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PUSHING THE LIMITS OF JURISDICTION OVER FOREIGN ACTORS UNDER THE FOREIGN CORRUPT PRACTICES ACT

I. INTRODUCTION

The Foreign Corrupt Practices Act (the “FCPA”)¹ is the primary law used by the United States to combat global corruption and bribery. As anti-corruption efforts have intensified worldwide through the last two decades, the FCPA’s enforcement agencies, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”), have prioritized FCPA prosecutions.² As part of these efforts, both agencies have signaled increasingly expansive interpretations of the FCPA’s jurisdictional reach, particularly over foreign individuals and companies. This Note examines the jurisdictional bounds of the FCPA by analyzing two areas where the DOJ and SEC have suggested expansive jurisdictional interpretations: correspondent account liability and parent-subsidiary liability.

Three hypothetical scenarios help exemplify the jurisdictional questions addressed in this Note. Consider which of these cases fall under the jurisdiction of the United States:

- Alex is a U.S. citizen who lives in Nigeria and works for a Canadian-owned energy company. Alex is suspicious that the contract payments he has been approving as part of his regular business duties are being used in part to bribe Nigerian officials. He is not certain this is true and has been doing his best to stay out of it and avoid confirming his suspicions.
- Beatrice is a British citizen employed by a Swiss company. She approved several transfers from a company account in Switzerland to a client account in Japan. Beatrice recently discovered that some of the money was used to purchase luxury cars for the Japanese officials who approved the client’s operational license. The transfers were made in U.S. dollars.
- Caro is a Panamanian company wholly owned by a U.S. company, Clare. Clare has minimal oversight over Caro’s business and does not review, direct, or approve any of its day-

1. 15 U.S.C. §§ 78dd-1-3 (2012).

2. *See infra* Part II.C.

to-day operations. Caro's accounting team recently discovered that several members of its sales team have been bribing Brazilian officials to secure lucrative shipping contracts.

Which of these corrupt acts can be prosecuted in the United States? The answer, according to the DOJ and the SEC, appears to be *all of them*. Alex is a straightforward case: U.S. citizens are subject to the FCPA, regardless of where they act, by virtue of their citizenship.³ Beatrice and Caro, however, mirror examples of recent expansive jurisdictional statements by the DOJ and SEC in FCPA prosecutions. Acts as small as making a transfer in U.S. dollars between foreign accounts, as Beatrice did, may be enough to trigger prosecution.⁴ Foreign companies may be liable based solely on their relationship with a U.S. company, as could be the case for Caro.⁵ This expansion raises important questions for businesses worldwide seeking to understand what their potential exposure to FCPA liability may be and how to design adequate anti-corruption compliance programs.

This Note examines the legality and policy implications of two particularly amorphous jurisdictional bases, exemplified in the hypothetical scenarios: correspondent account liability (Beatrice) and parent-subsidiary liability (Caro and Clare).⁶ Part II details the history and development of the FCPA's provisions and application, including the recent expansion in FCPA enforcement. Part III discusses the development of jurisdictional interpretations of the FCPA, looking particularly at the two jurisdictional bases in question: correspondent account and parent-subsidiary. Parts IV (correspondent account liability) and V (parent-subsidiary liability) analyze the legality and policy implications of recent applications of these jurisdictional bases in FCPA cases. The Note concludes that the DOJ and SEC are extending their jurisdictional reach too far. It proposes that a more effective FCPA strategy would result from a change in focus: instead of reaching everyone who may be reachable,

3. 15 U.S.C. §§ 78dd-2(a), (h)(1)(A); U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SECS. & EXCH. COMM'N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

4. See *infra* Part IV.

5. See *infra* Part V.

6. These issues and the cases giving rise to them have been identified by a number of sources. See, e.g., DOUGLAS N. GREENBURG ET AL., LATHAM & WATKINS LLP, PROSECUTORS WITHOUT BORDERS: EMERGING TRENDS IN EXTRATERRITORIAL ENFORCEMENT (2011), available at http://www.lw.com/upload/pubContent/_pdf/pub4122_1.pdf. This Note further expands the analysis on these issues.

agencies should strengthen collaboration with companies and foreign governments as they develop their own strategies to combat corruption.

II. THE HISTORY AND DEVELOPMENT OF THE FCPA

A. *The History of the FCPA and Global Anti-Corruption Regimes*

The FCPA was enacted in 1977 as one of many changes made in response to Watergate and related political scandals.⁷ Prior to passing legislation, the federal government gauged the corruption problem by giving companies a liability-free opportunity to disclose fraudulent business practices and found that these practices were alarmingly common.⁸ In response, Congress unanimously passed the FCPA, citing concerns that corrupt business practices were hurting the U.S. economy and tarnishing the country's global support for democracy and free markets, which was especially crucial to U.S. policy during the Cold War.⁹ The FCPA was enacted to clean up domestic business practices and to protect America's reputation and relationships abroad.¹⁰

The FCPA was the first law in the world to prohibit international bribery, and initially, it was not widely used; only twenty-three enforcement actions were pursued during the FCPA's first ten years.¹¹ This slow start was largely attributable to concerns that the FCPA's vague

7. Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 187 (1994).

8. See Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 307 (2012); Pines, *supra* note 7, at 187; see also H.R. REP. NO. 95-640, at 4 (1977) (noting that over 400 corporations had admitted to making illegal payments, including 117 in the top Fortune 500 industries); U.S. SECS. & EXCH. COMM'N, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 54 (Comm. Print 1976) [hereinafter SEC REPORT] (“[T]he problem of questionable and illegal corporate payments is, by any measure, serious and sufficiently widespread to be a cause for deep concern. Unfortunately, the Commission is unable to conclude that instances of illegal payments are either isolated or aberrations limited to a few unscrupulous individuals.”).

9. See SEC REPORT, *supra* note 8, at 54 (“Certain conclusions can be drawn from the Commission's experiences to date, the many reports filed, and the reaction of the private sector concerning the overall impact these questionable or illegal practices have had on public confidence in the integrity of American business.”); see also H.R. REP. 95-640, at 4 (noting that these practices were “unethical . . . counter to the moral expectations and values of the American public . . . [and] bad business as well . . . erod[ing] public confidence in the integrity of the free market system”).

10. H.R. REP. 95-640, at 5; see also Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 360 (2010). Spalding argues that, contrary to the commonly held perception that the FCPA was primarily targeted toward domestic problems, bribes “raised the issue of U.S. relations with foreign countries, and the solution would necessarily implicate foreign policy interests. . . . [T]he ensuing legislation was in fact widely understood as an instrument of foreign policy . . .” *Id.*

11. Klaw, *supra* note 8, at 311; Pines, *supra* note 7, at 192.

provisions and lack of global equivalents would damage U.S. competitiveness in the international market.¹² A 1981 Government Accountability Office (GAO) report confirmed that companies felt they were losing overseas business as a result of the FCPA and also that, “assuming all other conditions were similar, American companies could not successfully compete abroad against foreign competitors that were bribing.”¹³ The DOJ implemented a guidance program in 1980 to help clarify how the law would be applied,¹⁴ while the GAO stressed the need for the passage of similar anti-bribery conventions worldwide to level the playing field for U.S. businesses.¹⁵ Congress amended the FCPA in 1988 and 1998 to further address these concerns and improve the efficacy of the Act.¹⁶

The movement for international anti-bribery provisions eventually met some success as the Organization of American States, Organisation for Economic Co-operation and Development (OECD), United Nations, and a number of individual regions and states passed their own anti-corruption conventions in the 1990s–2000s.¹⁷ As the international anti-bribery regime grew, concerns about unilateral application to U.S. businesses lessened, and the U.S. government adopted an aggressive FCPA enforcement regime “in a renewed effort to pursue corruption at all levels and all branches of government.”¹⁸ The United Kingdom’s Bribery Act of 2010¹⁹

12. U.S. GEN. ACCOUNTING OFFICE, AFMD-81-34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (1981), available at <http://www.gao.gov/assets/140/132199.pdf> (“Ambiguities surrounding the act’s antibribery provisions have been cited as causing U.S. companies to forego legitimate export opportunities.”) (quoting from the Comptroller Gen.’s transmittal letter to the Pres. of the Senate and Speaker of the House); Pines, *supra* note 7, at 189–90.

13. AFMD-81-34, at 14. The GAO surveyed 250 randomly selected companies out of the country’s 1,000 largest firms. Thirty percent reported losing overseas business as a result of the FCPA and over sixty percent expressed concern about loss of competitive edge. *Id.*

14. Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80 (2013).

15. AFMD-81-34, at 45–47.

16. Amendments to the FCPA were enacted through the Omnibus Trade and Competitiveness Act of 1988 and The International Anti-Bribery and Fair Competition Act of 1998. The 1998 amendments were implemented to comply with the Organisation for Economic Co-operation and Development Anti-Bribery Convention. *See* Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 2 PUB. PAPERS 2011 (Nov. 10, 1998).

17. *See, e.g.*, United Nations Convention Against Corruption, Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41; African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (2004); Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998); Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 727.

18. Press Release, U.S. Dep’t of Justice, Fact Sheet: the Department of Justice Public Corruption Efforts (Mar. 27, 2008), available at http://www.justice.gov/opa/pr/2008/March/08_ag_246.html (quoting Att’y Gen. Michael B. Mukasey).

19. Bribery Act, 2010, c. 23 (U.K.).

marked a serious step in the fight against global corruption, as its strict measures and international impact are, in many ways, comparable to those of the FCPA.²⁰

B. Nuts and Bolts of the FCPA

The FCPA has two major sections: (1) a prohibition on bribery of foreign officials, and (2) accounting and reporting provisions for companies registered with the SEC.²¹ The anti-bribery provisions, which are the focus of this Note, criminalize the “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 foreign officials for the purpose of obtaining or retaining business.²² There is an exception for payments or gifts made “to expedite or to secure the performance of a routine governmental action.”²³ The statute also provides two affirmative defenses: defendants may be excused from liability if (1) the payment was legal under the written laws of the recipient’s country; or (2) the payment was a “reasonable and bona fide expenditure” toward specific, enumerated ends.²⁴

The scope of the FCPA is limited. It criminalizes improper payments to public officials but does not address bribes paid in the private sector.²⁵ It can be used to prosecute only the parties who make the payments, not those who solicit or receive them, and only when the payers act with a corrupt purpose.²⁶ The statute claims jurisdiction over SEC issuers and

20. See INCE & CO, WORLDWIDE ANTI-CORRUPTION INITIATIVES: A COMPARISON OF UK AND US LEGISLATION (2013), available at <http://incelaw.com/documents/pdf/legal-updates/bribery-act-update-february-2013>.

21. 15 U.S.C. §§ 78dd-1–3 (2012).

22. *Id.* § 78dd-1(a).

23. *Id.* § 78dd-1(b).

24. *Id.* § 78dd-1(c). The “reasonable and bona fide expenditure” must be “directly related to . . . (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.” *Id.* § 78dd-1(c)(2).

25. This is consistent with international priorities on corruption. For example, the World Bank defines corruption as “the abuse of public office for private gain.” THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 8 (1997), available at <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

26. 15 U.S.C. § 78dd-1(a). Klaw discusses the ambiguity surrounding what it means to act with a corrupt purpose. Klaw, *supra* note 8, at 325. He argues that there are at least two ways to interpret “corruptly”: broadly or narrowly. *Id.* A broad definition means that “one acts corruptly anytime she makes a payment to a foreign official to influence any official act, provided it relates to obtaining or retaining business.” *Id.* The narrow definition is that “one only acts corruptly by intending to have the official misuse his position, which would seemingly exclude payments made in response to coercive extortion that are merely intended to ensure that the official does his job and does not provide less than fair treatment to the payer.” *Id.*

U.S. citizens and companies worldwide, as well as foreign persons who violate the Act “while in the territory of the United States.”²⁷ The FCPA is enforced by the DOJ and SEC and allows for civil and criminal penalties that may include steep fines, imprisonment, or both.²⁸

C. Current Trends in FCPA Enforcement

The most important trend in FCPA enforcement is its rapid growth. As previously noted, the DOJ and SEC have significantly ramped up FCPA enforcement in recent years. For example, in the four-year period from 2002 to 2006, the United States brought a total of fourteen corporate enforcement actions, or an average of 3.5 per year; in 2010 alone, it brought twenty corporate enforcement actions.²⁹ Before 2006, there were fewer than ten individual enforcement actions a year; the numbers started growing in 2007, peaking with charges against forty-two individuals in 2009.³⁰ The DOJ and SEC have made it clear that increased enforcement is not a passing trend but rather a new norm.³¹

27. 15 U.S.C. § 78dd-3(a). An “issuer” is a party who “has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title.” 15 U.S.C. § 78dd-1(a). A “domestic concern” is

(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 territory, possession, or commonwealth of the United States.

15 U.S.C. § 78dd-2(h)(1).

28. 15 U.S.C. §§ 78dd-2(g)(1)-(3), 78dd-3(e)(1)-(3). The DOJ handles all criminal cases as well as civil anti-bribery cases involving domestic concerns and foreign actors. The SEC has jurisdiction only over anti-bribery actions against issuers. U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & U.S. SECS. & EXCH COMM’N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4-5 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

29. SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 1 (2012), available at http://www.Shearman.com/~media/Files/NewsInsights/Publications/2012/01/Shearman%20%20Sterlings%20Recent%20Trends%20and%20Patterns%20i_/Files/View%20January%202012%20iRecent%20Trends%20and%20Patterns%20in_/FileAttachment/FCPADigestTrendsandPatternsJan2012.pdf.

30. *Id.* at 3. These numbers are partially attributable to large cases with numerous defendants, particularly the Africa Sting (“SHOT show”) indictments of 2009; the *Siemens* indictments of 2011 had a similar effect on the statistics. *Id.* at 2-3; see also GREENBURG ET AL., *supra* note 6, at 19 (noting that one of the key lessons of the Africa sting case is that “corporate executives must be aware that the U.S. will not shy away from the use of novel and innovative investigative tactics to quash corruption”).

31. In a speech at the 24th National Conference on the Foreign Corrupt Practices Act, former Assistant Attorney General Lanny Breuer encouraged increased compliance efforts by businesses in light of the DOJ’s increased enforcement efforts:

On one hand, I want to tell you this afternoon that you are right to be more concerned. As our track record over the last year makes clear, we are in a new era of FCPA enforcement; and we

Another key trend in FCPA enforcement is the increased move toward prosecuting individual actors rather than focusing primarily on company-wide enforcement.³² This change is likely intended to inspire more individual accountability in decision making and to avoid allowing “companies to calculate FCPA settlements as the cost of doing business.”³³ It also raises the stakes substantially for individuals by increasing the likelihood of jail time and personal financial loss. The average FCPA sentence is around two years, but penalties vary widely; in 2011, one former executive was sentenced to fifteen years for his role in a bribery scheme.³⁴

The impact of the FCPA on global businesses is huge. The average FCPA case lasts 3.4 years from investigation to settlement,³⁵ resulting in large defense bills, increased compliance costs, hefty settlement fines, and, in some cases, imprisonment for the most culpable individual actors. SEC charges settled for more than \$138.3 million in 2012 alone.³⁶ Increased FCPA enforcement is meant to improve the global marketplace for businesses by decreasing corruption and increasing fairness. But it also creates serious risks for all businesses operating in any way within the United States. One of the biggest questions facing businesses, then, is what it means to act “within” the United States. The FCPA does not provide for unlimited jurisdiction; it applies only to U.S. citizens and companies, SEC issuers, and other individuals who act corruptly “within” the United States. The next Part examines the statute’s grounds for jurisdiction.

are here to stay. On the other hand, I want to impress upon you that you should not wait in worry for us to come knocking on your door. There are many steps that you can be taking that would put your organization in a better position for the day we do come knocking, or that could prevent us from coming at all.

Lanny A. Breuer, Assistant Att’y Gen., U.S. Dep’t of Justice, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

32. SHEARMAN & STERLING LLP, *supra* note 29, at 2–3.

33. DOJ Prosecution of Individuals—Are Other Factors at Play?, FCPA PROFESSOR (Jan. 29, 2013), <http://www.fcprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play-2>.

34. Press Release, U.S. Dep’t of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), *available at* <http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html>; Richard L. Cassin, *A Survey of FCPA Sentences*, THE FCPA BLOG (Feb. 28, 2012, 5:28 AM), <http://www.fcablog.com/blog/2012/2/28/a-survey-of-fcpa-sentences.html>.

35. Joe Palazzolo, *Does the FCPA Move Markets?*, WALL ST. J. BLOG (Oct. 2, 2012, 11:12 AM), <http://blogs.wsj.com/corruption-currents/2012/10/02/does-the-fcpa-move-markets>.

36. SEC Enforcement Actions: FCPA Cases, U.S. SECS. & EXCH. COMM’N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last modified Jan. 9, 2014).

III. THE JURISDICTION OF THE FCPA

The jurisdictional reach of the FCPA has expanded significantly over time. Some of those changes came through statutory amendment in response to problematic gaps in the law. Others have come about in practice as the DOJ and SEC have charged and settled cases that include expanded jurisdictional bases. This Part gives a brief background on the development of jurisdiction under the statute.

When the FCPA was enacted in 1977, Congress explicitly excluded foreign actors from its reach unless they otherwise fell under the jurisdiction of the United States.³⁷ Case law from the first two decades of FCPA enforcement discussed the rationale behind this intentional exclusion. The courts and Congress were concerned with issues of sovereignty, U.S. foreign policy and relations, and risks of reciprocal prosecution.³⁸

This exclusion ended with the 1998 amendments to the FCPA. In that year, Congress amended the FCPA to implement the OECD Anti-Bribery Convention.³⁹ The 1998 amendment followed the OECD Convention in declaring territorial jurisdiction over acts that were committed or occurred “within” the United States.⁴⁰

37. “[T]he conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer or domestic concern engaged in conduct proscribed by the bill.” H.R. REP. NO. 95-831, at 14 (1977) (Conf. Rep.).

38. The court in *Dooley v. United Techs. Corp.*, for example, held that it lacked jurisdiction over certain defendants after examining congressional intent in limiting the FCPA’s reach over foreign individuals and corporations. One of its primary concerns was international comity. 803 F. Supp. 428, 438–40 (D.D.C. 1992). International comity is a principle that extraterritorial jurisdiction should be limited “out of respect for foreign sovereignty. International comity requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns.” Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS., Summer 2008, at 19, 19 (footnote omitted). The court in *United States v. Castle*, cited two major concerns that led to the enactment of the FCPA: (1) concern about the domestic effect of corrupt payments, and (2) the effect of bribes on U.S. foreign relations. 925 F.2d 831, 834 (5th Cir. 1991).

39. See *supra* text accompanying note 16.

40. In Article 4, Paragraph 1, the OECD Convention states that “[e]ach Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.” Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 4, para. 1, Dec. 18, 1997, 37 I.L.M. 1 (1998). Territorial jurisdiction is also defined in the Restatement (Third) of Foreign Relations: “Subject to § 403, a state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). Section 403 deals with limitations on jurisdiction to prescribe, which mainly

“Within” has a particular meaning in this context: to commit an act “within” the territory actually means *causing* an act to be committed within the territory.⁴¹ The 1998 amendment thus established jurisdiction over anyone who uses the mails, means, or instrumentalities of interstate commerce in the United States to facilitate an FCPA violation, even if that person was not physically present in the United States when acting or otherwise subject to U.S. jurisdiction as a citizen or issuer.⁴² The 1998 amendment significantly expanded the FCPA’s reach, allowing “US enforcement agencies [to] make use of [the FCPA’s] extraterritorial provisions . . . to exert jurisdiction on the basis of actions as slight as registering American Depository Receipts, sending incriminating emails, or making a transfer to a US bank account.”⁴³

The application of when an act occurs “within” the United States can be unclear. Some examples are straightforward: an individual who offers a bribe to a foreign official during a meeting in New York has violated the FCPA “within” the United States, as has a company who opens a U.S. bank account to facilitate prohibited payments. Other applications, though, are much less obvious. Going back to the introductory hypotheticals, did Beatrice violate the FCPA if her transaction’s only connection to the United States was that it was made in U.S. dollars? Is Caro subject to FCPA jurisdiction even though its only jurisdictional contact with the United States is its U.S. parent, Clare? These examples demonstrate two new—and potentially troubling—bases for jurisdiction that the DOJ and SEC have recently advocated under the FCPA: (1) correspondent account liability and (2) parent-subsidiary liability, specifically, assumed agency. These jurisdictional bases, which push traditional notions of extraterritorial jurisdiction, are explored in turn in the next two Parts.

derive from an examination of whether or not the exercise of jurisdiction is reasonable. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

41. SHEARMAN & STERLING LLP, THE OTHER FCPA SHOE DROPS: EXPANDED JURISDICTION OVER NON-U.S. COMPANIES, FOREIGN MONITORS, AND EXTENDING COMPLIANCE CONTROLS TO NON-U.S. COMPANIES 2 (2010), *available at* <http://www.shearman.com/the-other-fcpa-shoe-drops—expanded-jurisdiction-over-non-us-companies-foreign-monitors-and-extending-compliance-controls-to-non-us-companies-07-19-2010> (follow “View full memo” hyperlink).

42. 15 U.S.C. § 78dd-3 (2012).

43. ARNOLD & PORTER LLP, THE EXTRATERRITORIAL REACH OF THE FCPA AND THE UK BRIBERY ACT: IMPLICATIONS FOR INTERNATIONAL BUSINESS 3 (2012), *available at* http://www.arnoldporter.com/resources/documents/Advisory%20Extraterritorial_Reach_FCPA_and_UK_Bribery%20Act_Implications_International_Business.pdf. For a more detailed explanation of the reach of Section 78dd-3, see H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?*, 26 N.C. J. INT’L L. & COM. REG. 239, 303–17 (2001).

IV. CORRESPONDENT ACCOUNT LIABILITY

A. *The Basics of Correspondent Account Liability*

When banks wish to transact in a location where they do not have a branch, they can use a correspondent account in that location to conduct transactions, such as receiving deposits or making payments. Foreign banks use U.S. correspondent accounts to facilitate U.S. dollar transactions, as Beatrice did in the second hypothetical. In recent enforcement actions, the DOJ and SEC have signaled that the use of U.S. correspondent accounts can establish jurisdiction over the foreign actor conducting the transaction, even when that correspondent account is the actor's only link to the United States.⁴⁴ Thus, if a foreign actor uses a U.S.-based correspondent account to bribe another foreign actor, the government's new theory would permit a criminal prosecution for bribery in federal court.

This novel approach to FCPA jurisdiction creates problems. It raises questions about whether these defendants have adequate notice and it could also interfere with foreign relations and international comity.⁴⁵ On a more practical level, jurisdiction via correspondent account liability makes it difficult for companies to design effective compliance programs and creates uncertainty for domestic and foreign businesses.

Neither enforcing agency has used correspondent account liability as a stand-alone jurisdictional basis; rather, they have cited it in cases where they otherwise have jurisdiction but nonetheless have differentiated between foreign transactions that use a correspondent account (within the United States) and foreign transactions that do not use a correspondent account (outside the United States).⁴⁶ FCPA cases rarely go to trial, jurisdictional challenges are rare, and correspondent account liability has

44. SHEARMAN & STERLING LLP, *supra* note 41, at 2. This argument is the strongest if the money clears through one of the U.S.'s two primary clearing systems: the Clearing House Interbank Payment System (CHIPS), which is the world's largest private sector transfer system for U.S. dollars, or Fedwire, the Federal Reserve's funds transfer system. Michael Gruson, *The U.S. Jurisdiction over Transfers of U.S. Dollars Between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks*, 2004 COLUM. BUS. L. REV. 721, 725–26; THE CLEARING HOUSE, <http://www.chips.org/home.php> (last visited Jan. 31, 2013); *Fedwire Funds Services*, THE FED. RESERVE, http://www.federalreserve.gov/paymentsystems/fedfunds_about.htm (last updated Feb. 19, 2014). It is possible to move U.S. dollars between foreign accounts outside of these systems, which would make the jurisdictional argument more difficult.

45. *See infra* Part IV.B.2.

46. *See, e.g.*, Information, United States v. Kellogg Brown & Root LLC, No. 09-CR-071 (S.D. Tex. Feb. 6, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-06-09kbr-info.pdf> (compare treatment of Counts 2–3 with treatment of Counts 4–5).

not yet been squarely challenged in federal court, meaning there is little guidance on how judges may view correspondent account liability in these cases.⁴⁷ But outside the correspondent account liability context, courts have followed the Restatement's approach when determining whether an exercise of jurisdiction is reasonable and satisfies due process requirements. Cases addressing challenges to the extraterritorial applications of U.S. law in other contexts thus help in predicting how a court would decide a challenge to correspondent account liability.

B. The Restatement's Three-Part Reasonableness Test

Section 402 of the Restatement lists several situations in which a state may assert jurisdiction over domestic or foreign actors, including:

- (1) territorial jurisdiction when the conduct occurs within the state's borders;
- (2) universal jurisdiction over persons or things within a state's territory;
- (3) jurisdiction over people whose conduct has effects within a state's territory (sometimes called objective territorial jurisdiction);
- (4) jurisdiction based on the nationality of the offender or victim; and,
- (5) jurisdiction over a person or thing when doing so protects state security or other specific state interests.⁴⁸

Territorial jurisdiction over the conduct at issue, under Section 402(1)(a), provides the clearest argument for correspondent account liability. The relevant conduct within U.S. territory would be the use of a U.S. bank account to clear funds, which is a use of the mails, means, or instrumentalities of interstate commerce.⁴⁹ Thus, in Beatrice's case, if her

47. Furthermore, practitioners are concerned that these jurisdictional questions will not be raised for practical reasons; the cost of raising a challenge would likely be too high given the uncertainty of prevailing. See ARNOLD & PORTER LLP, *supra* note 43, at 3.

48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

49. Section 78dd-3 requires the nexus to interstate commerce for foreign nationals charged under the FCPA. 15 U.S.C. § 78dd-3(a) (2012). The argument for jurisdiction over correspondent accounts under Section 402(1)(a) of the Restatement may fail even without the limitations of Section 403 because Section 402(1)(a) gives jurisdiction for conduct that "wholly or in substantial part" occurs in the territory. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1)(a), 403. There is a strong argument that the mere fact that money clears through a correspondent account on its way between two foreign accounts is insufficient to meet this threshold.

transfer cleared through a U.S. account on its way between the Swiss and Japanese accounts, the clearance through a U.S. account could provide the sole jurisdictional contact that would subject her to FCPA jurisdiction.

Section 402's jurisdictional bases are quite broad. To keep jurisdiction from reaching too broadly, the Restatement requires that any exercise of jurisdiction also satisfy the limits of Section 403. Section 403 provides that "[e]ven when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."⁵⁰ The question, then, is whether correspondent account liability is "unreasonable." The Restatement outlines three issues that courts should examine when answering this question: (1) the nexus between the defendants, their conduct, and the charging state; (2) international norms regarding regulation of the activity in question and exercise of jurisdiction over the offense or person; and (3) a balance of interests (that is, a weighing of the importance of the regulation to the charging state and the likelihood that its actions would conflict with the interests of another state or other systemic interests).⁵¹ As discussed below, all three of these factors suggest that jurisdiction via correspondent account liability is improper.

1. Adequate Nexus

The first prong of the reasonableness test—adequate nexus—examines the connection between the United States and the actor or acts. Courts have held that this standard is met "[w]here an attempted transaction is aimed at causing criminal acts within the United States"⁵² or where actions were "likely to have effects in the United States."⁵³ For example, in cases of drug seizures in international waters, courts generally have held that an adequate nexus exists when there is evidence that the drugs are headed toward the United States. Although the defendants were captured in international waters and thus had not yet taken any action within the United States, sale and use of the drugs would presumably have occurred there.⁵⁴ In such cases, courts have determined that the connection between

50. *Id.* § 403(1).

51. *Id.* § 403(2).

52. *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987).

53. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting *United States v. Khan*, 35 F.3d 426, 429 (9th Cir. 1994)).

54. *Id.* at 1257–59; *Peterson*, 812 F.2d at 493. Similar reasoning was applied in *Chua Han Mow v. United States*, where all actions occurred in Malaysia but were intended to cause harm in the United

the defendant and the United States is strong enough that exercising jurisdiction over the defendant would not be “arbitrary or fundamentally unfair.”⁵⁵ Similarly, foreign conspiracies to smuggle immigrants into the United States likely have an adequate nexus because the intended effects of the conspiracy will be felt in the United States, even when all of the illegal acts occur abroad.⁵⁶

In the correspondent account context, the movement of corrupt payments through a U.S. account arguably causes a criminal act to occur in the United States, such that an adequate nexus exists. But, as the examples just discussed illustrate, this conclusion has at least two major flaws.

First, correspondent account liability does not cause sufficient harm to create an adequate nexus. Courts look for a cognizable harm occurring within the United States, such as the entry of drugs or undocumented immigrants. Use of correspondent accounts, however, causes no apparent harm within the United States. The only arguable harm is the impact any corrupt act will have on the global economy. But such a harm is far too attenuated to provide an adequate nexus; otherwise, *any* corrupt act—wherever it occurred—could have an adequate nexus to the United States.

Second, those using correspondent accounts often lack the intent to commit a criminal act or cause harm within the United States. Cases in which courts have found an adequate nexus often involve such intent, but in correspondent account cases, defendants may not have this intent. There is a risk, then, that jurisdiction over them would be arbitrary and unfair.

Courts’ applications of federal securities law provide helpful comparisons.⁵⁷ Under these laws, courts have held that the mere use of a U.S. bank to clear a check is sufficient to establish territorial jurisdiction and to create an adequate nexus.⁵⁸ “[J]urisdiction predicated on the use of the instrumentalities of interstate commerce is extremely broad, and it comprehends the involvement of virtually any channel of interstate

States. 730 F.2d 1308, 1312 (9th Cir. 1984). In these cases, the analyses for territorial jurisdiction and objective territorial jurisdiction are largely the same.

55. *United States v. Davis*, 905 F.2d 245, 249 (9th Cir. 1990).

56. *Rocha v. United States*, 288 F.2d 545, 548 (9th Cir. 1961).

57. *See, e.g.*, *United States v. Kunzman*, 54 F.3d 1522, 1527 (10th Cir. 1995) (“As long as the instrumentality used is itself an integral part of an interstate system, Congress may regulate intrastate activities involving the use of the instrumentality under the federal securities laws.”).

58. *See, e.g.*, *United States v. Gilbert*, 181 F.3d 152, 158–59 (1st Cir. 1999) (holding that making a bomb threat over the telephone, even if the call is intrastate, creates a sufficient nexus to interstate commerce to confer jurisdiction); *Kunzman*, 54 F.3d at 1527 (finding that jurisdiction is established if transactions occur in FDIC-insured banks or there is some minimal connection between the action and the integral parts of interstate commerce).

commerce . . . so long as that channel is used in furtherance of the violation.”⁵⁹ The use does not need to be the primary means of accomplishing the corrupt act,⁶⁰ nor does it necessarily have to be used directly by the defendant.⁶¹

At first glance, jurisdiction via correspondent account liability seems similar. But an important difference exists—intent. In securities and money laundering cases, the defendants intentionally drew and deposited checks at U.S. banks, causing movement across state banks and the use of interstate commerce.⁶² The defendants *knew* that they were using the U.S. national banking system and thus had reason to know they were subjecting themselves to federal law.⁶³ In contrast, defendants in FCPA actions may not know nor have any reason to know that their funds would move through a U.S. account. They use foreign accounts; money might travel, for example, from a Swiss bank to a Japanese bank. It is the foreign banks—not the defendants—that use U.S. correspondent accounts.

A court could find that this connection gives defendants insufficient notice that their actions would subject them to U.S. jurisdiction, which would violate due process requirements of “fair play and substantial justice”⁶⁴ and the reasonableness test’s standard that jurisdiction not be “arbitrary or fundamentally unfair.”⁶⁵ These defendants do not cause a cognizable harm in the United States, nor do they intend to. Their contact with the United States is extremely minimal, and they may not even know it is occurring. Thus this contact alone is insufficient to establish an adequate nexus between foreign actors and the United States.

59. Brown, *supra* note 43, at 317.

60. *McLaury v. Duff & Phelps, Inc.*, 691 F. Supp. 1090, 1095 (N.D. Ill. 1988) (“It is not necessary that the fraud be committed during and through the actual use of the jurisdictional means; to be a violation of Section 10(b) and Rule 10b-5 it is sufficient if the jurisdictional means are used in connection with a fraudulent scheme.”).

61. *Id.*

62. See *Kunzman*, 54 F.3d at 1527 (defendant charged with securities fraud, mail fraud, wire fraud, money laundering, and bank fraud); *McLaury*, 691 F. Supp. at 1095 (defendants charged with violations of Section 10 of Securities and Exchange Act).

63. The defendants in *McLaury* claimed the checks never left the Illinois and thus were not subject to federal jurisdiction. 691 F. Supp. at 1095. But, the court found that the national banking system is sufficiently integrated such that its use constitutes use of the mails, means, or instrumentalities of interstate commerce. *Id.*

64. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing from *Milliken v. Meyer*, 311 U.S. 457 (1940)) (establishing the accepted standard for the basis of personal jurisdiction).

65. *United States v. Davis*, 905 F.2d 245, 249 (9th Cir. 1990).

2. *Comportment with International Norms*

The second prong of the reasonableness test—comportment with international norms—asks two questions: (1) whether Congress intended the statute to apply extraterritorially, and (2) whether the exercise of jurisdiction aligns with principles of international law, as outlined in Sections 401 through 403 of the Restatement. These two factors work together: “[i]n determining whether a statute applies extraterritorially, [courts] . . . presume that Congress does not intend to violate principles of international law.”⁶⁶

The difficulty comes in identifying widely accepted principles of international law. One commonly held principle is that extraterritorial jurisdiction is appropriate under international law when the offense is “serious and universally condemned,” making it unlikely that conflict would arise from the exercise of jurisdiction.⁶⁷ Courts have divided, however, over which offenses meet this threshold.⁶⁸ Some law-of-nations violations are clearly defined, such as genocide and crimes against ambassadors. Jurisdiction is also frequently granted when U.S. citizens are injured.⁶⁹ But ambiguity still exists in interpreting these violations and in determining what other offenses are “serious and universally condemned.”

Since Congress clearly intended for the FCPA to have extraterritorial applications, the analysis should focus on whether correspondent account liability aligns with international law. As previously noted, territorial jurisdiction technically could exist because a transfer occurs within the United States. But the reasonableness analysis also includes an examination of international norms, which focuses particularly on the potential for conflict between states when one reaches too far into the affairs of another.

66. *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994). The court in *Vasquez-Velasco* stated that there is a presumption against extraterritoriality for statutes that violate principles of international law unless Congress clearly directs the statute’s extraterritorial application. *Id.*

67. *See, e.g., id.* at 841 (reasoning that since “drug smuggling is a serious and universally condemned offense, no conflict is likely to be created by extraterritorial regulation of drug traffickers”).

68. *See, e.g., United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012). In holding that drug trafficking does not constitute a violation of the law of nations such that Congress has the ability to regulate it without another jurisdictional connection, *id.* at 1258, the court in *Bellaizac-Hurtado* directly contradicts the outcome in *Vasquez-Velasco*.

69. *See, e.g., United States v. Neil*, 312 F.3d 419 (9th Cir. 2002). The defendant in *Neil* was a foreign citizen who assaulted a twelve-year-old U.S. citizen on a cruise ship. *Id.* at 420. The court applied an effects analysis and the passive personality principle to find jurisdiction. *Id.* at 422.

State autonomy is a key principle in international law. Indeed, “[a] corollary to the territorial principle is that foreign governments do not have the right to interfere in the affairs of another state.”⁷⁰ States are thus not allowed to regulate foreign actors without a clear jurisdictional nexus unless their crimes violate the law of nations.⁷¹ The law of nations encompasses only a limited number of crimes considered universally egregious and harmful to global peace, such as piracy and war crimes.⁷² Congress has the authority to define law-of-nations offenses.⁷³ The Supreme Court has been extremely cautious about otherwise expanding law-of-nations definitions, noting that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world.”⁷⁴

Corruption does not meet this threshold. Corruption is globally harmful but it has not been identified by Congress as a law-of-nations violation, nor is there international consensus surrounding its treatment. The problem varies widely based on the political, economic, and cultural conditions of a country or region, and some view corruption as little more than a necessary part of doing business.⁷⁵ The Supreme Court has not granted law-of-nations violations even in extreme cases, such as when U.S. officials ordered an illegal, international kidnapping and extradition.⁷⁶ The Court has held that an offense must “[violate a] norm of customary international law so well defined as to support the creation of a federal remedy.”⁷⁷ Corruption does not meet this threshold.⁷⁸ Thus, there must be

70. Gruson, *supra* note 44, at 761.

71. In the United States, the “law of nations” concept is most commonly referenced in cases arising under the Alien Tort Statute, which provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2012).

72. For an explanation by the Supreme Court of the law of nations, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–20 (2004).

73. *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

74. *Sosa*, 542 U.S. at 725. The Court continued with an extremely cautious analysis, noting that “the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Id.* at 727.

75. See, e.g., TRANSPARENCY INT’L, GLOBAL CORRUPTION BAROMETER 2013 (2013), available at http://www.transparency.org/whatwedo/pub/global_corruption_barometer_2013 (follow “Download the report”); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419 (1999).

76. *Sosa*, 542 U.S. at 697–98.

77. *Id.* at 738.

78. Other authors have argued that corruption could fall under the law of nations, which led me to examine the law of nations as part of the international norms analysis. See, e.g., Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527 (2008).

a clear jurisdictional nexus for prosecution to satisfy international norms. As the nexus analysis demonstrated, that does not exist for correspondent account liability. Thus, it does not comport with international norms.

3. *Balancing of Interests*

The third prong of the reasonableness test—balancing of interests—examines the interests of the charging state in applying its law versus the interests of other states in regulating the prohibited activity (or in not being regulated themselves). These concerns are serious, as experience with the FCPA’s old exclusion of foreign companies and officials demonstrates. Before Congress amended the FCPA in 1998 to allow prosecution of foreign actors, courts stuck close to Congress’s clear intent to exclude them from U.S. prosecution. Courts cited Congress’s concerns with “international comity[,] . . . diplomatic difficulties[,] and jurisdictional contacts” that could arise if these actors were prosecuted under the FCPA.⁷⁹ In other words, courts were worried that if they prosecuted foreign actors under the FCPA, they would cause foreign-relations problems or unpredictable retaliation from other countries.

Though foreign actors are now within the reach of the FCPA, these same concerns remain relevant. Aggressive prosecution can damage relationships with other countries who disagree with U.S. treatment of their companies or nationals. States also argue that U.S. prosecution interferes with the development of their own anti-corruption regimes.⁸⁰ Aggressive FCPA prosecution clearly has the potential to damage international relationships when it prioritizes U.S. goals over host countries’ concerns.

A reasonable prosecution strategy also serves U.S. interests. The United States has an interest in fighting criminal activity and reducing corruption.⁸¹ Aggressive prosecution may help U.S. businesses stay competitive when other countries are failing to prosecute corruption effectively. But the United States does not have the prosecutorial resources

79. *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992); *see also* *United States v. Castle*, 925 F.2d 831, 835–36 (5th Cir. 1991).

80. *See* *Salbu*, *supra* note 75, at 440. *Salbu* notes “encouraging nations to adopt and implement their own domestic antibribery laws is the solution to corruption most respectful of legitimate cultural differences.” *Id.*

81. *Brown* uses a “conduct test” that focuses on “acts committed within the territorial United States and seeks to vindicate the national interest by preventing the United States from becoming a haven for criminality,” but notes that “courts do not fully agree on the nature of conduct required to engender subject matter jurisdiction, particularly where a transaction or fraudulent scheme has not had a significant effect in the United States.” *Brown*, *supra* note 43, at 324–25.

to reach every crooked scheme. Sustainable progress will be made when all of the major global players have effective anti-corruption regimes, but they need an opportunity to develop them.⁸²

Expansive prosecution could also redirect business away from the United States. For example, in correspondent account cases, the DOJ distinguishes between bank transfers that clear through U.S. correspondent accounts (within the United States) and ones that do not (outside the United States).⁸³ A company could thus avoid FCPA liability simply by transacting in yens or euros instead of dollars, cutting the correspondent account and, therefore, eliminating its U.S. connection. That scenario is all loss for the United States: a U.S. bank loses a transaction, U.S. currency loses an exchange, and corruption continues unabated.

Correspondent account liability does not satisfy any of the three prongs of the reasonableness test. It does not create an adequate nexus: defendants lack sufficient contact with the United States, and they do not intend to cause, nor do they actually cause, harm here. It does not comport with international norms. The only exception to traditional jurisdictional requirements in international law is for law-of-nations violations, where any state is presumed to have some jurisdiction over a perpetrator. Corruption is not a law-of-nations violation; thus, prosecution without jurisdiction violates international norms. Finally, in the balancing of interests, no one is well-served by aggressive U.S. prosecution. Other states have an interest in growing and receiving support for their own anti-corruption regimes. The United States has an interest in sharing the prosecutorial load and supporting U.S. businesses. All of these interests are best served by a reasonable prosecution strategy that focuses on compliance and global buy-in rather than just policing and punishing.

V. PARENT-SUBSIDIARY LIABILITY

The second jurisdictional basis that has been asserted in a novel manner in FCPA enforcement is parent-subsidiary liability, specifically, liability based on an agency relationship. As a general rule, parents and

82. Many nations are indeed developing their own anti-corruption regimes. *See, e.g.*, Richard L. Cassin, *Africa nations shut down tainted China telecoms deals*, THE FCPA BLOG (Sept. 19, 2013, 3:08 AM), <http://www.fcpablog.com/blog/2013/9/19/africa-nations-shut-down-tainted-china-telecoms-deals.html>; Richard L. Cassin, *Life sentence for Bo Xilai*, THE FCPA BLOG (Sept. 22, 2013, 9:22 PM), <http://www.fcpablog.com/blog/2013/9/22/life-sentence-for-bo-xilai.html>.

83. *See, e.g.*, Information, *United States v. Kellogg Brown & Root LLC*, No. 09-CR-071 (S.D. Tex. Feb. 6, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-06-09-kbr-info.pdf> (compare treatment of Counts 2–3 with treatment of Counts 4–5).

subsidiaries are treated as separate entities for liability purposes. Neither side is responsible for the acts of the other, and jurisdiction over one does not create jurisdiction over the other.⁸⁴ But, there are exceptions to this rule.⁸⁵ One of these exceptions is that a parent and subsidiary may both be held liable for the subsidiary's actions when the subsidiary was acting as an agent of the parent.⁸⁶ If an agency relationship is established, jurisdiction over the U.S. party can be extended so that jurisdiction over the foreign party is also appropriate.⁸⁷

Under the FCPA, the United States has jurisdiction over foreign actors who operate as authorized agents of a U.S. company, including foreign subsidiaries of U.S. parents.⁸⁸ Thus, in the third hypothetical, if the United States could prove that Caro was acting as an authorized agent of Clare when it committed acts that would violate the FCPA, the United States could exercise jurisdiction over Caro by virtue of its jurisdiction over Clare. The issue with this application is that the SEC has signaled recently that it may assert FCPA jurisdiction over non-issuer subsidiaries based solely on their relationship with an issuer parent, *without proving a principal-agent relationship exists*.⁸⁹ This lack of proof of a principal-agent relationship presents possibilities for conflict with agency law and the liability structure of parent-subsidiary relationships.

This question of imputing jurisdiction is complicated. Typically, parent-subsidiary liability questions focus on when a parent may be held responsible for the illegal acts of its subsidiary, *i.e.*, when a plaintiff may "pierce the corporate veil." The SEC's application, though, is different: it is using the parent-subsidiary relationship to establish jurisdiction over a party that would otherwise be out of reach. It thus seeks to extend its

84. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929)).

85. Courts have not established a clear test for determining parent-subsidiary liability but have found liability based on a number of theories, including "(1) agency, (2) instrumentality, (3) identity or alter ego, (4) fraud, and (5) abuse of control or inequitable use of the separate entity privilege." 1 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 7:16 (3d. ed. 2011) (footnotes omitted).

86. *See id.*

87. *See, e.g.*, *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994).

88. All three sections of FCPA legislation claim jurisdiction over agents acting on behalf of the enumerated parties (issuers, domestic concerns, or other persons acting in the territory of the United States). 15 U.S.C. §§ 78dd-1-3 (2012).

89. The clearest example of this appeared in the SEC action against Snamprogetti Netherlands in the Bonny Island bribery case. *Information, United States v. Snamprogetti Neth. B.V.*, No. 10-CR-460 (S.D. Tex. July 7, 2010).

jurisdiction over a parent company to that parent's subsidiary, over whom they do not have jurisdiction otherwise, by arguing that the subsidiary acted as an agent of the parent. There is no clear test for determining when jurisdiction or liability may be imputed from a parent to subsidiary (or vice versa). This Part analyzes the legal principles that the SEC may have to apply to exercise jurisdiction over a foreign party based on its relationship with a U.S. parent.

A. *Basics of Parent-Subsidiary Structure*

The parent-subsidiary structure is a limited liability arrangement that serves largely “to minimize the potential liability of the parent company for the operations and potential claims against its operating subsidiaries.”⁹⁰ But plaintiffs frequently seek to “pierce the corporate veil,” which means they ask courts to “[disregard] the veil of incorporation that separates the property of a corporation from the property of its security holders.”⁹¹ Courts will allow the veil to be pierced, i.e., disregard the corporate limited liability form, when “the corporate form would otherwise be misused to accomplish certain wrongful purposes.”⁹²

If the veil is pierced, plaintiffs can access the assets of the parent corporation or individual owners or stockholders, exposing these parties to additional liability and potentially giving the plaintiffs access to more funds for recovery. Indeed, “[g]iven the massive financial assets of many multinational parent corporations, actions seeking to ignore the legal separateness of a corporate subsidiary of a parent company offer some of the biggest potential payoffs for claimants.”⁹³ Given this potential for damages, attempts to pierce the veil are fiercely and frequently litigated, and the law remains amorphous.⁹⁴ What is clear, however, is that a *mere assertion* of a parent-subsidiary relationship is insufficient to impute the acts or jurisdiction of one party to the other given that one of the primary purposes of the relationship is to limit liability.⁹⁵

90. John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1094 (2009).

91. Bryan A. Garner, *GARNER'S DICTIONARY OF LEGAL USAGE* 676 (3d. ed. 2011).

92. *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

93. Matheson, *supra* note 90, at 1095.

94. *Id.*

95. Though piercing the veil is a separate question from extending jurisdiction, it is useful to address both principles because courts frequently combine these analyses when looking at agency relationships. As one court noted,

It is useful to distinguish situations in which liability is imposed on a parent because of the existence of the agency relation, in our common-law understanding of that relation, from

B. Agency in the Parent-Subsidiary Relationship

One way to pierce the veil in a parent-subsidiary relationship is to claim that the subsidiary was acting as an agent of the parent, thus making the parent liable for the subsidiary's actions.⁹⁶ This same reasoning can be used to extend jurisdiction from the parent to the subsidiary. Returning to the introductory hypothetical, the argument would be that since the United States has jurisdiction over Clare, and Caro is acting as an agent of Clare, the United States also has jurisdiction over Caro. Agency is not assumed in a parent-subsidiary relationship; it depends on a showing of consent by both the parent (the principal) and the subsidiary (the agent) that the subsidiary would act on the parent's behalf and be subject to the parent's control.⁹⁷ Indeed, "the ability of the parent corporation to control the actions of the subsidiary is the predicate for liability and jurisdiction based on agency."⁹⁸

cases in which the corporate veil of the subsidiary is pierced for other reasons of policy. Unfortunately, however, the courts have not always observed the distinction between these two separate bases for parent's liability. When liability is fastened upon the parent it is said that the subsidiary is a "mere agent." The result has been a weakening and muddying of the term "agent" and a failure by courts to state the real reasons for their decisions.

Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004) (citing RESTATEMENT (SECOND) OF AGENCY § 14M reporter's note (1958)).

96. *See supra* note 85.

97. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Some agency relationships are straightforward. *See, e.g.*, Indictment, *United States v. Jeffrey Tesler*, No. 09-CR-098 (S.D. Tex. Feb. 17, 2009) (UK citizen who was hired by a U.S. company, among others, handling bribe payments to Nigerian officials); Indictment, *United States v. Ousama M. Naaman*, No. 08-CR-246-ESH (D.D.C. Aug. 7, 2008) (Lebanese/Canadian dual national negotiating contracts with the Iraqi Ministry of Oil on behalf of a U.S. parent company and foreign subsidiary); Information, *United States v. Ingersoll-Rand Italiana SpA*, No. 07-CR-294-RJL (D.D.C. Oct. 31, 2007) (Jordanian company, Company X, serving as an agent and intermediary between a foreign subsidiary of a U.S. company and the government of Iraq); Indictment, *United States v. Hans Bodmer*, No. 03-CR-947-SAS (S.D.N.Y. Aug. 5, 2003) (Swiss lawyer representing a New York-based company, among others, in facilitating bribe payments to Azeri officials).

98. *Brown, supra* note 43, at 355. *Brown* also details the jurisprudence on parent-subsidiary relationships up to 2001. *Id.* at 350–57. As he notes, "a foreign parent corporation does not become subject to in personam jurisdiction simply because its subsidiary is located in the United States" (and, presumably, vice versa when the parent corporation is in the U.S. and the subsidiary is abroad). *Id.* at 351. *Lestelle* discusses the principal-agent relationship in the context of torts and contracts. *See Lestelle, supra* note 78, at 533–34. Liability of the principal is established

if the agent acts with actual authority in committing the tort; if the principal is negligent in supervising, selecting, or controlling the agent; or if the principal owes a duty to a third party, and the agent to whom the principal has delegated performance of the duty fails in such duty.

Id. at 534. However, he then further notes that it appears that "foreign subsidiaries of U.S. companies who do not act as agents of their parent corporation and who act on their own behalf are excluded from the FCPA." *Id.* The U.S. Chamber of Commerce also issued a report where it detailed suggested amendments to the FCPA and outlined problems with expansive parent-subsidiary liability. ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE:

If a plaintiff wants to assign liability based on an agency relationship, he bears the burden of proving that relationship existed.⁹⁹ Courts have not agreed on a clear test for this relationship, particularly because “the inquiry is inherently fact-specific.”¹⁰⁰ But the D.C. Circuit articulated a standard that is widely cited:

At a minimum . . . we can confidently state that the relationship of principal and agent does not obtain unless the parent has *manifested its desire* for the subsidiary to act upon the parent’s behalf, the subsidiary has *consented so to act*, the parent has the *right to exercise control* over the subsidiary with respect to matters entrusted to the subsidiary, and the parent *exercises its control* in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary’s Board of Directors.¹⁰¹

Courts have applied similarly rigorous tests when determining whether jurisdiction over one party can be imputed to the other. For example, jurisdiction may be extended where “the subsidiaries are created by the parent, for tax or corporate finance purposes, to carry on business on its behalf, [so that] there is no basis for distinguishing between the business of the parent and the business of the subsidiaries.”¹⁰² Or it may be extended only when “the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.”¹⁰³ Thus, while there is not one clear test for determining agency, courts generally apply tests focusing on the parent’s control over the subsidiary, looking for a sufficient level of control to justify viewing the two as one entity.¹⁰⁴

PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 22–24 (2010), *available at* http://ilr.iwssites.com/uploads/sites/1/restoringbalance_fcpa.pdf.

99. *See* *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533–34 (5th Cir. 1992).

100. *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 849 (D.C. Cir. 2000).

101. *Id.* (emphasis added); *see also* *S & Davis Int’l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1299 (11th Cir. 2000) (applying the standard from *Transamerica Leasing*).

102. *Bellomo v. Pa. Life Co.*, 488 F. Supp. 744, 746 (S.D.N.Y. 1980).

103. *Gallagher v. Mazda Motor of Am., Inc.*, 781 F. Supp. 1079, 1084 (E.D. Pa. 1992).

104. 1 COX & HAZEN, *supra* note 85, § 7:16.

C. *The Agency Test in FCPA Cases*

The agency problem in FCPA cases is not that this control test has been incorrectly applied; it is that the SEC has signaled that it may assert jurisdiction on an agency theory based purely on the existence of a parent-subsidary relationship, without applying the test at all.¹⁰⁵ The SEC's anti-bribery jurisdiction is limited to issuers and their employees or agents. Thus, if the SEC wants to assert jurisdiction over a non-issuer foreign party, it has to prove that the party is either an agent or employee of an issuer. As evidenced above, that analysis is complicated and fact-intensive. But in at least one recent case, the SEC claimed jurisdiction over a non-issuer foreign company just by claiming it was owned and controlled by its issuer parent.¹⁰⁶ As happens with most FCPA cases, the non-issuer settled without challenging jurisdiction,¹⁰⁷ leaving open a troublesome question: can the SEC assert jurisdiction over a non-issuer foreign party simply because its parent company is an issuer?¹⁰⁸

The answer, clearly, is no. The law has clear rules and precedent for evaluating an agency relationship, whether the U.S. arm is the subsidiary or the parent. A mere parent-subsidary relationship is insufficient to establish jurisdiction without evidence that the parent had some control

105. The clearest example of this failure appeared in the SEC action against Snamprogetti Netherlands in the Bonny Island bribery case. Information, *United States v. Snamprogetti Neth. B.V.*, No. 10-CR-460 (S.D. Tex. July 7, 2010); *see also* SHEARMAN & STERLING LLP, *supra* note 41, at 1. Snamprogetti is not a U.S. issuer; the SEC asserted jurisdiction in an anti-bribery action against Snamprogetti by claiming it acted as an agent of its issuer parent, ENI. Complaint, Secs. & Exch. Comm'n v. ENI, S.p.A., No. 4:10-cv-2414 (S.D. Tex. July 7, 2010). In its discussion of jurisdiction, the SEC noted that Snamprogetti Netherlands used the mails, means, or instrumentalities of interstate commerce to violate the FCPA, and that "Snamprogetti was a wholly-owned subsidiary of Snamprogetti, S.p.A., an Italian company, which in turn was a wholly-owned subsidiary of ENI during the relevant time period." *Id.* at 2-3.

106. The SEC did not present any facts to support the agency claim. The SEC's only jurisdictional claims were that ENI owned Snamprogetti, did not ensure its compliance with ENI policies, and had control over Snamprogetti "during the relevant time and on certain of its business decisions, such as Snamprogetti's entry into the joint venture." Complaint, *supra* note 105, at 4; SHEARMAN & STERLING LLP, *supra* note 41.

107. Secs. & Exch. Comm'n v. ENI, S.p.A. & Snamprogetti Neth., B.V., Case No. 4:10-cv-02414, S.D. Tex. (Houston), Accounting and Auditing Enforcement Act Release No. 3,149, 98 SEC Docket 2973, 2010 WL 2685825 (July 7, 2010); Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), *available at* <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html> (on file with author).

108. SHEARMAN & STERLING LLP, *supra* note 41, at 4; *see also* SIDLEY AUSTIN LLP, ANOTHER SIGN OF AGGRESSIVE FCPA ENFORCEMENT: THE SEC BRINGS ANTI-BRIBERY CHARGES AGAINST A NON-ISSUER (Aug. 10, 2010), *available at* <http://www.sidley.com/Another-Sign-of-Aggressive-FCPA-Enforcement--The-SEC-Brings-Anti-Bribery-Charges-Against-a-Non-Issuer-08-10-2010> (follow "To View this Sidley Update as a PDF click here").

over or knowledge of the subsidiary's corrupt actions. Although this legal principle is clear, its application may not be. As previously discussed, FCPA cases rarely go to trial, and jurisdictional challenges are nearly non-existent. Thus, this application of parent-subsidiary liability, while likely improper, creates significant risks for U.S. parent companies with foreign subsidiaries. It threatens the normal limited liability rules for a parent-subsidiary relationship and opens the possibility that companies will have to choose between a risky jurisdictional challenge or an expensive settlement for conduct over which they may have had no control.

VI. CONCLUSION

A strong FCPA is essential in the continuing fight against corruption and bribery around the world. U.S. anti-bribery efforts through the FCPA have shaped the global fight against corruption. Assertive enforcement is needed as the problem continues everywhere. The harms of corruption are very real for U.S. businesses, citizens of developing economies, and the stability of a globalized world.¹⁰⁹ The DOJ and SEC's aggressive enforcement strategies are a logical response to the ongoing pervasiveness of corruption. However, it is essential for the DOJ and SEC to shape enforcement strategies with an understanding of how enforcement can both advance and detract from the laudable goals of the FCPA.¹¹⁰

An enforcement philosophy that focuses on prosecution wherever it may be possible is misguided. That approach is myopic and will always fall short of FCPA goals. Overly aggressive prosecution punishes actors who may be trying to comply and encourages corrupt actors to find ways to work around U.S. jurisdiction. In an era where the United States is already concerned about economic competition from growing foreign economies, it does not want to enforce policies in a way that encourages companies to look elsewhere to do business. FCPA enforcement should meet the requirements of fairness and comport with international norms and due process. To do so, the DOJ and SEC must take a holistic approach that moves away from a prosecute-whenever-possible philosophy toward a

109. Professor Salbu notes that "[j]ust as intrusive legislation poses a threat to global peace, rampant bribery in the post-Cold War era potentially undermines world order, particularly as it harms struggling nations, where fair and efficient economic development is critically important." Salbu, *supra* note 75, at 433 (footnotes omitted).

110. Professor Spalding notes that FCPA "legislation should create a disincentive to bribe but not a disincentive to invest. . . . [W]hile it is good to deter bribery, it is far better to deter bribery that occurs in the course of ongoing business activity. Promoting ethical business in emerging markets is precisely the purpose of the FCPA." Spalding, *supra* note 10, at 401.

plan that is consistent, collaborative with companies who are self-reporting and building compliance programs, and supportive of foreign governments waging their own anti-corruption battles.

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