracts with cus-

47. *See id.* §§ 78dd-2(a), -2(h)(1). "Domestic concern" is a broad term used by the FCPA to refer to any "individual who is a citizen, national, or resident of the United States" as well as "any corporation, partnership, association, joint-stock company, business trust, or unincorporated organization which is owned or controlled by individuals who are citizens or nationals of the United States and which has its principal place of business in the United States or which is organized under the laws of a State or any territory, possession or commonwealth of the United States." *Id.*

48. *See id.* § 78dd-3.

49. *Id.* §§ 78dd-1(a), -2(a) (emphasis added).

50. United States v. Hoskins, 902 F.3d 69, 71 n.1 (2d Cir. 2018).

51. Third Superseding Indictment ¶ 2, United States v. Lawrence Hoskins, 123 F. Supp. 3d 316 (D. Conn. 2015) (No. 3:12CR238) [hereinafter Hoskins Indictment].

52. *Id.* ¶ 3.

53. *Id.* ¶¶ 2–3.

54. *Id.* ¶ 2.

55. *Id.*

56. *Id.* ¶ 3.

tomers in Asia.[57] Notably, at all times relevant for this case, Hoskins had never been physically present in any territory within the U.S.[58]

Between 2002 and 2009, Alstom Power, Inc. (Alstom U.S.) — Alstom France's subsidiary located in Connecticut — and PT Energy Systems Indonesia (Alstom Indonesia) — Alstom France's subsidiary located in Indonesia — partnered with each other to bid on a power-related services contract in Indonesia.[59] In an effort to obtain that contract, Alstom U.S. retained two consultants to assist both it and Alstom Indonesia.[60] Hoskins advised on the selection of these consultants and approved the payments made to both of them.[61] According to the DOJ, however, these consultants did not provide any legitimate consulting services.[62] Instead, the DOJ alleged they were used to pay bribes to Indonesian officials who had the capacity to influence to whom the contract would be awarded.[63]

Given Hoskins' involvement, the DOJ charged him with both conspiring to commit and aiding and abetting the commission of violations of the FCPA anti-bribery provisions.[64] The DOJ pursued these charges despite Hoskins never having set foot in the United States and never having been employed by Alstom U.S.[65] Hoskins moved for the dismissal of the conspiracy count against him, arguing that the DOJ sought to improperly circumvent the

57. Hoskins Indictment, *supra* note 51, ¶ 13.

58. United States v. Hoskins, 902 F.3d 69, 72 (2d Cir. 2018).

59. Hoskins Indictment, *supra* note 51, ¶¶ 5–6. The contract was for a project, known as the "Tarahan Project," to provide power-related services to the citizens of Indonesia and it was contracted through Indonesia's state-owned and state-controlled electricity company. Alstom U.S. and Alstom Indonesia also partnered with Marubeni, a trading company headquartered in Japan, that was charged separately by the DOJ. *See id.* ¶¶ 4, 6.

60. *Id.* ¶ 7.

61. *Id.* ¶ 8. There were various email exchanges between Hoskins and officials related to Alstom U.S. in which the officials were asking Hoskins for advice and Hoskins offered recommendations as well as made certain requests. *See id.* ¶¶ 67, 70, 73–74.

62. *Id.* ¶ 7.

63. *See id.* Note that, assuming the truth of the DOJ's allegations, the FCPA anti-bribery provisions apply both to Alstom U.S. and to the two consultants. Alstom U.S. is a domestic concern as the term is used in the FCPA, and the consultants took actions in furtherance of the corrupt payments while physically present in the United States (the consultants attended meetings in and maintained a bank account in the U.S.). *See Hoskins*, 902 F.3d at 72.

64. *See* Hoskins Indictment, *supra* note 51 at ¶¶ 26, 102. The DOJ also alleged that Hoskins was an agent of Alstom U.S., a domestic concern, but this issue was not argued before the court. *Id.*

65. *Hoskins*, 902 F.3d at 72.

"narrowly-circumscribed groups of people" subject to the FCPA.[66] The district court granted Hoskins' motion in part, and concluded that the DOJ could not use theories of conspiracy or complicity to expand the reach of a statute to include a class of individuals that Congress chose to exclude from it.[67] The DOJ subsequently appealed the district court's ruling.

2. *The Presumption Against Extraterritoriality and the Carefully Tailored Text of the FCPA*

The Second Circuit considered whether the DOJ could use theories of conspiracy or complicity to charge a defendant not expressly covered by the FCPA with violating its anti-bribery provisions.[68] After an extensive analysis of the extraterritorial applicability of the FCPA, the Second Circuit held that the DOJ could not expand the reach of the FCPA by recourse to the conspiracy and complicity statutes.[69] The court reached this conclusion in light of the Supreme Court's decisions in *Gebardi*[70] as well as *Morrison*[71] and *RJR Nabisco*.[72]

Under *Gebardi*, prosecutors cannot use theories of conspiracy and complicity to expand the reach of criminal statutes where Congress has demonstrated an "affirmative legislative policy to leave some type of participant in a criminal transaction unpunished."[73] The *Gebardi* Court underscored the specificity of the statute in question and found that the absence of language specif-

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66. *Id.* at 73.
67. *Id.*
68. *Id.* at 71.
69. *Id.* at 97.
70. Gebardi v. United States, 287 U.S. 112 (1932). The *Gebardi* Court considered the conviction of a man and woman under the Mann Act on the theory that woman conspired to transport herself merely by consenting to the man's transportation of her. *Id.*
71. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010). The *Morrison* Court considered "whether § 10(b) of the Securities Exchange Act of 1934 provide[d] a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." *Id.* at 250–51.
72. RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016). The *RJR Nabisco* Court held that the Racketeer Influenced and Corrupt Organizations Act (RICO) applies to some foreign racketeering activity, to the extent that the predicate offenses alleged themselves apply extraterritorially. *Id.* at 2103.
73. *Hoskins*, 902 F.3d at 80 (citing *Gebardi*, 287 U.S. at 123). The Supreme Court reasoned it would be obvious that women would participate in many violations of the Mann Act and since the statute did not discuss any punishment for women, "Congress intended for the women not to be liable for at least some class of violations of the Act." *Id.* at 78.

ically criminalizing the conduct at issue constituted an affirmative legislative policy by Congress not to criminalize such conduct.[74] Nevertheless, the Court was careful to emphasize that a statute's focus on one category of entities at the exclusion of another, without something more, will not always constitute an affirmative legislative policy.[75] A court can determine this "something more" by examining a statute's text, structure, and legislative history.[76]

Similarly, under *Morrison*, prosecutors cannot expand the reach of a statute extraterritorially unless there is an "affirmative intention [that] . . . Congress clearly expressed to give a statute extraterritorial effect[.]"[77] In coming to its decision, the Court underscored the "longstanding principle of American law"[78] that presumes Congress is primarily concerned with domestic issues and, absent any indication otherwise, courts should presume laws apply only within the territorial jurisdiction of the United States.[79] This presumption can be overcome by a clear indication that the statute has an extraterritorial effect.[80] However, an express statement of extraterritoriality is not essential, as context

74. *See Gebardi*, 287 U.S. at 123 (The Supreme Court perceived "in the failure of the Mann Act to condemn the woman's participation in those transactions which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished.").

75. *See id.* at 121–23 ("But in this case we are concerned with something more than an agreement between two persons for one of them to commit an offense which the other cannot commit. There is the added element that the offense planned, the criminal object of the conspiracy, involves the agreement of the woman to her transportation by the man, which is the very conspiracy charged"). The "something more" for the Court was a recognition that the woman's "participation was an inseparable incident of all cases in which the woman is a voluntary agent capable of entering into a conspiracy, Congress's silence as to the wom[a]n's liability was a conferral of immunity." *Hoskins*, 902 F.3d at 80 (citation and internal quotation marks omitted).

76. *Hoskins*, 902 F.3d at 81 ("In keeping with traditional principles of statutory interpretation, as well as the analysis employed in *Gebardi* and its progeny, an affirmative legislative policy can be discerned by looking to the statute's text, structure, and legislative history.").

77. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (internal quotation marks omitted). The Court concluded, in part, that Section 10(b) of the Securities Exchange Act of 1934 does not provide a cause of action to foreign plaintiffs suing foreign and American defendants because the statue gives no clear indication of an extraterritorial application. If a statute does not clearly specify its extraterritorial application, then it has none. *Id.* at 255–56.

78. *Id.* at 255. (internal quotation marks omitted). This "longstanding principle" is commonly referred to as the presumption against extraterritoriality. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85 (1998).

79. *Morrison*, 561 U.S at 255.

80. *Id.*

can be dispositive as well.[81] The Supreme Court in *RJR Nabisco* expounded upon *Morrison* and provided that even when a statute does permit some extraterritorial application, that application is limited by the statute's terms.[82] Consequently, even statutes that explicitly allow for their application extraterritorially will be construed strictly and against the backdrop of the principle against extraterritoriality.

With these cases in mind, the Second Circuit turned to an examination of the text of the FCPA and its legislative history. The court considered the FCPA's "carefully tailored text," against the "backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization."[83] It ultimately found that these factors constituted an affirmative legislative policy by Congress to limit the scope of liability under the FCPA to its terms.[84] In other words, the DOJ could not use conspiracy or complicity theories to expand the reach of the FCPA because Congress did not intend for entities outside of the FCPA's explicitly defined categories[85] to be subject to conspiracy or complicity liability.[86] Therefore, given that Congress drew explicit lines in the FCPA out of specific concern for the scope of its extraterritorial application, the DOJ could not use charging theories to circumvent those lines.[87]

The *Hoskins* court went on to hold that even if Congress had not expressed an affirmative legislative policy, conspiracy and complicity theories of liability could not be used to expand the reach of the FCPA because the DOJ failed to establish a "clearly expressed congressional intent" to allow the use of those theories to expand the reach of the FCPA.[88] Several provisions of the FCPA allow for its extraterritorial application, but those provi-

81. *Id.* at 265.

82. *RJR Nabisco*, 136 S. Ct. at 2102. The Supreme Court explained that the principle against extraterritoriality operates to limit the extraterritorial application of statutes to its terms. *Id.*

83. United States v. Hoskins, 902 F.3d 69, 83 (2d Cir. 2018).

84. *Id.*

85. Recall from Part II.A.2, *supra*, that the categories of entities explicitly subject to the FCPA are: (1) issuers of securities pursuant to 15 U.S.C. § 78*l* or issuers required to file reports under 15 U.S.C. § 78o(d); (2) any domestic concern regardless of where such person happens to be in the world; and (3) foreign persons or businesses taking acts to further corrupt schemes, including ones causing the payments of bribes, while present in the United States. *See* 15 U.S.C. §§ 78dd-1, -2(a), -3.

86. *Hoskins*, 902 F.3d at 83–84.

87. *Id.* at 83–84, 97.

88. *Id.* at 95.

sions must be limited by their terms.[89] The FCPA does not impose liability on foreign nationals who are not agents, employees, officers, directors, or shareholders of an American issuer or domestic concern *unless* that person commits a crime within the territory of the United States.[90] Accordingly, to the Second Circuit, the territorial limitations of the FCPA were clear here and the DOJ could not expand the reach of the FCPA beyond those limitations by recourse to the conspiracy or complicity statutes.[91]

However, the Second Circuit maintained that Hoskins could be liable under the FCPA if the DOJ could prove that he acted as an agent of a domestic concern (i.e., Alstom U.S.) and granted the DOJ leave to demonstrate that.[92] Despite not having brought this argument before the Second Circuit, the DOJ asserted in its indictment against Hoskins that he was an agent of Alstom U.S.[93] According to the DOJ, because Hoskins performed functions and support services "for and on behalf of various other Alstom subsidiaries," including Alstom U.S.; oversaw the hiring of the consultants at issue; and informed at least one of the consultants that they were going to be making bribe payments, he was "thus . . . an agent of" a domestic concern.[94]

These assertions, without more, should not be enough to consider Hoskins an agent of a domestic concern for purposes of criminal liability under the FCPA. As explained further in Part IV.C of this Note, holding Hoskins to be an agent of Alstom U.S. is inconsistent not only with traditional principles of agency, but also with what this Note argues to be the correct understanding of agency under the FCPA, as compelled by the OECD Anti-Bribery Convention.

89. *Id.* at 96.
90. *Id.* (citation omitted) (emphasis in original); *see supra* Part II.A.2.
91. *Hoskins*, 902 F.3d at 97.
92. *Id.* at 72.
93. Hoskins Indictment, *supra* note 51, ¶ 13.
94. *Id.* ¶¶ 3, 9, 13.

III. AGENCY THEORY AND THE OECD ANTI-BRIBERY CONVENTION

Before discussing the OECD Anti-Bribery Convention, Part III.A first provides a brief overview of the traditional principles of agency theory. Part III.B shifts to a discussion of the OECD Anti-Bribery Convention and underscores its pivotal role in empowering the FCPA. It then analyzes the meaning of the term agent, as understood by the signatories to the OECD Anti-Bribery Convention, referred to here as OECD Agency, as opposed to the traditional principles of agency theory. Finally, Part III.C presents two case studies to demonstrate the workable application of OECD Agency under the FCPA.

A. TRADITIONAL AGENCY THEORY

According to the Restatement (Third) of Agency, an agency relationship is a "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf."[95] This relationship is solidified when, "subject to the principal's control . . . the agent manifests assent or otherwise consents so to act."[96] In order for an agency relationship to exist then, several elements must be met.[97] First, the principal-to-be and the agent-to-be must consent to the relationship.[98] Second, the agent must have the authority to represent and act on the principal's behalf, with the power to affect the legal rights and duties of the principal.[99] Third, and most importantly for the argument put forward in this Note, the common law generally does not recognize an agency relationship in the absence of a right of the principal to control the agent's actions and/or terminate the agency relationship.[100] Similarly,

95. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

96. *Id.*

97. Generally, an agency relationship does not exist in the absence of any one of these elements. *Id.* § 1.02; *see also* Pauline T. Kim, *Beyond Principal–Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 542 (2011) (stating the necessary elements of an agency relationship).

98. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. d (2006).

99. *Id.* § 1.01 cmt. c.

100. *See id.* at Introduction ("In general, agency does not encompass situations in which an 'agent' is not subject to a right of control in the person who benefits from or whose interests are affected by the agent's acts, who lacks the power to terminate the 'agent's' representation, or who has not consented to the representation.").

the "power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents."[101] If any of these elements are missing, courts will not recognize the existence of an agency relationship.[102]

While agency relationships typically exist between two people (or entities), much of agency law concerns legal relationships with third parties.[103] The focus is generally on when and under what circumstances a principal will be liable to a third party for the acts of the agent.[104] Under traditional principles of agency, a principal is vicariously liable for, among other things, the tortious conduct of his agent if the agent was acting with actual or apparent authority.[105]

An agent acts with actual authority when "at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[106] In other words, an agent acts with actual authority when she engages in conduct that she was authorized to either expressly or impliedly by the principal.[107] On the other hand, apparent authority is the "power held by an agent . . . to affect a principal's legal relations with third parties when a third party reasonably believes the [agent] has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[108] That is, an agent acts with apparent authority if the principal seemingly manifests to the agent that the agent can engage in such actions on the principal's behalf.[109] The third party involved also must have reasonably relied on that apparent manifestation.[110]

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101. *Id.* § 1.01 cmt. f(1).
102. *Id.* § 1.02.
103. *See* Eric Rasmusen, *Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369, 370 (2004).
104. *See* Kim, *supra* note 97, at 542.
105. *See* Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565–66 (1982).
106. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).
107. Highland Capital Mgmt. LP v. Schneider, 607 F.3d 322, 327 (2d Cir. 2010) (discussing an agent's authority to contract on behalf of principal).
108. RESTATEMENT (THIRD) OF AGENCY 2.03 (2006).
109. Herbert Const. Co. v. Cont'l Ins. Co., 931 F.2d 989, 993–94 (2d Cir. 1991).
110. *Id.* at 994.

While there are various exceptions to a principal's vicarious liability, this Note assumes that a principal will not be liable for the acts of her agent if the agent does not act with actual or apparent authority. The principal will similarly escape liability if an agency relationship did not actually exist between the parties. Before evaluating whether, under these principles, Hoskins was an agent of Alstom U.S., the next section of this Note offers an overview of the OECD Anti-Bribery Convention and its profound influence on the FCPA. In so doing, Part III.B provides an alternative definition of the term agent in the cross-border bribery context (OECD Agency), as understood by the signatories to the OECD Anti-Bribery Convention.

B. THE OECD ANTI-BRIBERY CONVENTION

To underscore the significance of the OECD Anti-Bribery Convention and its effect on the FCPA, Part III.B.1 examines the FCPA's legislative history. This history demonstrates that Congress amended the FCPA to conform it to the requirements of the OECD Anti-Bribery Convention, and that these amendments empowered the DOJ and SEC to enforce the FCPA. Part III.B.2 then provides an overview of the OECD and the Anti-Bribery Convention, and explains OECD Agency.

1. *The FCPA Was Amended to Conform It to the OECD Anti-Bribery Convention*

Amidst congressional discussions over the proposed FCPA, then-Secretary of the Treasury, Michael Blumenthal, expressed several concerns regarding potential due process and international comity issues related to the FCPA's reach.[111] According to Blumenthal, the criminal penalties under the FCPA had to be described using a "high degree of specificity in order to be enforceable."[112] He further expressed concern for the foreign countries and citizens who might become involved as well as a desire to ensure that the FCPA would afford them fairness and due pro-

111. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the S. Comm. on Banking, Hous., & Urban Affairs*, 95th Cong. 94 (1977) (statement of W. Michael Blumenthal, Secretary of the Treasury).

112. *Id.* at 70.

cess.[113] Discussions of the House Committee on Interstate and Foreign Commerce elucidated similar concerns. The committee paid particular attention to the jurisdictional problem posed by charging foreign agents of domestic corporations.[114] Specifically, the committee noted that the language of the FCPA, applying "to any agent, might create some jurisdictional problems if the agent is wholly situated overseas and has not been in this country."[115] The committee went so far as to state that agents should be distinguished from officers, directors, or others in policymaking positions.[116] According to the committee, this suggestion stemmed from the strong possibility that a "low level employee or agent of the corporation — perhaps someone designated to make the [illegal] payment — might . . . be made a scapegoat[.]"[117]

Consequently, it is likely that the FCPA went largely unenforced because, as originally written, it essentially only applied to American corporations.[118] The FCPA also forced them to operate at a "disadvantage relative to foreign competitors who continued to pay bribes without fear of penalty."[119] Although the FCPA was amended in 1988, it was not rigorously enforced until the adoption of the OECD Anti-Bribery Convention in 1997.[120] In fact, in

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113. *Id.* at 94.

114. *Unlawful Corporate Payments Act of 1977: Hearing on H.R. 3815 Before the Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 232 (1977) (statement of Harvey L. Pitt, General Counsel, Securities and Exchange Commission).

115. *Id.* Interestingly, this is the exact issue left open by the Second Circuit. Hoskins is alleged to be an agent of Alstom U.S. but is wholly situated overseas and never set foot in any territory within the United States during the relevant period. *Hoskins,* 902 F.3d at 76.

116. H. REP. NO. 95-640, at 11 (1977).

117. *Id.*

118. *See* S. REP. NO. 105-277, at 2 (1998) ("American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty."); *see also* Brewster, *supra* note 31, at 1611 ("American industry argued that the law created an uneven playing field in global commerce, which made robust enforcement politically unpopular.").

119. S. REP. NO. 105-277, at 2 (1998); *see also* Charlie Savage, *With Wal-Mart Claims, Greater Attention on Law*, N.Y. TIMES (Apr. 25, 2012), https:/www.nytimes.com/2012/04/26/business/global/with-wal-mart-bribery-case-more-attention-on-a-law.html [https:/perma.cc/YK67-CLCE] (noting how the FCPA was rarely enforced for the first few decades after it was enacted).

120. *See, e.g.*, Brewster, *supra* note 31, at 1612, 1616; Margot Cleveland et al., *Trends in the International Fight Against Bribery and Corruption*, 90 J. BUS. ETHICS 199, 210 (2009) ("Prior to 1998,. . . only 30 cases [were opened] in the 20-year period leading up to the OECD Convention[.]"). *See also* Frederick T. Davis, *Where Are We Today in the International Fight Against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward*, 23 ILSA J. INT'L & COMP. L. 337, 337–38 (2017) ("The real history of

1998, just one year after the conclusion of the convention, the DOJ was investigating over seventy-five FCPA cases.[121] Congress amended the FCPA a final time in 1998 to "conform it to the requirements of and to implement the OECD [Anti-Bribery] Convention."[122] Given that Congress amended the FCPA in accordance with the OECD Anti-Bribery Convention, the principles of the convention, and the agreed upon understandings of its signatories, should guide its interpretation and enforcement.

2. *The OECD Anti-Bribery Convention's Approach to Agency*

Founded in 1961, the OECD grew out of the Organisation for European Economic Cooperation (OEEC), which was established in 1948 to operationalize the Marshall Plan.[123] As established, the OECD offers a forum for discussion and cooperation amongst its member countries, which are committed to "market economies backed by democratic institutions."[124] After Congress amended the FCPA for the first time in 1988, legislators sought to have its anti-bribery provisions negotiated into multi-lateral trade agreements, hoping to bind other countries to anti-bribery rules similar to those in the U.S.[125] They identified the OECD as the preferred forum to engage in such negotiations.[126]

Ultimately, these negotiations culminated in the OECD Anti-Bribery Convention, which was open for signature in 1997.[127] The OECD Anti-Bribery Convention recognized bribery as a "widespread phenomenon in international business transactions" that raised "serious moral and political concerns [and] under-

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FCPA enforcement began with the implementation of the OECD Convention in roughly 2000; DOJ investigations since that date have steadily increased, with fines well into the billions of dollars having been paid to federal and state treasuries.").

121. Brewster, *supra* note 31, at 1647.

122. S. REP. NO. 105-277, at 2 (1998).

123. *History*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., https:/www.oecd.org/about/history [https:/perma.cc/U2RT-SKJR] (last visited Nov. 6, 2019). Enacted in 1948, the Marshall Plan was a U.S. program that sought to finance the rebuilding efforts of Western Europe after World War II. In addition to economic redevelopment, one of the goals of the program was to halt the spread of communism. *Marshall Plan*, HISTORY (Aug. 21, 2018), https:/www.history.com/topics/world-war-ii/marshall-plan-1 [https:/perma.cc/PQ6F-9ALN].

124. U.S. Mission Argentina, *What is OECD*, U.S. EMBASSY IN ARGENTINA (Apr. 6, 2018), https:/ar.usembassy.gov/what-is-oecd/ [https:/ar.usembassy.gov/what-is-oecd/].

125. Brewster, *supra* note 31, at 1611, 1637.

126. *Id.* at 1637.

127. *Id.* at 1642. *See* Davis, *supra* note 120, at 337–38. The OECD Anti-Bribery Convention is now signed by over forty-one nations, including the United States. *Id.*

mine[d] good governance and economic development."[128] Furthermore, the Anti-Bribery Convention acknowledged that "all countries share a responsibility to combat bribery in international business transactions" and thereafter sought to develop effective measures to deter and prevent this kind of bribery.[129] The purpose of the Anti-Bribery Convention, then, was to create a "level playing field" across countries by obligating its signatories to adopt and enforce laws similar to the FCPA.[130] Significantly, among the 1998 amendments Congress made to the FCPA, one amendment expanded the FCPA's scope to include foreign nationals employed by, or acting as, agents of U.S. corporations.[131]

Still, the Anti-Bribery Convention does not provide a definition of "agency" for purposes of cross-border bribery.[132] Instead, the OECD's Working Group on Bribery in International Business Transactions (WGB)[133] published a report in 2009, which provides guidance as to what those signatories understand "agents" to be in these cases.[134] The WGB report focused on intermediaries who act as "conduits" in international business transactions, listing "agents" as an example of such intermediaries.[135] In the absence of a legal definition, the WGB defines an "intermediary" as a per-

128. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, 6.

129. *Id.*

130. S. REP. NO. 105-277, 2 (1998).

131. *See* U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 5. The 1998 amendments "expanded the FCPA's scope to: (1) include payments made to secure 'any improper advantage;' (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of 'foreign official;' (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies." *See id.* at 4.

132. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (The Articles to the Convention do not provide a definition of the term "agent.").

133. *See OECD Working Group on Bribery in International Business Transactions*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., http:/www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm [https:/perma.cc/PQB2-6M6S] (last visited Oct. 18, 2019). The WGB consists of cross-border bribery experts from signatories to the OECD Anti-Bribery Convention. Established in 1994, the WGB is "responsible for monitoring the implementation and enforcement" of the OECD Anti-Bribery Convention. *Id.*

134. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, TYPOLOGIES ON THE ROLE OF INTERMEDIARIES IN INTERNATIONAL BUSINESS TRANSACTIONS (2009), https:/www.oecd.org/daf/anti-bribery/anti-briberyconvention/43879503.pdf [https:/perma.cc/KS77-X24X] [hereinafter WGB REPORT].

135. *Id.* at 5.

son who is "put in contact with or in between two or more trading parties" and who is normally understood to be a "conduit for goods or services offered by a supplier to a consumer."[136] Furthermore, the WGB also noted that these intermediaries may be "local representatives" working on behalf of large multinational corporations.[137] Although the WGB did not state that intermediaries are exclusively local representatives, it recognized that in many cases the intermediary is located in the bribed official's jurisdiction.[138]

This Note argues that the key characteristics of an "intermediary" then, as derived from the WGB report, are: that the individual is a local third party, contracted by a non-local supplier to serve as a representative and to facilitate the movement of goods and services between that supplier and a local consumer. Because of the WGB's particular use of the term "agents" as examples of intermediaries and the lack of a formal definition of agent in the Anti-Bribery Convention, this Note presumes that the WGB's definition of "intermediary" reflects the signatories' understanding of what constitutes an "agent" in cases of cross-border bribery. As will be argued in Part IV.A *infra*, this "OECD Agency" theory is the one that courts, as well as the DOJ and SEC, should use when interpreting what constitutes an agent of a domestic concern.

C. APPLYING OECD AGENCY UNDER THE FCPA

This section of the Note provides two case studies to demonstrate the workability of adopting OECD Agency. Specifically, these case studies illustrate how OECD Agency does not prevent the DOJ from prosecuting entities it otherwise could have under traditional principles of agency. Furthermore, the case studies highlight a potential issue of statutory construction that could be resolved by adopting OECD Agency.

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136. *Id.* (noting also that intermediaries can act as conduits for legitimate economic activities, illegitimate bribery payments, or a combination of both).

137. *Id.*

138. *Id.* at 22.

1. *The* Titan Corporation *Case*

The *Titan Corporation* case study exemplifies how replacing traditional agency theory with OECD Agency would not undermine the DOJ's ability to enforce the FCPA. Titan Corporation (Titan) and its subsidiaries were in the business of constructing wireless telephone systems in developing countries.[139] Titan maintained its headquarters and principal place of business in San Diego, California, and was therefore a domestic concern as the term is used in the FCPA.[140]

In 1998, Titan sought to construct a telephone system in the Republic of Benin and sent several of its personnel and officers to Benin to discuss the project with members of the Benin government.[141] During the visit, Titan's personnel were introduced to a Beninese national, who informed them that he had access to the President of Benin.[142] The Beninese national then entered into a "consulting agreement" with Titan's personnel, in which he was supposed to identify and advise on potential business opportunities.[143] Ultimately, Titan was able to construct the telephone system it planned, but not before transferring four hundred thousand dollars to a bank account in Benin, held in the name of a relative of the Beninese national.[144] Titan also went on to make seven payments to the Beninese national, totaling over two million dollars, which were used to support the President of Benin's re-election efforts.[145]

In 2005, the DOJ reached a plea agreement with Titan, which was charged with, among other things, violating the anti-bribery provisions of the FCPA.[146] In the agreement, the DOJ asserted that the Beninese national was Titan's agent, representing its

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139. *See* Plea Agreement at 6, United States v. Titan Corp., No. 05-CR-0314-BEN (S.D. Cal. Mar. 1, 2005).

140. *Id.*

141. *Id.* at 6, 7.

142. *Id.*

143. *Id.* The "consulting agreement" was a sham. The Beninese national did not perform any of the duties listed in the agreement. *Id.* at 8, 10, 11.

144. *Id.* at 8. This payment came only two weeks after the Beninese national entered into the consulting agreement. *Id.*

145. *See id.* at 10. The plea agreement states that Titan Corporation was aware of the fact that the payments to the Beninese national would be used for the Benin president's re-election efforts. *Id.*

146. *Id.* at 4. Note that the plea agreement also shows that Titan Corporation was charged with violating the record keeping and accounting provisions of the FCPA, as well as aiding and abetting violations of the FCPA. *Id.* at 5.

interests in Benin.[147] Therefore, the Beninese national was an agent of a domestic concern. As an agent of a domestic concern, the Beninese national was subject to the FCPA's anti-bribery provisions and could have been prosecuted by the DOJ.[148] This result — that is, the determination that the Beninese national was an agent of a domestic concern — would be achieved under both traditional principles of agency and OECD Agency.

First, in order to establish an agency relationship under the traditional principles of agency: the principal-to-be and the agent-to-be must consent to the relationship; the agent must have the authority to represent and act on the principal's behalf; and the principal must have a right to control the agent's action and/or terminate the relationship.[149] Here, these requirements are clearly satisfied as evidenced by the consulting agreement that the Beninese national entered into with Titan; both parties agreed to the relationship, the Beninese national had authority to act on Titan's behalf, and Titan could direct the Beninese national's actions and terminate the agreement.

Second, to establish OECD Agency, the agent must be a local third party, contracted by a non-local supplier to serve as its representative and to facilitate the movement of goods and services between that supplier and a local consumer.[150] These requirements are also satisfied in Titan's case. At all relevant times, the Beninese national was a resident of Benin and was therefore a "local third party." The Beninese national was contracted by Titan, a non-local consumer, and represented Titan's interests in Benin and was responsible for facilitating the bribes (i.e., the goods) from Titan to the President of Benin, the local consumer. Consequently, the Beninese national would also have been considered an agent of a domestic concern had the DOJ been operating under OECD Agency.

147. *Id.* at 7.

148. 15 U.S.C. §§ 78dd-1(a) to -2(a) (2012).

149. *See supra* Part III.A for the necessary conditions to establish the principal-agent relationship.

150. *See supra* Part III.B.2 for the key features of OECD Agency.

2. *The* Keppel Offshore & Marine *Case*

The *Keppel Offshore & Marine* case study serves a twofold purpose. First, it presents an issue of statutory construction. Second, it explains how OECD Agency could help solve this issue by more clearly defining the categories of entities subject to the FCPA.

Keppel Offshore & Marine Ltd. (KOM) was a Singapore-based corporation that operated shipyards in Asia, America, and Europe.[151] KOM's American subsidiary, KOM USA, was a corporation based in Texas and incorporated in Delaware.[152] Therefore, KOM USA was a domestic concern as the term is defined in the FCPA.[153] At all relevant times, KOM "Executive 3" — a senior executive of KOM USA — was a citizen of Singapore and a legal permanent resident of the U.S.[154] Also, at all relevant times of the alleged misconduct, KOM "Executive 4" was a citizen of Singapore and served as an executive of KOM USA.[155]

Among others,[156] Executive 3 and Executive 4 were responsible for supervising operations in Brazil and other non-U.S. locations.[157] In order to secure certain business advantages in Brazil, Executive 3 and Executive 4 "hired" a local consultant in Brazil.[158] The "consultant" did not offer any legitimate consulting services, but instead facilitated bribe payments from KOM USA to Brazilian public officials and to Brazil's Worker's Party.[159] In total, KOM USA funneled over eight million dollars in bribe payments to these government officials through the "consultant."[160] In 2017, the DOJ charged KOM USA with violating the anti-bribery provisions of the FCPA.[161] Importantly, the DOJ asserted that Executive 3 and Executive 4 were both "employees" and "agents" of a domestic concern (i.e., KOM USA).[162]

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151. Information ¶ 2, United States v. Keppel, No. 17-CR-00698 (E.D.N.Y. Dec. 22, 2017).
152. *Id.*
153. *Id.*
154. *Id.* ¶ 11.
155. *Id.*
156. There are six executives listed in the Information. *Id.* ¶ 8–13.
157. Information ¶ 2, United States v. Keppel, No. 17-CR-00698 (E.D.N.Y. Dec. 22, 2017).
158. *Id.* ¶¶ 7, 17.
159. *Id.* ¶¶ 7, 20.
160. *Id.* ¶ 20.
161. *Id.* ¶¶ 1, 17, 22–23.
162. *Id.* ¶¶ 10–11.

That assertion illustrates a blurring of the lines drawn by Congress to define the categories of entities subject to the FCPA. Recall from Part II.A.2 that among the categories of entities subject to the FCPA are officers, directors, employees, and agents of a domestic concern.[163] Each of these categories should be read as being distinct from the other, so as to not render any of them superfluous.[164] For example, while officers of a corporation are generally also considered to be employees,[165] the categorical term "employees" should not be read as including officers because doing so would render Congress' inclusion of the term "officers" as a category redundant.

If the DOJ can assert that Executive 3 and Executive 4 were *both* employees *and* agents of KOM USA, then Congress' inclusion of "employees" and "agents" in the categorical jurisdiction of the FCPA is superfluous. If the "employee" category can also be used to capture "agents," then the inclusion of agents as a separate category is unnecessary.[166] Adopting OECD Agency for the FCPA would resolve this issue by more clearly defining the term agent. Under OECD Agency, neither Executive 3 nor Executive 4 could be considered an "agent of a domestic concern" under the FCPA — neither acted as a local representative nor did they facilitate the bribe payments from KOM USA to the Brazilian public officials the way the Brazilian consultant did.[167] In this way, OECD Agency provides enough specificity to the term "agent" so as to differentiate it from "employee."

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163. 15 U.S.C. § 78dd-2(a) (2012); *see supra* Part II.A.2.

164. Corley v. United States, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'") (internal citation omitted).

165. *See* 70A AM. JUR. 2D SOCIAL SECURITY & MEDICARE § 314 (2019) ("The term 'employee' under the Social Security Act and the Internal Revenue Code includes any officer of a corporation. If a person is an officer of a corporation, the person will be considered an employee of the corporation if the person is paid or the person is entitled to be paid for holding office or performing services."); *see also* PUBLICATION 15-A: EMPLOYER'S SUPPLEMENTAL TAX GUIDE, DEP'T OF TREAS., INTERNAL REVENUE SERV. 5 (Dec. 20, 2018), https:/www.irs.gov/pub/irs-pdf/p15a.pdf [https:/perma.cc/R43C-8XUL] ("An officer of a corporation is generally an employee. . . .").

166. Note that under the traditional principles of agency, employees would generally be considered agents. *See supra* Part III.A. The distinctions between employee and agent (and employee and officer) are more nuanced and fact-dependent than depicted in the above example. The example here is simplified to illustrate the potential for confusion and does not necessarily assert that these categories should never overlap — only that the boundaries of such categories should be clear.

167. In fact, the agent of the domestic concern in this case would be the Brazilian consultant.

This is not to say that the DOJ could not prosecute Executive 3 and Executive 4. The DOJ alleged both Executive 3 and Executive 4 were employed by KOM USA and therefore were "employees" of a domestic concern, subject to the FCPA.[168] OECD Agency would simply prevent Executive 3 and Executive 4 from also being labeled as "agents" of a domestic concern. Practically then, OECD Agency would only prevent the DOJ from bringing an action in cases where the entity not only fails to fall under the other broadly applicable categories, but also fails to fall under the very limited definition of "agent": a local third party contracted by a non-local supplier to serve as a representative and to facilitate the movement of goods and services (i.e., bribes) between that supplier and a local consumer. Adopting OECD Agency would make clearer the categories of entities subject to the FCPA without compromising the DOJ's ability to bring enforcement actions under it.

IV. RETURNING TO *HOSKINS* AND SUGGESTIONS MOVING FORWARD

Before returning to *Hoskins*, Part IV.A first argues that there are four factors that justify the adoption of OECD Agency under the FCPA. Next, Part IV.B examines in greater detail one of the four justifications put forth in Part IV.A. Finally, Part IV.C then argues that Lawrence Hoskins should not be considered an agent of Alstom U.S. for purposes of criminal liability under the anti-bribery provisions of the FCPA because he does not satisfy the elements of OECD Agency.

168. While the DOJ asserts Executive 3 and Executive 4 were "employees" of a KOM USA, *see* Information ¶¶ 10, 11, United States v. Keppel, No. 17-CR-00698 (E.D.N.Y. Dec. 22, 2017), a more appropriate labeling of them would be "officers" given their supervisory roles. For similar reasons, this would prevent blurring the lines drawn by Congress. While officers generally are considered to be employees, if the term "employees" was meant to encompass officers, the inclusion of the categorical term "officers" then, would be redundant.

A. OECD AGENCY AND EXTRATERRITORIAL APPLICATION OF THE FCPA

There are four reasons why courts, as well as the DOJ and SEC, should adhere to OECD Agency when determining what constitutes an agent of a domestic concern for purposes of extra-territorial application of the FCPA. First, Congress specifically amended the FCPA in accordance with the requirements of the OECD Anti-Bribery Convention. Prior to the Anti-Bribery Convention, the FCPA did not reach foreign nationals employed by, or acting as, agents of U.S. corporations. As the legislative history suggests, this was probably due to concerns for due process and international comity.[169] Congress likely was more willing to expand the scope of the FCPA to include this category of individuals after the Anti-Bribery Convention because of the signatories' particularized understanding of what constitutes agents in cross-border bribery cases (i.e., OECD Agency). In other words, OECD Agency provided enough assurance of due process and international comity to permissibly expand the reach of the FCPA.

Second, OECD Agency does not contravene traditional principles of agency theory although it is likely a more restrictive application of agency theory. Under OECD Agency, an agent is a local third party who agrees to represent a non-local corporation and act on that corporation's behalf, usually to facilitate bribes. This characterization satisfies the essential elements required for traditional agency. The parties consent to this arrangement and the local third-party agent has the authority to act on behalf of the corporation (offering bribes). This definition however, effectively limits "agents of domestic concerns" to the local bribe givers. That is, it ensures that no one in Hoskins's position (i.e., a foreign national and corporate executive that does not commit acts within the U.S.) would be considered an agent of a domestic concern under the FCPA. This would effectively prevent prosecutors from impermissibly expanding the reach of the FCPA by labelling individuals like Hoskins as agents of a domestic concern.

Second Circuit Judge Gerard Lynch expressed concerns that a narrow interpretation of the FCPA would prevent the DOJ from prosecuting the "mastermind" of a bribery scheme if the master-

169. *See supra* Part III.B.1 for the discussion of the concerns expressed by legislators for international comity and due process.

mind was a foreign individual in a position similar to that of Hoskins.[170] Still, a narrowed interpretation of the FCPA does not mean that an orchestrator of a bribery scheme in Hoskins' position will go unpunished. It simply means that such an individual will not be punished by the DOJ; they could (and should) be punished by the appropriate foreign authority.[171]

Third, as exemplified by Part III.C of this Note, adopting OECD Agency would not undermine the DOJ's ability to enforce the FCPA. In fact, it would provide greater specificity and draw clearer distinctions between the entities subject to the FCPA. Adopting OECD Agency would update the FCPA to reflect what practitioners have already known "agents" to be: local third parties hired by U.S. companies to "advise them, to introduce them to appropriate officials, to lobby, and sometimes to funnel illegal payments to foreign officials."[172]

Fourth, and as discussed in greater detail in the next section, OECD Agency would do more to accomplish the OECD Anti-Bribery Convention's goal of leveling the playing field related to cross-border bribery enforcement.

B. OECD AGENCY HELPS LEVEL THE PLAYING FIELD

Adopting OECD Agency would narrow the term "agent of a domestic concern" to include only local representatives that offer bribes and exclude the officials who authorized them. This limitation, however, would do much to address the issue of uneven anti-bribery enforcement by the signatories to the OECD Anti-Bribery Convention.[173] While over forty nations have since signed the OECD Anti-Bribery Convention and enacted laws similar to that of the FCPA, several of those nations have done a rather poor job in enforcing those laws.[174]

Some FCPA scholars have argued that one explanation for the poor enforcement could be the lack of clear statements by the

170. United States v. Hoskins, 902 F.3d 69, 104 (2d Cir. 2018) (Lynch, J., concurring).

171. *See* Frederick T. Davis, *The Result in US v. Hoskins is Required by the OECD Anti-Bribery Convention*, GLOB. ANTICORRUPTION BLOG (Sept. 27, 2018), https:/globalanticorruptionblog.com/2018/09/27/guest-post-the-result-in-us-v-hoskins-is-required-by-the-oecd-anti-bribery-convention [https:/perma.cc/B4D4-ECHT].

172. *Id.*

173. Davis, *supra* note 120, at 337–39 (explaining that some of the signatory countries have been more aggressive and successful than others in implementing their own anti-bribery laws).

174. *Id.*

U.S. that it will desist from prosecuting a corporation or individual if a local prosecutor from a signatory country does so in good faith.[175] In order to solve the problem of uneven enforcement, some scholars have argued for penalty-sharing arrangements between the U.S. and foreign authorities.[176] Under these arrangements, the U.S. would agree to share in the penalties recovered from an FCPA enforcement with foreign authorities whose state has been harmed or whose state had illicit behavior occur in their territory.[177]

This proposed solution falls short for two reasons. First, it doesn't encourage foreign authorities to enforce their respective anti-bribery laws. In fact, it potentially encourages them to refrain from enforcing their anti-bribery laws since they will still share in the profits so long as their state has been harmed or if behavior contributing to the violation occurred in their state. Second, it does not consider the fact that it is more equitable for an offender to be prosecuted by the authorities of the state with whom it has the *most* amount of contacts. The penalty-sharing agreements could be written to require any foreign authority seeking to share in the penalties to bring or be in the process of bringing charges against the violator (addressing the first issue). But this proposed solution does not address the second issue because it would still allow for prosecutions by more than one state, which would be less equitable than a single prosecution brought by the prosecutor of a state with whom the violator has the most contacts. In fact, this is something that has already been addressed by the OECD Anti-Bribery Convention: Article 4.3 of the convention asks the signatories to determine the most appropri-

175. Frederick Davis, *Guest Post: The US Needs to Show More Respect for Foreign Prosecutions*, GLOB. ANTICORRUPTION BLOG (Nov. 3, 2016), https:/globalanticorruptionblog.com/2016/11/03/guest-post-the-us-needs-to-show-more-respect-for-foreign-prosecutions [https:/perma.cc/JQE5-M7XX].

176. Michael Maruca, *Equitable Sharing, Not Deference: How US FCPA Enforcers Should Accommodate Foreign Interests*, GLOB. ANTICORRUPTION BLOG (Dec. 16, 2016), https:/globalanticorruptionblog.com/2016/12/16/equitable-sharing-not-deference-how-us-fcpa-enforcers-should-accommodate-foreign-interests [https:/perma.cc/Z7KZ-H34W].

177. *See* SEC Press Release 2016-34, *VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations*, U.S. SECURITIES AND EXCHANGE COMMISSION (Feb. 18, 2016), https:/www.sec.gov/news/pressrelease/2016-34.html [https:/perma.cc/XK5V-LUK6]. The DOJ and Dutch authorities agreed to evenly split the fines paid by VimpelCom Ltd., a Dutch corporation, for violating the FCPA. *Id.*

ate jurisdiction for prosecution when more than one signatory has jurisdiction.[178]

Adopting OECD Agency would be an affirmative step in achieving the OECD Anti-Bribery Convention's purpose of creating a level playing field by helping to solve the problem of uneven enforcement. In limiting the reach of the FCPA, foreign agencies would essentially be receiving an assurance in certain cases that the U.S. would not (and could not) prosecute. This will encourage (and require) those agencies to enforce their respective anti-bribery laws. For example, Hoskins, a U.K. national, could have been prosecuted by the U.K. under the U.K. Bribery Act.[179] Adopting OECD Agency will be a step toward ensuring violators are prosecuted by the state with whom the violator has the most contacts.

By limiting the reach of the FCPA, the U.S. would take an important step in conforming to this requirement of the OECD Anti-Bribery Convention and ensuring that entities with essentially no ties to the U.S. are prosecuted by a signatory with the most appropriate jurisdiction. Congress, therefore, should amend the FCPA to make explicit the instructive nature of the OECD Anti-Bribery Convention in interpreting the FCPA and to provide a specific definition of what it means to be an "agent of a domestic concern" that includes the characteristics described in Part III.B.2 of this Note.

If Congress does not amend the FCPA, then federal courts should, as has been argued by others, expressly recognize that, "by joining the OECD Convention, the U.S. has agreed to share decision-making authority about whom to prosecute."[180] Such recognition by federal courts will have a similar effect as an amendment to the FCPA recognizing the instructive nature of the OECD Anti-Bribery Convention on FCPA.

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178. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, art. 4.3 ("When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."). The Anti-Bribery Convention already suggests that the signatories should be cognizant of each other's jurisdictions and that defendants should be tried in the most appropriate forum. *Id.*

179. *See* Bribery Act 2010, c. 23, § 12 (Eng.), https:/www.legislation.gov.uk/ukpga/2010/23/section/12 [https:/perma.cc/QA8E-LMRX] (last visited Oct. 19, 2019). Under Section 12, Hoskins is subject to this act because he is a U.K. national. *Id.*

180. Davis, *supra* note 171.

C. APPLICATION TO *HOSKINS*

This section returns to *Hoskins* and argues that Lawrence Hoskins should not be considered an agent of Alstom U.S. for purposes of criminal liability under the anti-bribery provisions of the FCPA because he does not satisfy the elements of OECD Agency. Further, even if OECD Agency did not govern application of the FCPA, Hoskins also fails to satisfy the traditional principles of agency. Therefore, he should not be liable under the FCPA.

To begin, Hoskins is not an agent under OECD Agency. Recall that under OECD Agency, an agent is a local third party contracted by a non-local supplier to serve as a representative and to facilitate the movement of goods (bribes) between that supplier (briber) and a local consumer (bribe). Hoskins was not local to Indonesia; he was not serving as a local representative on behalf of Alstom U.S. and he was not facilitating the movement of the bribes between Alstom U.S. and the government of Indonesia (although he did commission them). In fact, when reviewing the facts of *Hoskins* with OECD Agency in mind, it is evident that the "agents" in *Hoskins* are the consultants that were hired by Alstom U.S. Those consultants were local to Indonesia and represented Alstom U.S.'s interests there. The consultants were also the ones who actually offered the bribes to the Indonesian government officials on behalf of Alstom U.S.[181] The consultants therefore satisfy the requirements of OECD Agency and should be held liable for violating the anti-bribery provisions by the FCPA.

Further, recall from Part III.A *supra*, that if any of the elements required for a traditional agency relationship to exist are absent, then there is no agency relationship. A critical element of that relationship is the power of the principal to control the agent and/or to terminate the relationship. In order for Hoskins to have been an agent of Alstom U.S. then, Alstom U.S. should have been able to control Hoskins and/or terminate its relationship with Hoskins. Alstom U.S. could do neither of those things; Hoskins was senior vice-president in a department, International Net-

181. Hoskins Indictment, *supra* note 51, ¶¶ 7, 66–68. The consultants were hired to facilitate the illegal payments and they both were in Indonesia lobbying on behalf of Alstom U.S. *Id.* ¶¶ 7, 66.

work, to which Alstom France's subsidiaries reported.[182] The DOJ even conceded that Hoskins was responsible for overseeing Alstom France's subsidiaries' efforts to secure contracts in Asia.[183] Alstom U.S. could not direct Hoskins or control him. In fact, officials at Alstom U.S. sent emails to Hoskins asking him for his advice and consent.[184] Furthermore, the power to give interim instructions is a distinguishing feature of principals in agency relationships. Here, it was Hoskins who provided instructions to and made requests of Alstom U.S., not vice-versa.[185] This element does not exist, and therefore there is no agency relationship between Alstom U.S. as "principal" and Hoskins as "agent" under the traditional principles of agency.

Despite the nonexistence of these essential elements, a jury concluded that Hoskins was an agent of Alstom U.S. and convicted him of violating the FCPA.[186] Following the presentation of evidence at Hoskins' trial, District Court Judge Janet Arterton instructed the jury to consider the definition of "agent" to include: "a manifestation by the principal that the agent will act for it"; "the agent's acceptance of an 'undertaking' — meaning 'acts or services' for the principal"; and "an understanding that the principal is 'in control' of those acts or services."[187] This jury instruction is not grounded in OECD Agency, but rather in traditional principles of agency. But as this Note has already demonstrated, Hoskins is not an agent under traditional principles of agency. Alstom U.S. did not control Hoskins generally nor with respect to the hiring of the consultants used to facilitate the bribe payments. Therefore, there did not exist an "understanding" that Alstom U.S. was "in control" of the acts undertaken by Hoskins.[188]

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182. *See* Swiss Punishment Order re Alstom Network Schweiz AG ¶¶ 2.2–2.3 (Nov. 22, 2011), https:/star.worldbank.org/corruption-cases/sites/corruption-cases/files/Alstom_Summary_Punishment_Order_Nov_22_2011.pdf [https:/perma.cc/5JSB-W55R] (noting that Alstom subsidiaries in Switzerland reported to International Network in France).

183. Hoskins Indictment, *supra* note 51, ¶ 13.

184. *Id.* ¶¶ 67, 70, 73-74.

185. *Id.* ¶ 70, 73.

186. *See supra* note 23 and accompanying text.

187. John M. Hillebrecht et al., *Jury Finds Former Executive Lawrence Hoskins Guilty in Key Case Testing Agency under the FCPA*, DLA PIPER (Nov. 8, 2019), https:/www.dlapiper.com/en/us/insights/publications/2019/11/jury-finds-former-executive-lawrence-hoskins-guilty-in-key-case-testing-agency-under-the-fcpa/ [https:/perma.cc/NQ7G-64CQ].

188. *Id.*

At most, for what the DOJ has alleged against him, Hoskins aided and abetted and conspired to violate the anti-bribery provisions of the FCPA. Yet, the Second Circuit has held that these theories of liability cannot extend the reach of the FCPA to entities not intended by Congress to be subject to it.[189] The text of the FCPA is carefully tailored and should be read against the backdrop of the presumption against extraterritoriality. Allowing Hoskins and those similarly situated to be considered agents of a domestic concern for purposes of FCPA liability would diminish any distinction between agency, and conspiracy and complicity in these cases. It would allow for the implementation of conspiracy and complicity theories of liability under the guise of agency, which would result in the impermissible expansion of the extraterritorial reach of the FCPA.

In fact, this is exactly what happened in Hoskins' trial. The jury instructions were grounded in traditional principles of agency and were general enough to allow the jury to conclude Hoskins was an agent of a domestic concern, despite the fact that Alstom U.S. did not control Hoskins. This result is an impermissible expansion of the FCPA — the DOJ was essentially able to convict Hoskins for conspiring to commit and aiding and abetting an FCPA violation under the guise of agency. A jury instruction grounded in OECD Agency would be more specific and would sufficiently close this backdoor approach to circumventing the Second Circuit's decision in *Hoskins*.[190]

If Hoskins chooses to appeal, the Second Circuit will be presented with the very issue that it opted not to decide: what constitutes an agent of a domestic concern under the FCPA? For all of the reasons set forth above, the Second Circuit should recognize the significance of the OECD Anti-Bribery Convention and decide that OECD Agency governs the interpretation of "agent of a domestic concern" under the FCPA.

189. United States v. Hoskins, 902 F.3d 69, 97 (2d Cir. 2018) (holding that prosecutors could "not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes").

190. *Id.*

V. CONCLUSION

Although the Second Circuit has held that the extraterritorial reach of the FCPA cannot be expanded by recourse to the conspiracy and complicity statutes, it has expressly left open the question of what constitutes an "agent of domestic concern" under the FCPA. The signatories to the OECD Anti-Bribery Convention have a particular understanding as to what agents are in cases of cross-border bribery. Given that the FCPA was amended to conform to and implement the OECD Anti-Bribery Convention, the OECD Anti-Bribery Convention should be instructive in interpreting the FCPA, and OECD Agency should govern the use of agency under the FCPA. Congress should therefore amend the FCPA to make explicit the instructive nature of the OECD Anti-Bribery Convention on the FCPA and should adopt a definition of "agent" similar to that of OECD Agency. Doing so would not only resolve the issue left open by the Second Circuit, but would also be an affirmative step in helping to level the playing field of anti-bribery enforcement across borders by encouraging foreign authorities to prosecute violators of their respective anti-bribery laws.