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United States v. Hoskins: An Opportunity for the Second Circuit to Limit the Abusive Reach of the FCPA

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**UNITED STATES V. HOSKINS: AN
OPPORTUNITY FOR THE SECOND CIRCUIT TO
LIMIT THE ABUSIVE REACH OF THE FCPA**

Christopher D. Man & Kyllan J. Gilmore¹

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I. INTRODUCTION

A critical question now before the Second Circuit in *United States v. Hoskins*² concerns the scope of the word “agent” as used in the Foreign Corrupt Practices Act (“FCPA”).³ In a prior

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2. Brief for the United States of America, *United States v. Hoskins*, No. 20-842(L) (2d Cir. July 13, 2020) [hereinafter “DOJ Br.”].

3. *See, e.g.*, DANIEL J. FETTERMAN & MARK P. GOODMAN, DEFENDING

appeal involving the same case (“*Hoskins I*”),⁴ the Second Circuit held that the United States Department of Justice (“DOJ”) could not prosecute foreign national Lawrence Hoskins under the FCPA for conduct committed abroad on a conspiracy or aiding-and-abetting theory.⁵ The court found that Congress was concerned with the extraterritorial reach of the FCPA and endeavored to limit its application by carefully delineating the categories of included foreign nationals and conduct.⁶ It held that Hoskins could not be prosecuted under the FCPA unless he fell within one of those enumerated categories, which includes officers, directors, employees, and agents of a company with a sufficient U.S. nexus to be subject to the FCPA,⁷ and that the

CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 1:3 (2020) (“The case is significant because it narrows the jurisdictional reach of DOJ over nonresident foreign nationals, directly contradicting existing DOJ guidance.”).

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

5. *Id.* at 97; see also U.S. DEP’T OF JUST. & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 36 (2019) [hereinafter RESOURCE GUIDE] (citing United States v. Firtash, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019) as support for their position post-*Hoskins I*). DOJ and the Securities and Exchange Commission (“SEC”) disagree with the holding in *Hoskins I* and maintain that conspiracy and aiding and abetting theories can be used to prosecute those who do not fall into any of the FCPA’s enumerated categories of liable persons, but they acknowledge that the decision is binding in the Second Circuit.

6. *Hoskins*, 902 F.3d at 94.

7. *Id.*; see 15 U.S.C. §§ 78dd-1(a), 77dd-2(a). The FCPA applies to an “issuer” that has a class of securities registered pursuant to section 78 or that is required to file reports under section 78o(d) of Title 15 and to a “domestic concern,” along with any officer, director, or employee acting on its behalf to commit a prohibited foreign bribery offense. 15 U.S.C. § 78dd-1(a). “Issuer” is statutorily defined to mean “any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term ‘issuer’ means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term ‘issuer’ means the person by whom the equipment or property is, or is to be, used.” 15 U.S.C. § 78c(a)(8). Thus, foreign companies that are publicly traded on a U.S. stock exchange will be issuers. “Domestic concern” is statutorily defined to mean “(A) any individual who is a citizen, national, or resident of the United States; and (B) 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

government could not use conspiracy and aiding-and-abetting liability theories to expand those categories.

Hoskins was employed by a U.K. subsidiary of the French power company, Alstom S.A. (“Alstom”) and seconded to another subsidiary based in France, Alstom Resources Management.⁸ While the FCPA did not reach the foreign subsidiaries, the Second Circuit remanded the case, at the government’s urging, so the prosecution could seek to prove that Hoskins was guilty as an “agent” of Alstom’s U.S. subsidiary, Alstom Power Inc. (“API”).⁹ On remand, the jury agreed with the government and convicted Hoskins for violating the FCPA’s anti-bribery provisions.¹⁰ Nevertheless, the district court set aside the conviction, finding that the record failed to establish that API had sufficient control over Hoskins to establish an agency relationship.¹¹ The government appealed (“*Hoskins II*”), arguing that the district court erred by construing the term “agent” too narrowly.¹²

Although the district court reached the right result, we believe the issue was framed improperly. Words are not to be construed “in a vacuum.”¹³ Rather, there “is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”¹⁴ And when an undefined word in a statute is borrowed from another body of law, the word should be defined in accordance with that borrowed body of law.¹⁵ But before the district court, the word “agent” was not construed based on its context or its place in the statutory scheme.

territory, possession, or commonwealth of the United States.” 15 U.S.C. § 77dd-2(h)(1).

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

9. *Id.*

10. *United States v. Hoskins*, No. 3:12cr238, 2020 WL 914302, at *1 (D. Conn. Feb. 26, 2020).

11. *Id.* at *13.

12. *See* DOJ Br, *supra* note 2.

13. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (quoting *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989)).

14. *Gundy*, 139 S. Ct. at 2126 (quoting *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 666 (2007)).

15. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 73 (2012) [hereinafter “READING LAW”] (noting this canon applies whether the term was borrowed from common law or a specific field of law).

Instead, without pointing to any evidence that Congress so intended, the parties agreed that the term should be interpreted to hold its common law meaning, and the district court construed the term accordingly.¹⁶

The parties continue to litigate the scope of common law agency on the current appeal,¹⁷ but the FCPA uses the term “agent” in a much narrower sense than it was used before the district court. In settling on the common law definition, the parties and the district court looked to the wrong body of law. The term “agent” is a term of art in the field of anti-corruption law, and the district court should have defined the term accordingly.¹⁸

16. Hoskins initially argued in a motion *in limine* that the term “agent” in the FCPA refers to a specific type of special agent—a foreign third-party intermediary engaged by a domestic concern to pay a bribe on its behalf. Memorandum of Law at 2, *United States v. Hoskins*, No. 3:12-cr-238, 2019 WL 1213028 (D. Conn. Feb. 26, 2020). He was right, and this is directly supported by the legislative history as explained below, but the district court never decided this issue because the parties ultimately agreed to stipulate for the purposes of trial to define “agent” in accordance with the common law. *United States v. Hoskins*, No. 3:12cr238, 2020 WL 914302, at *2 n.1 (D. Conn. Feb. 26, 2020). Hoskins renewed this argument on appeal in a footnote in his brief. Brief for Hoskins at 15 n.7, *United States v. Hoskins*, No. 20-842(L) (2d Cir. Oct. 23, 2020) [hereinafter “Hoskins Br.”]. “Here, both parties agreed that the common-law definition of agency applied. However, there is strong reason to conclude that Congress actually intended ‘agents’ in the context of the FCPA to refer to a narrower category of individuals. Indeed, as Mr. Hoskins explained in a motion *in limine*, the legislative history of the FCPA strongly suggests that Congress was concerned with third-party, bribe-paying intermediaries—not any person who might qualify as an agent under common-law agency principles—when it added the term ‘agent’ to the FCPA.” *Id.* Although we advocate for the narrower definition of “agent” that Hoskins initially argued, Hoskins’ agreement to define “agent” in accordance with the common law shifted the battle to ground that he could, and before the district court did, prevail upon. That definition may be good enough to protect Hoskins, but the Second Circuit should define the term as Congress intended, which would protect a wider class of persons.

17. On appeal, the parties both seem to view “agent” as having a singular meaning at common law, but they disagree as to the controlling definition. The prosecution claims that the district court’s analysis, defended by Hoskins on appeal, “misunderstands . . . common law principles of agency.” DOJ Br., *supra* note 2, at 60. By contrast, Hoskins tells the Second Circuit that “the government has advanced an ever-expanding agency definition, one that would make ‘agent’ a synonym for ‘conspirator,’ thereby resuscitating the erroneous interpretation of the FCPA that this Court’s prior decision properly foreclosed.” Hoskins Br., *supra* note 16, at 5.

18. The International Academy of Financial Crimes Litigators (“IAFCL”) filed an *amicus* brief that argues Congress did not look to the common law in

When the initial FCPA passed in 1977, Congress contemplated a specific problem related to agents. The concern was that U.S. companies were hiring people in foreign countries as “agents” who ostensibly were retained for legitimate reasons, but who were used to pass bribes on to foreign government officials.¹⁹ Typically, companies would pay these agents disproportionate sums of money for whatever legitimate work they did, if any, with full knowledge that some of this money would be used by the agent to pay bribes.²⁰ For a variety of reasons though, including a desire to avoid intruding on the foreign sovereignty of other nations, the 1977 FCPA “did allow liability for agents, but restricted the liability to an agent who was ‘a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States,’ and also

defining “agent,” but that Congress instead looked to a settled understanding of what the word “agent” meant in anti-corruption circles. Brief for the International Academy of Financial Crime Litigators as Amicus Curiae in Support of Defendant-Appellee and Affirmance, *United States v. Hoskins*, 20-842(L) (2d Cir. Oct. 20, 2020) [hereinafter “IAFCL Br.”]. The IAFCL noted that the concern was with U.S. companies paying bribes through foreign procurement consultants, often explicitly called “agents,” who often were paid excessive fees on the understanding that part of the money they received would be passed along as bribes. *Id.* at 6. We agree that this was Congress’ focus, and our definition of “agent” as a special agent retained for the purpose of paying foreign government officials bribes essentially overlaps with IAFCL’s understanding of that term. The National Association of Criminal Defense Lawyers (“NACDL”) also filed an *amicus* brief in the case advocating the same definition of “agent” that we support. Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Appellee at 3, *United States v. Hoskins*, No. 20-842(L) (2d Cir. Oct. 20, 2020) [hereinafter “NACDL Br.”]. “[T]he text, structure, and legislative history of the FCPA demonstrate that Congress intended the term ‘agent’ to have a narrower meaning than the common-law definition: specifically, Congress intended that ‘agent’ liability be restricted to foreign bribe-paying intermediaries.” *Id.*; see also Christian R. Martinez, Note, *The Curious Case of Lawrence Hoskins: Evaluating the Scope of Agency Under the Anti-Bribery Provisions of the FCPA*, 53 COLUM. J.L. & SOC. PROBS. 211, 239 (2020) (advocating a similar interpretation of “agent”). Because Congress used the term “agent” as a term of art based on its usage in the field of anti-corruption law, that interpretation is controlling. See, e.g., *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 487–88 (2005) (although “seaman” is undefined in the statute it is a “term of art” in maritime law and “Congress took the term ‘seaman’ as the general maritime law found it”); *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974) (rejecting ordinary definition of “working conditions” in a statute because “the term has a different and much more specific meaning in the language of industrial relations”).

19. See *infra* notes 67–70 and accompanying text.

20. See *id.*

required a finding that the employer had been liable.”²¹ And Congress focused on this same concern when it amended the FCPA in 1988 to extend civil liability to foreign “agents.”²²

This is the very same problem related to agents that led to Congress expanding criminal penalties under the FCPA to “agents” regardless of their nationality in 1998. The initial FCPA failed to redress the global corruption problem, in large part because the United States often found itself fighting the battle alone.²³ Ultimately, the Organisation for Economic Cooperation and Development (“OECD”) promulgated the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Bribery Convention” or “OECD Convention”), which was signed by the United States and dozens of countries.²⁴ The OECD Convention required signatories to adopt anti-bribery provisions that would, among other things, address the specific problem of enlisting foreign agents to pay bribes.²⁵ As the DOJ and the SEC explain: “In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention.”²⁶ This use of the term “agent” was even adopted by the prosecution in *Hoskins* to describe the local agents who were retained to pay bribes.²⁷

“Agent,” therefore, was a term of art when Congress enacted the FCPA in 1977 and when it expanded criminal liability to reach foreign agents in 1998, and that is the construction it should receive. That interpretation also is consistent with its use in statutory context. The word “agent” does not appear in isolation. The FCPA applies to certain entities and “any officer, director, employee, or agent of such” entities,²⁸ and the *noscitur a sociis* canon directs that “agent” should be construed similarly

21. *United States v. Hoskins*, 902 F.3d 69, 89 (2d Cir. 2018) (citation omitted).

22. *See infra* note 74 and accompanying text.

23. *See Hoskins*, 902 F.3d at 91.

24. Organisation for Econ. Co-operation & Dev. [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, S. Treaty Doc No. 105-43 (Dec. 17, 1997) [hereinafter “OECD Convention”].

25. *See infra* notes 82–84 and accompanying text.

26. RESOURCE GUIDE, *supra* note 5, at 3.

27. IACFL Br., *supra* note 18, at 17–18.

28. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

to these other terms.²⁹ Consistent with *Hoskins I* and Congress' refusal to extend co-conspirator liability to every foreign party who aids and abets an FCPA violation, a narrow definition restricts liability to those who are acting as the U.S.-regulated entity itself. Companies, for example, can only act through their people—the officers, directors, employees, or agents. There is no ambiguity about whether someone is an officer, director, or employee of a company because there will be a formal relationship between those people and the company. There is a similar level of formality when an agent is retained for the specific purpose of paying a bribe. When someone agrees to that role as an agent, he or she will know it, just as someone will know whether he or she has become an officer, director, or employee of a company.

Employing a broader and more generic definition of “agent,” which depends on an analysis of a host of factors, is problematic for many reasons. A broad definition of “agent” that reaches anyone working on behalf of another would swallow the meaning of the words that surround it—officer, director, and employee,³⁰—which would violate the canon against construing one term in a statute so broadly as to render other parts surplusage.³¹ Such a broad and ambiguous test would also deprive persons (particularly foreigners less familiar with the American legal system) of fair notice of when their assistance crosses over into agency, which would offend the rule of lenity. Finally, a broad construction of “agent” could become a backdoor means for prosecutors to charge the sorts of people *Hoskins I* barred from being charged as conspirators and aiders-and-abettors, which would resurrect the same risk of prosecutorial overreach in a way that offends the sovereignty of foreign nations.³²

A. Background on United States v. Hoskins

1. *Hoskins I*

The Second Circuit's ruling in *Hoskins I* came in the wake

29. See, e.g., READING LAW, *supra* note 15, at 195–98.

30. See NACDL Br., *supra* note 18, at 12–13.

31. See, e.g., READING LAW, *supra* note 15, at 174–79.

32. See Hoskins Br., *supra* note 16, at 35 n.17.

of French power company Alstom S.A. pleading guilty to two FCPA counts in 2014 and paying a \$772 million criminal penalty for bribing Indonesian officials to obtain contracts related to the “Tarahan Project,” a \$118 million initiative to build a coal-fired power plant.³³ The prosecution brought FCPA charges against several Alstom executives and subsidiaries, including Hoskins, a senior executive of Alstom’s U.K. subsidiary, Alstom UK Ltd., who was seconded at the time to Alstom subsidiary Alstom Resources Management in France. The prosecution charged Hoskins with helping Alstom’s Connecticut-based subsidiary API hire contractors to pay the bribes.³⁴

The prosecution alleged that while employed by Alstom UK Ltd., Hoskins was assigned to an Alstom division called Country Network (later renamed “International Network”) that supported Alstom subsidiaries’ efforts to secure contracts around the world.³⁵ Hoskins was the Area Senior Vice President for the Asia, Asia-Pacific, and Eastern and Northern Europe regions.³⁶ In this role, he was involved with securing the Tarahan Project, which was contracted through Indonesia’s state-owned electricity company, Perusahaan Listrik Negara (“PLN”).³⁷ The prosecution charged Hoskins with aiding and abetting API in hiring consultants to funnel bribes to PLN and other Indonesian officials to secure the contracts for the Tarahan Project.³⁸ Specifically, the prosecution accused Hoskins of obtaining information about the status of the project from Indonesian officials, coordinating and engaging in discussions with others at Alstom regarding the plan to hire consultants to pay bribes, participating in the negotiation and approval of the agreements with the consultants, and meeting with the consultants regarding the plan.³⁹ The prosecution alleged that API then paid those consultants under the agreements and that a portion of those payments was funneled to Indonesian officials

33. Press Release, Dep’t of Just., Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), <https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>.

34. *Id.*

35. DOJ Br., *supra* note 2, at 11.

36. *Id.* at 12.

37. *Id.*

38. *Id.* at 13.

39. *Id.* at 14–20.

in the form of bribes, although Hoskins himself was not alleged to have paid anything to the consultants or officials.⁴⁰

In relevant part, Hoskins was charged with six counts of violating the FCPA's bribery provisions, which provide that it:

shall be unlawful for any domestic concern⁴¹ . . . or for any officer, director, employee, or agent of such domestic concern . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to [a foreign official].⁴²

Hoskins also was prosecuted on one count of conspiracy to violate this same provision.⁴³ In bringing the substantive charges, the prosecution proceeded on both the theory that Hoskins was liable as an agent of domestic concern, API, and on an aiding-and-abetting theory.⁴⁴

The *Hoskins I* appeal focused on whether FCPA liability could attach based on conspiracy or aiding-and-abetting theories of liability to persons who are not among the FCPA's enumerated categories of potentially liable persons.⁴⁵ Hoskins moved to dismiss the conspiracy count, and the prosecution filed a related motion *in limine* seeking to preclude Hoskins from arguing that the prosecution could not prevail on conspiracy or aiding-and-abetting theories alone, but would have to prove that Hoskins fell within one of the three FCPA-specific categories of persons.⁴⁶ The district court granted Hoskins' motion and rejected the prosecution's motion,⁴⁷ and the Second Circuit

40. *Id.*

41. 15 U.S.C. § 78dd-2(h) (2020); *see also supra* text accompanying note 7 (defining "domestic concern").

42. 15 U.S.C. § 78dd-2(a).

43. *United States v. Hoskins*, 902 F.3d 69, 72–73 (2d Cir. 2018).

44. *United States v. Hoskins*, 123 F. Supp. 3d 316, 319 (D. Conn. 2015).

45. *Hoskins*, 902 F.3d at 73.

46. *Id.* at 73–74.

47. *Hoskins*, 123 F. Supp. 3d at 327.

affirmed.⁴⁸

The Second Circuit explained:

The FCPA establishes three clear categories of persons who are covered by its provisions: (1) Issuers of securities registered pursuant to 15 U.S.C. § 78l or required to file reports under Section 78o(d), or any officer, director, employee, or agent of such issuer, or any stockholder acting on behalf of the issuer, using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-1; (2) American companies and American persons using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-2; and (3) foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States, 15 U.S.C. § 78dd-3.⁴⁹

Importantly, the Second Circuit looked to the structure, text, and legislative history of the FCPA and applied the presumption that a statute has no extraterritorial effect absent express congressional authorization⁵⁰ to conclude that Congress sought to limit liability to the listed categories.⁵¹ As Judge Lynch's concurring opinion explained, "[i]n adopting the FCPA,

48. *Hoskins*, 902 F.3d at 98.

49. *Id.* at 71. Alternatively, the Second Circuit explained: "these provisions provide jurisdiction over the following persons, in the following scenarios: (1) American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad; (2) most American companies, regardless of whether they violate the FCPA domestically or abroad; (3) agents, employees, officers, directors, and shareholders of most American companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad; (4) foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States." *Id.* at 85.

50. There is a presumption against construing a statute to have extraterritorial effect absent a clear statement by Congress to the contrary, and any extraterritorial scope afforded to a statute will be construed narrowly. *See, e.g.*, *READING LAW*, *supra* note 15, at 268–72.

51. *See Hoskins*, 902 F.3d at 83–84.

Congress sought to criminalize wrongful conduct by Americans and those who in various ways work with Americans, while avoiding unnecessary imposition on the sovereignty of other countries whose traditions and laws may differ from our own.”⁵² Accordingly, the Second Circuit ruled that the prosecution could not rely upon conspiracy and aiding-and-abetting theories to expand liability beyond the categories of liable persons delineated by Congress.⁵³

Nevertheless, the Second Circuit agreed that that the prosecution could still seek to prove at trial that Hoskins was the agent of API and was therefore liable under Section 78dd-2(a).⁵⁴ On remand, the prosecution sought to do exactly that.

2. *Prelude to Hoskins II*

On remand, the prosecution persuaded the jury that Hoskins was guilty as an agent, but the district court disagreed and issued an order of acquittal.⁵⁵ The district court concluded that the jury could find that API controlled the process for the hiring of foreign consultants to pay bribes, and that API gave Hoskins instructions regarding the hiring of those consultants, which he followed.⁵⁶ Nevertheless, the district court found that “the evidence adduced at trial cannot support the conclusion that Mr. Hoskins acted subject to API’s control such that Mr. Hoskins was an agent of API.”⁵⁷

The district court explained:

Agency is a legal concept that depends on the

52. *Id.* at 102 (Lynch, J., concurring).

53. *See id.* at 96–97. While the conspiracy and aiding-and-abetting statutes are generally applicable, there is an exception where the substantive statute at issue reflects a congressional intent to limit the categories of persons who may be charged. *See, e.g.,* *Gebardi v. United States*, 287 U.S. 112, 123 (1932). Prior to *Hoskins*, the Fifth Circuit applied the same principle to the FCPA in a different context, holding that Congress carefully precluded foreign officials who accepted bribes from FCPA liability, so the U.S. government cannot prosecute those foreign officials under the general conspiracy statute. *See generally* *United States v. Castle*, 925 F.2d 831, 832 (5th Cir. 1991).

54. *Hoskins*, 902 F.3d at 97.

55. *United States v. Hoskins*, No. 3:12cr238, 2020 WL 914302 (D. Conn. Feb. 26, 2020).

56. *Id.* at *6–7.

57. *Id.* at *7.

existence of three elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." In other words, an agency relationship arises when "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."⁵⁸

The district court emphasized that "[a]n essential element of agency is the principal's right to control the agent's actions."⁵⁹ Additionally, the district court explained, "[a]gency requires more than mere authorization to assert a particular interest.' Agency is a 'fiduciary relationship.'"⁶⁰

Applying these standards, the district court found that the facts at trial did not demonstrate control. Rather, the facts merely demonstrated that API directed the standards for the hiring of consultants and Hoskins assisted, for example, by revising draft agreements per API's direction.⁶¹ While Hoskins did assist API, the district court observed that API lacked traditional indicia of control, such as the ability to hire or fire Hoskins, reassign him, dictate what he did, or review his performance, and there was no evidence Hoskins agreed to be controlled by API.⁶²

On appeal, the government maintains that the district court "misapplied cases of this Court and the Supreme Court to suggest a narrower view of control than the law permits," and that agency can be inferred from API giving instructions that Hoskins followed.⁶³ The government claims that "the district

58. *Id.* at *2 (quoting *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006); RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006)).

59. *Id.* at *3 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013); RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. L. INST. 2006)).

60. *Id.* at *3 (quoting *Hollingsworth*, 570 U.S. at 713; RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM L. INST. 2005)).

61. *Id.* at *8.

62. *Id.*

63. DOJ Br., *supra* note 2, at 24.

court dispensed with the fact-bound agency analysis required . . . and instead relied on a claimed lack of certain ‘typical’ indicia of control (like the right to hire or fire).”⁶⁴ Not surprisingly, Hoskins defends the district court’s analysis as resting upon a straight-forward application of the law to the facts, and raises the alarm that the government’s amorphous and watered-down standard invites a jury to find a sort of agency that would not have been recognized at common law and that leaves the line separating the legal from the illegal too unclear for people to safely navigate.⁶⁵

II. AGENT IS A TERM OF ART UNDER THE FCPA THAT REFERS TO THOSE AGENTS RETAINED FOR THE SPECIFIC PURPOSE OF PAYING FOREIGN GOVERNMENT OFFICIALS BRIBES

A. Congress Used “Agent” in a Very Specific Sense in the FCPA

The IAFCL is undoubtedly correct that the word “agent” has “an everyday, common-sense meaning that is understood and widely shared by members of the international community.”⁶⁶ As the problem of international bribery was receiving greater scrutiny in the post-Watergate era, it quickly became apparent that U.S. companies often were not paying bribes to foreign officials directly.⁶⁷ Rather, it is “well known in the world of international bribery” that

the bribing company will often turn to local individuals, invariably called “agents,” “intermediaries,” or “consultants” to, in essence, “do the dirty work.” Often such agents take the formal position of a “consultant,” whose “fees” can

64. *Id.* at 24–25.

65. Hoskins Br., *supra* note 16, at 5.

66. IAFCL Br., *supra* note 18, at 2.

67. See, e.g., Evan Forbes, *Extraterritorial Enforcement of the Foreign Corrupt Practices Act: Asserting U.S. Interest or Foreign Intrusion?*, 93 S. CAL L. REV. 109, 109–10 (2020) (“The United States began to acknowledge the problem of foreign bribery after Watergate,” and noting this led to an investigation in which more than 400 companies disclosed paying more than \$300 million in foreign bribes.).

be carried as such on the company's books, but in fact are used as a conduit to pay a bribe.⁶⁸

Much of the initial focus of congressional hearings leading up to the FCPA was on military contractors that paid millions in fees to local agents with the understanding that much of that money would be passed along to foreign officials as bribes.⁶⁹ This was the context in which Congress first considered the "agent" problem leading up to the passage of the FCPA in 1977.⁷⁰

68. IAFCL Br., *supra* note 18, at 10.

69. *See, e.g., id.* at 10; Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 934–36 (2012); *Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379 and S. 3418 Before the S. Comm. on Banking, Hous. & Urban Affs.*, 94th Cong. 7 (1976) (statement of Sen. Frank Church) [hereinafter "*Senate Hearings*"] ("What we are talking about is an arms industry campaign to flood the Middle East with weapons, in which a U.S. aircraft company paid over \$100 million in agents' fees in one country to sell an airplane which has no competitor. A large part of that \$100 million is known to have ended up in the Swiss bank accounts of high military and civilian defense officials of the purchasing country."); SEC. & EXCH. COMM'N, QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 27–28 (Comm. Print 1976) (submitted to the Sen. Comm. on Banking, Hous. & Urban Affs.) [hereinafter "*SEC REPORT*"] ("Commercial Agents and Consultants: The Commission recognizes that corporations doing business abroad often engage the services of non-official nationals possessing specialized information with regard to business opportunities or relationships which are of assistance in securing or maintaining business.").

70. *See, e.g.,* NACDL Br., *supra* note 18, at 14–15; SEC REPORT, *supra* note 69, at 28 ("Commission or consultant payments substantially in excess of the going rate for [] services may give rise to a disclosable event, depending upon the significance of the business involved. In many instances, this may suggest that a portion of the commission was, in fact, intended to be passed through to government officials or their designees to influence government action."). When the initial legislation was discussed at a Senate Banking Committee hearing in 1976, witnesses testified about the use of foreign third-party intermediaries to pay bribes on behalf of American corporations. Leonard C. Meeker of the Center for Law and Social Policy testified that corporate funds were "transferred to foreign bank accounts or foreign subsidiaries, and a foreign employee or agent ha[d] drawn cash to pay bribes or kick-backs or to contribute to foreign political campaigns." *Senate Hearings*, *supra* note 69, at 68. Similarly, a July 2, 1976, Senate Banking Committee Report discussed questionable overseas "payments to foreign sales agents, many of whom act essentially as influence peddlers." S. REP. NO. 94-1031, at 9 (1976). Dr. Gordon Adams, Director of Military Research for the Council on Economic Priorities, testified before the House Subcommittee on Consumer Protection and Finance of the Committee of Interstate and Foreign Commerce in April 1977 that "[a] large proportion of the bribes paid government officials did not result from direct company/government contact," but rather "[m]ost firms ha[d] used sales agents, often local nationals, to seek orders and to carry

Although Congress understood the foreign agent problem, the FCPA, as enacted in 1977, took only limited steps to stop it.⁷¹ The initial FCPA had accounting provisions that would make it more difficult to conceal bribes paid through agents, but the bribery offense was limited to “issuers” and individuals and corporations who were “domestic concerns.”⁷² Thus, issuers and domestic concerns, including U.S. citizens, who paid bribes to foreign officials through the use of foreign agents could be prosecuted for bribery, but neither the foreign official who received the bribes nor the foreign agent who paid the bribe would be liable.⁷³

The use of the term “agent” in the congressional record during the adoption of the 1988 Amendments to the FCPA further confirms it indicated a third party used to pay a bribe. Initial drafts of the amendments did not address foreign agents at all, but this received some pushback from those who identified the problem with “agents” being retained to pay bribes. Senator Proxmire, for example, quoted John Keeney of the Criminal Division of the Department of Justice during a debate before the Senate Banking Committee as stating that “[t]he majority of the FCPA cases which have been investigated involved payments made to ‘agents’ or ‘consultants’ who then forwarded all or a portion of the money they received to foreign officials.”⁷⁴ And in

out such transactions.” *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Prot. & Fin. of the Comm. on Interstate & Foreign Commerce*, 95th Cong. 30 (1977) [hereinafter “*Unlawful Payments Hearings*”]. Dr. Adams further testified that “[a] number of these payments . . . ha[d] been made by sales *agents* in foreign jurisdictions acting as *agents* of the company, using slush funds created with income drawn from a foreign subsidiary.” *Id.* at 38 (emphases added).

71. *See, e.g.*, Koehler, *supra* note 69, at 1003 (“[T]he FCPA was intended to be a limited statute . . . [E]ven though Congress was aware of a wide range of foreign corporate payments to a variety of recipients for a variety of reasons, it intended, and accepted in passing the FCPA, to capture only a narrow category of such payments.”).

72. *See, e.g.*, Forbes, *supra* note 67, at 122.

73. *See* United States v. Hoskins, 902 F.3d 69, 94 (2d Cir. 2018) (noting that Congress rejected criminal liability for foreign agents due to Executive Branch “voicing concerns for due process protections and clarity of rules for foreign persons” and a concern with “overreach”).

74. S. REP. NO. 99-486, at 28 (1986). Senator Proxmire argued that “[o]ften times in criminal prosecutions you only get to the top persons involved in a criminal activity by being able to prosecute the ‘go-fors’ who will then agree to testify about the higher-ups in return for leniency. That is exactly how the Watergate conspiracy was cracked. So why is [the proposed amendment]

discussing whether to raise the mens rea for a domestic concern to be liable for paying a bribe through a third party from “reason to know” to “knowing,”⁷⁵ it was observed that “[f]oreign payments scandals of the 1970s demonstrated a clear need for . . . barring bribes paid through third parties” because “[n]umerous cases involved companies that used agents as conduits for illegal payments.”⁷⁶ Congress further explained that “[i]n adopting the FCPA, Congress determined that it would not permit companies to do through agents what they could not do directly or otherwise to take a ‘head in the sand’ approach and attempt to remain free from liability.”⁷⁷ As a result of these concerns, the 1988 Amendments to the FCPA retained criminal liability for employees and agents of a domestic concern that were “United States citizen[s], national[s], or resident[s],”⁷⁸ but added a provision extending civil liability to foreign employees and agents of a domestic concern.⁷⁹

As with the original 1977 version, an explicit definition of “agent” was not included in the 1988 Amendments to the FCPA, but the context in which the term was used is clear. A section of the Conference Report on the final 1988 amendments titled “Anti-bribery provision—Standard of Liability for Acts of *Third Parties (Agents)*,” for example, defined “third party bribery” as “the furnishing of money or any other ‘thing of value’ by an agent for the purpose of bribing foreign officials.”⁸⁰ And a section titled “Intermediaries” in reports on the Senate Banking Committee’s proposed amendments indicated that proposed changes regarding payments through third parties were “intended to be the exclusive means of enforcement of the Act with respect to payments made by an agent of a ‘domestic concern.’”⁸¹ All these references and statements show that Congress meant something

removing the government’s ability to prosecute ‘agents’ or ‘go-fors’ despite the specific recommendation of the Justice Department not to do so?” *Id.* at 29 (emphases added).

75. H.R. REP. NO. 100-576, at 919–21 (1988); see 15 U.S.C. § 78dd-2(a)(3), (h)(3)(A).

76. H.R. REP. NO. 100-40, pt. 2, at 75 (1987).

77. *Id.*

78. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 104(g)(B) (1988).

79. See *id.* § 104(g)(C).

80. H.R. REP. NO. 100-576, at 919 (1988) (emphasis added).

81. S. REP. NO. 97-209, at 20 (1981); S. REP. NO. 98-207, at 21 (1983); S. REP. NO. 99-486, at 15 (1986).

specific when it included the term “agent” in the FCPA, and that was a third party retained to serve as a conduit for the payment of bribes.

The term “agent” was used in the same sense in the 1998 amendments. These amendments were part of a much larger global effort to combat international bribery. The United States had largely been fighting international bribery alone while encouraging other countries to adopt anti-corruption legislation of their own that would be comparable to the FCPA. The OECD promulgated the OECD Bribery Convention, which was signed by the United States and ultimately dozens of countries.⁸² As DOJ and the SEC observed: “In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention.”⁸³

The OECD Convention called on all parties to make it a criminal offense “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through *intermediaries*, to a foreign public official, [or] for that official.”⁸⁴ To bring the United States into compliance with the OECD Convention, Congress amended the statute to “apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.”⁸⁵ As the

82. See OECD Convention, *supra* note 24.

83. RESOURCE GUIDE, *supra* note 5, at 3.

84. OECD Convention, *supra* note 24, at art. 1.1 (emphasis added); Organisation for Econ. Co-operation & Dev. [OECD], *Declaration on International Investment and Multinational Enterprises*, at art. VII(1) (June 20, 1976), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144>. The OECD’s Guidelines for Multinational Enterprises reiterates the same understanding of “agent” by advising that international companies “should not use third parties such as agents and other intermediaries . . . for channeling undue pecuniary or other advantages to public officials.” Similarly, the OECD’s Working Group on Bribery in International Business Transactions prepared a report that identified the word “agent” as a type of intermediary and explained “agents often receive excessive compensation that in turn is used to fund bribery.” *Typologies on the Role of Intermediaries in International Business Transactions*, OECD 5, 20 (2009), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43879503.pdf>; IAFCL Br., *supra* note 18, at 14 n.20. (noting that the OECD Working Group document uses the word “agent” in that sense more than 50 times.)

85. RESOURCE GUIDE, *supra* note 5, at 3; see also S. REP. NO. 105-277, at 4–5 (1998) (“Section 3(d) implements the OECD Convention by eliminating the current disparity in treatment between U.S. nationals that are employees or agents of domestic concerns and foreign nationals that are employees or agents of domestic concerns. Presently, foreign nationals who are employees or agents

Second Circuit noted in *Hoskins I*, prior versions of the statute addressed “foreign nationals employed by or acting as agents of U.S. companies,” or who were “employed by or acting as agents of U.S. companies,”⁸⁶ which demonstrates a long-standing congressional view of employees and agents as separate categories.

In rejecting conspiracy and aiding and abetting theories of liability that would extend beyond the FCPA, the Second Circuit emphasized that Congress was careful not to expand the liability of foreign nationals in ways that are not clearly identified. The court noted that Congress repeatedly had shown a concern with “overreaching” by expanding liability to “foreign nationals who may not be learned in American law” and the “desire to protect such persons,” particularly when doing so may damage “foreign policy and public perception of the United States.”⁸⁷ This would not create any hole in the American liability scheme, as Congress “repeatedly emphasized that out-of-reach foreign entities should not create concern because American companies would be liable for violating the Act even if they did so indirectly through such persons.”⁸⁸ And it must be remembered that the impetus behind the 1998 FCPA Amendments and the OECD Convention was to encourage foreign governments to adopt anti-bribery legislation of their own, so that better-situated foreign governments would prosecute their own citizens.⁸⁹

This understanding of the term “agent” is apparent just from the *Hoskins* case. The government begins its appellate brief by claiming that *Hoskins* should be found liable for his involvement in the “hiring consultants to funnel bribes to Indonesian officials.”⁹⁰ But what the government here

(as opposed to officers or directors) are subject only to civil sanctions. Eliminating this preferential treatment implements the OECD Convention's requirement that “[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person to [make unlawful payments].”).

86. *United States v. Hoskins*, 902 F.3d 69, 91 (2d Cir. 2018) (quoting S. REP. NO. 105-277, at 2–3 (1998)); *see also Hoskins*, 902 F.3d at 91 (explaining that the 1998 Act imposed only civil liability on foreign employees or agents, but now they would be subject to criminal liability).

87. *Id.* at 94–95.

88. *Id.* at 94.

89. *See Martinez*, *supra* note 18, at 241.

90. DOJ Br., *supra* note 2, at xi (Statement of Issue Presented for Review); *see also id.* at 2 (“*Hoskins* helped API identify and negotiate with consultants

strategically chooses to call “consultants” are the very sort of “agents” contemplated by the FCPA.⁹¹ The government quotes API witnesses as equating “consultants” with “agents,”⁹² and even the prosecution’s summation characterized these consultants as “agents.”⁹³

Thus, when Congress amended the FCPA to expand criminal liability to “agents,” it did so against this backdrop where “agents” were understood to be persons retained to pay bribes to foreign government officials. This definition of “agent”

who would pass the bribes to officials.”); *id.* at 12 (“Hoskins assisted API in hiring consultants to funnel bribes.”); Reply Brief of DOJ at 10, *United States v. Hoskins*, No. 20-842(L) (2d Cir. Jan. 12, 2021) (addressing Hoskins’ involvement with “bribe-paying consultants”); *id.* at 18 (quoting record evidence addressing Hoskins’ involvement in “negotiations with agents and consultants”).

91. *See Hoskins Br.*, *supra* note 16, at 7 n.1 (“Third-party sales consultants were commonly referred to as “agents,” within Alstom and in international business more broadly. Congress had precisely these “agents” in mind—and not employees of a parent company like Mr. Hoskins—when it included “officers, directors, employees and agents” of U.S. issuers and U.S. domestic concerns within the scope of the FCPA’s criminal prohibition.”). The FCPA’s legislative history also shows that “consultant” and “agent” are used interchangeably. Examples include: Chairman William Proxmire explaining at the April 1976 Senate Banking Committee Hearings that “the law should require regular disclosure of all *consultant* fees and sales commissions paid to *foreign agents*.” *Senate Hearings*, *supra* note 69, at 2 (emphases added); Mr. Meeker discussing a proposal at those same hearings that “all commissions and *consultant’s and agent’s* fees paid by the corporation to secure contracts or to promote corporate business” should be reported. *Id.* at 70 (emphases added); the SEC Report contained a section discussing recipients of questionable payments focused on “Commercial *Agents and Consultants*,” where the SEC discussed the issue of whether “*agents*” were “acting as conduits for improper payments,” and went on to report that in many cases of “unusual sales commissions . . . a portion of the payment to a *foreign agent or consultant* ultimately was passed to foreign government officials in order to obtain favorable treatment of some kind for the company.” SEC REPORT, *supra* note 69, at 39 (emphases added); A Report on Questionable Foreign Payments by Corporations, presented at the April 1977 House Finance Subcommittee Hearings by the Association of the Bar of the City of New York, describing the problem of payments made “indirectly through inflated commissions to *sales agents or consultants*.” *Unlawful Payments Hearings*, *supra* note 70, at 64 (emphasis added).

92. *See Hoskins Br.*, *supra* note 16, at 13 (citing the record regarding the strategy with respect to the “consultant or agent”).

93. *See IAFCL Br.*, *supra* note 18, at 17 & n.28 (citing Transcript of Oral Argument at 1328, 1449 (Nov. 5, 2019)) (noting the prosecutor described Hoskins as liable based on his “selection of the agents” and explaining that API was concerned it had a “serious agent problem” in which “the agent had not shown a willingness to spend money” and was not paying lavish bribes).

is commensurate with the specific problem posed by agents, and this is therefore the meaning the Second Circuit should adopt.⁹⁴

B. Congress Was Careful Not to Adopt Sweeping Liability

While Congress sought to aggressively pursue international corruption through the FCPA, it has always been mindful that unnecessary assertion of U.S. law abroad could undermine the sovereignty of foreign governments and disrupt foreign relations. The FCPA more broadly punishes those who supply bribes than it did in the past, but it still does nothing to punish foreign government officials who receive, and often demand, bribes. Congress has shown similar restraint in expanding the scope of liability to other categories of liable persons, including agents.

In 1977, Congress and the Carter Administration set out to “pass aggressive anti-bribery legislation” to combat bribery of foreign officials by American companies.⁹⁵ President Carter, urged by sponsors of the 1976 precursor to the FCPA, which passed the Senate but failed in the House, “suggested that ‘specific criminal penalties’ for acts of bribery were the correct approach to solving the problem.”⁹⁶ But Congress and the Administration understood that “a statute focusing on criminalization, rather than disclosure, required a delicate touch where extraterritorial conduct and foreign nationals were concerned.”⁹⁷ The Second Circuit quoted Secretary of the Treasury W. Michael Blumenthal’s warning that “a law which provides criminal penalties must describe the persons *and acts* covered with a high degree of specificity,” and must “insur[e] fairness and due process, not only for American citizens but also for those foreign citizens and foreign countries who may in some way become involved.”⁹⁸ This concern was so great that while the initial drafts of the FCPA contemplated the use of conspiracy

94. See *supra* note 16 (addressing canon that Congress adopts terms of art).

95. *United States v. Hoskins*, 902 F.3d 69, 86 (2d Cir. 2018).

96. *Id.* (citing *Senate Hearings, supra* note 69, at 70 (statement of W. Michael Blumenthal, Secretary of the Treasury)).

97. *Id.*

98. *Id.* (citing *Senate Hearings, supra* note 69, at 94 (statement of W. Michael Blumenthal, Secretary of the Treasury)) (emphasis added).

and complicity theories to impose individual liability, “[i]n response to administration concerns—particularly concerns regarding the clarity of liability and its application to foreign persons—the Senate rejected its prior approach . . . [and] opted for a version of the bill that was not reliant on conspiracy or complicity theories . . . [and instead] defined, with great precision, who would be liable.”⁹⁹

The initial Administration and Senate bill was therefore revised to specifically impose liability on “any officer, director, employee or stockholder thereof acting on behalf of such domestic concern,”¹⁰⁰ and the initial House bill “created liability . . . also for ‘agents’ who ‘knowingly and willfully *carried out*’ bribes.”¹⁰¹ Nevertheless, “[s]everal leading authorities, including Harvey L. Pitt, General Counsel of the SEC, suggested . . . these provisions went too far” because “the language of subsection (c)(2), applying to any agent, might create some jurisdictional problems if the agent is wholly situated overseas and has not been in this country.”¹⁰² Pitt suggested that if such jurisdiction was to be asserted, the language should be amended to address this “very serious concern” by “clarify[ing] burdens of proof, obligations, *and the involvement of agents*, to provide a fair opportunity for an agent to present his defense.”¹⁰³ The House bill was then amended to require that a foreign agent’s liability be predicated on the domestic concern’s liability, and to specify that this extraterritorial application only “cover[s] ‘agents’ who ‘carried out’ bribes.”¹⁰⁴

Just as Congress considered conspiracy liability insufficiently specific as to the parties and conduct that would expose foreign persons to liability to satisfy fairness and due process, it had the same concerns regarding the inclusion of

99. *Hoskins*, 902 F.3d at 88.

100. *Unlawful Payments Hearings*, *supra* note 70. The *Hoskins* court noted that “[a]t the same time that the Senate made these changes, the House was revising its own legislation to cut back on liability placed upon foreign agents, again because of specific concerns expressed by executive-branch officials regarding overreach.” *Hoskins*, 902 F.3d at 94.

101. *Hoskins*, 902 F.3d at 88 (quoting H.R. 3815, 95th Cong. §§ 2(a), 3(c)(2) (as introduced Feb. 22, 1977)) (emphasis added).

102. *Hoskins*, 902 F.3d at 88 (citation and internal quotations omitted).

103. *Id.* (emphasis added); see *Unlawful Payments Hearings*, *supra* note 70, at 232 (statement of Harvey L. Pitt, General Counsel, SEC).

104. *Hoskins*, 902 F.3d at 88.

agents. Subsequently, Congress did expand liability to foreign agents, first civilly in the 1988 amendments and then criminally in the 1998 amendments, but it did so with the understanding that “agent” would mean those agents who are retained for the specific purpose of paying foreign government officials bribes. That definition addresses Congress’ due process concerns by putting foreign defendants on notice of the conduct that would expose them to liability while limiting the United States’ intrusion into foreign sovereignty.

C. Common Law Agency Principles Are of Limited Relevance

The district court was right to conclude that the nature of the relationship between Hoskins and API did not comport with the structure of an agency relationship, but we believe the more fundamental problem with the government’s case is that he is not the type of agent Congress intended to subject to FCPA liability. An agency relationship describes a power dynamic and the structure of a relationship, but it tells us nothing about what a person has been retained to do. Congress, however, was express in enacting and amending the FCPA, that the type of agent it sought to cover was one retained to bribe a foreign government official on behalf of a U.S. company or person.

Even at common law, the term “agent” was an elastic word and held a broader or narrower meaning depending on the context in which it was used.¹⁰⁵ The *Third Restatement*, which the district court relied upon extensively,¹⁰⁶ acknowledges that agency “encompasses a wide and diverse range of relationships and circumstances” and “legal usage varies,” as does usage “in commercial settings and academic literature.”¹⁰⁷

Black’s Law Dictionary broadly defines the term as “[s]omeone who is authorized to act for or in place of another,”¹⁰⁸ but distinguishes between two general categories—“general

105. It has long been noted that “many doctrines in the law of agency are vague and ill-defined.” Book Note, 15 HARV. L. REV. 326 (1901) (reviewing ERNEST HUFFCUT, *THE LAW OF AGENCY* (2d ed. 1901)).

106. See *United States v. Hoskins*, No. 3:12cr238, 2020 WL 914302, at *2–3 (D. Conn. Feb. 26, 2020).

107. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. (b), (c) (AM. L. INST. 2006).

108. *Agent*, BLACK’S LAW DICTIONARY (11th ed. 2019).

agents,” who are “authorized to transact all the principal’s business of a particular kind or in a particular place,” and “special agents” “employed to conduct a particular transaction or to perform a specified act.”¹⁰⁹ It then lists a whopping seventy-four different “types” of general and special agents defined by the type of acts or services they provide on behalf of the principal.¹¹⁰ Rather than having a fixed and uniform meaning, “agent” is the sort of term that the Supreme Court has described as a “chameleon word; its meaning depends on the context in and purpose for which it is used.”¹¹¹

In these terms, “agent” as used in the FCPA refers to a type of common law “special agent” retained for the purpose of paying bribes to foreign government officials. While the *Hoskins* parties¹¹² (and apparently others)¹¹³ seem to consider this definition to be narrower than the common law of agency, we view it as a reference to a particular kind of common law special agent defined by both the structure and purpose of the relationship.¹¹⁴ This is how Congress understood the term, and

109. *Id.*

110. *See id.* As the THIRD RESTATEMENT notes, “[p]eople often retain agents to perform specific services.” RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. (c) (AM. L. INST. 2006).

111. *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 318 (2006); *see also* *C.I.R. v. Nat’l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948) (Hand, J.) (“[W]ords are chameleons, which reflect the color of their environment.”).

112. *See supra* note 17.

113. *See supra* note 18.

114. Because Congress intended to adopt the definition of “agent” as it was used as a term of art in the anti-corruption community, whether this definition is viewed as narrower than the common law or as a particular application of the common law is a semantic difference that should not matter. Nevertheless, the government attaches great importance to the common law label. On appeal, the government claims that *Hoskins* waived any argument that “agent” be defined as NACDL or IACFL suggests because *Hoskins* raised this argument in only a footnote and previously conceded that “agent” should be defined in accordance with the common law. Reply Brief of DOJ at 36–40, *United States v. Hoskins*, No. 20-842(L) (2d Cir. Jan. 12, 2021). The government’s argument is mistaken. The principal argument on appeal is over the meaning of the term “agent” in the FCPA and the Second Circuit “review[s] questions of statutory interpretation *de novo*.” *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). In doing so, the Second Circuit is not bound to accept the statutory interpretation of either party. The Court can consider the views of *amici* and other sources, including law review articles, in striving to give a statute the correct interpretation. While the parties may believe the definition of “agent” lies in the common law, whether the correct interpretation of the term lies elsewhere is a subsidiary question that is fairly included in the

as discussed, it adopted this limited common-law definition to provide necessary clarity with respect to the categories of persons and conduct it intended to reach.

III. STATUTORY CANONS OF CONSTRUCTION FAVOR A NARROW DEFINITION OF AGENT

A. The Extraterritorial Reach of the FCPA Should Be Construed Narrowly

In *Hoskins I*, the Second Circuit found that Congress expressed “an affirmative legislative policy in the FCPA to limit criminal liability to the enumerated categories of defendants,” but independent of this rationale the court emphasized that it would rule for *Hoskins* because the government had failed to rebut the presumption against extraterritoriality with clearly expressed congressional intent.¹¹⁵ Those same principles apply here, as a definition of “agent” that would stretch as far as common law allows would drastically expand the scope of the statute to reach all types of foreign persons, regardless of what they were retained to do.

question presented. *See, e.g.*, *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013); *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379–80 (1995) (“a different but closely related theory” is within the question presented). Furthermore, the government’s contention that the Court should not consider arguments raised by an *amicus* alone are overbroad, and do not apply to questions involving the interpretation of legal texts before the Court. *See, e.g.*, *Samuels, Kramer & Co. v. C.I.R.*, 930 F.2d 975, 986 & n.9, 988–90 (2d Cir. 1991) (considering argument by *amicus* regarding a phrase in Appointments Clause even though parties relied upon different language and expressly rejected reliance on language argued by *amicus*). Indeed, the very purpose of *amicus* briefs is to raise new issues that are not addressed by the parties. *See* FED. R. APP. P. 29. advisory committee note to 1988 amendment (citing S. Ct. R. 37.1) (“An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.”); *see* *Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (finding no need to allow intervention to raise new legal arguments because “a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers . . .”). In any event, even if the parties’ agreement that the definition of “agent” is limited to a common law definition of agent, as explained above, the definition we advance meets that common law definition.

115. *See* *United States v. Hoskins*, 902 F.3d 69, 95 (2d Cir. 2018).

American courts will “not apply a U.S. law extraterritorially unless ‘the affirmative intention of the Congress [is] clearly expressed.’”¹¹⁶ This is necessary “to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries” and in recognition of the fact that “Congress generally legislates with domestic concerns in mind.”¹¹⁷ Even where, as here, Congress plainly meant to reach some extraterritorial conduct with the FCPA, the Second Circuit explained that “when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.”¹¹⁸ *Hoskins I* concluded that “the FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—unless that person commits a crime within the territory of the United States.”¹¹⁹

The government, of course, sought to circumvent the *Hoskins I* decision by arguing that Hoskins fell within the statutory term “agent,” but as shown above, it is trying to fit a square peg in a round hole. The government is using the wrong definition of “agent,” and one that is inconsistent with the *Hoskins I* interpretation of the statute.¹²⁰ Even assuming the government is correct and that “agent” must be construed in accordance with the common law of agency, there are a multitude of different common law definitions of that term,¹²¹ which would invite ambiguity. The presumption against extraterritoriality would suggest that the term be given a narrow construction to prevent it from reaching further than Congress intended.¹²²

116. *Id.* at 85 (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

117. *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)); see *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

118. *Hoskins*, 902 F.3d at 96 (quoting *RJR Nabisco*, 136 S. Ct. at 2102).

119. *Id.*

120. See *supra* Section B(1)

121. See *supra* Section B(3).

122. See, e.g., *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (“[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 250–51 (1991) (applying canon to interpret ambiguous statutory language); *Validus Reinsurance, Ltd. v.*

B. The *Nosciur a Sociis* and Surplusage Canons Suggest a Narrow Meaning of “Agent”

Again, the word “agent” should not be construed in a vacuum,¹²³ particularly as it is used in a statute that extends liability from entities with a certain U.S. nexus to “any officer, director, employee, or agent of such” entities, wherever they may be located.¹²⁴ The *noscitur a sociis* canon recognizes that “a word is known by the company it keeps,”¹²⁵ and here each of those terms references a formal agreement by one person to work for another. Someone would plainly know if he or she had agreed to become an officer, director, or employee of a U.S. company, or if he or she had agreed to become an agent who would pay bribes to a foreign government. But that parity of understanding is lost with the government’s proposed “highly factual” inquiry that depends upon a variety of factors to determine who qualifies as an agent.¹²⁶ Having to perform such an unpredictable, multi-factor analysis with respect to the term “agent” would render it unlike the other terms in its series (and undermine the due process clarity Congress sought to provide foreign defendants).¹²⁷

To harmonize the words in the statute, the Second Circuit should read them in tandem with the more specific definition of “agent” that we suggest. Courts regularly rely on the *noscitur a sociis* canon in this manner “to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying

United States, 786 F.3d 1039, 1046 (D.C. Cir. 2015) (limiting extraterritorial reach of a statute by construing ambiguous language narrowly, despite the government offering a broader plausible interpretation).

123. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (quoting Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007)).

124. See, e.g., *READING LAW*, *supra* note 15, at 195–98.

125. *Yates v. United States*, 574 U.S. 528, 543 (2015); see *READING LAW*, *supra* note 15, at 195–98.

126. See *DOJ Br.*, *supra* note 2, at 6 (quoting *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006)) (claiming this inquiry requires considering “the situation of the parties, their relations to one another, and the business in which they are engaged; the general usages of the business in question and the purported principal’s business methods; the nature of the subject matters and the circumstances under which the business is done”).

127. See *United States v. Hoskins*, 902 F.3d 69, 88 (2d Cir. 2018); *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the House Fin. Subcomm.*, 95th Cong. 30 (1977).

words, thus giving unintended breadth to the Acts of Congress.”¹²⁸

Moreover, the *noscitur a sociis* canon is reinforced by the canon against construing statutory terms so broadly as to render other statutory language surplusage.¹²⁹ The Supreme Court has long held that Congress “is presumed to have used no superfluous words,” and so “where a given construction would make a word redundant, [that is] reason for rejecting it.”¹³⁰ That reasoning applies here. The government’s interpretation of “agent,” if stretched as broadly as the principles of common law agency would allow, would result in the word “agent” swallowing all the other categories of liable persons, rendering “officer,” “director,” and “employee” surplusage. As the *Third Restatement* notes, “[t]he elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner.”¹³¹ Congress would not therefore have drafted the FCPA to include “any officer, director, employee, or agent” if it referred to the common law definition of agent that would redundantly capture all four. Instead, Congress plainly intended the term “agent” to refer to a distinct type of “special agent,” a third-party intermediary engaged by a domestic concern to pay a bribe on its behalf.

C. The Rule of Lenity Warrants a Narrow Construction of the

128. *Yates*, 574 U.S. at 543 (punctuation and citation omitted); *see also* *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (applying the canon to the federal bribery statute in giving a narrow definition to the terms used.); *United States v. Williams*, 553 U.S. 285, 294 (2008) (recognizing that the definition of statutory terms may be “narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated”).

129. *See, e.g.*, *READING LAW*, *supra* note 15, at 195–98.

130. *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58–59 (1878); *see also* *Duncan v. Walker*, 533 U.S. 167, 167 (2001) (“Respondent’s contrary construction would render the word ‘State’ insignificant, if not wholly superfluous, [and courts have a] duty to give effect, where possible, to every word of a statute, [and to be] reluctant to treat statutory terms as surplusage.”). To be sure, “[t]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute,” *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91 (2011), but this is such a case—only if “agent” refers to a specific type of special agent do the terms officer, director, and employee have distinct meaning and effect.

131. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. (c) (AM. L. INST. 2005).

Word “Agent”

Because the FCPA is a criminal statute, the “rule of lenity” applies and leads to the same narrow reading of the term “agent.” The rule requires that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”¹³² It derives from the constitutional requirements of due process and fair notice, and, like the presumption against extraterritoriality, it requires the narrowest interpretation of a statute’s liability not expressly rebutted by Congress.¹³³ Considering the concerns with notice for foreign defendants and the perception of American fairness abroad that are implicated by the FCPA, a strict application of the rule of lenity is all the more crucial to avoid offending the sensibilities of foreign actors and sovereigns.¹³⁴ The Second Circuit should therefore apply the rule and find that the more narrow definition of “agent” that we propose is controlling.

IV. CONCLUSION

“Agent” is a term of art in the international anti-corruption community used to refer to those agents who are retained for the purpose of acting as intermediaries in funneling bribes to foreign government officials, and that is how Congress used the term “agent” in the FCPA. The government is overreaching in seeking a definition of “agent” that can be extended to (and beyond) the

132. *United States v. Bass*, 404 U.S. 336, 348 (1971).

133. *See id.* at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)) (“When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”). For example, one court used the rule of lenity, rather than the presumption against extraterritoriality, to construe the FCPA and dismiss charges against a foreign national. *See United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004). In *Bodmer*, the defendant was charged as an agent of a domestic concern under the FCPA, but he argued that because his alleged conduct occurred before the 1998 FCPA amendments clarified that foreign agents were subject to criminal and civil liability, he could not be criminally liable. *Id.* The court looked to the legislative history of the FCPA to determine whether Congress intended to subject a foreign agent in his position to criminal liability, and finding it ambiguous, relied on the rule of lenity (with no mention of the presumption against extraterritoriality) to dismiss the charges. *Id.* at 189.

134. *See supra* notes 95–106 and accompanying text.

limits of common law agency and that fails to account for what the agent has been retained to do. Such a definition, and the highly factual, multi-factor analysis that the government suggests using to define “agent,” would be just as unpredictable as the conspiracy and aiding-and-abetting theories of liability that the *Hoskins I* court wisely limited in the FCPA context.

Moreover, the same concerns about protecting foreign sovereignty that animated *Hoskins I* remain equally applicable now. The government’s proposed definition of “agent” is so broad that it would swallow up all the carefully delineated categories of persons expressly limited in the FCPA, rendering them surplusage, and drastically expand the scope of U.S. law over foreign persons and territory that Congress never intended to reach. Defining the term “agent” in terms of the purpose of the agency relationship—paying bribes to foreign government officials on behalf of the principal—achieves the objectives of the FCPA while avoiding unnecessary intrusion into foreign sovereignty. Not only does that strike the right balance, but also the one struck by Congress.