International Journal of Law and
Legal Jurisprudence Studies :
ISSN:2348-8212

The Harmful Effects of SEC Overreach on United States Foreign Relations

By: Adam R. Martin

Abstract

Since becoming a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1998, the United States, along with numerous other nations, has sought to create a level playing field for international businesses by eliminated corrupt payment schemes between corporate executives and government officials. In recent years, however, the United States' Department of Justice and Securities Exchange Commission have failed to embody the ideals of international cooperation and global parity of enforcement inherent in The Convention. Instead, the U.S. agencies have used the Foreign Corrupt Practices Act to become a global police power, levying hefty fines on foreign corporations with little to no business contacts in the U.S. for actions which are not considered bribery under the laws of the corporations' home states. Rather than subjecting foreign corporations with little to no connection to American commerce to U.S. law, the Legislature should initiate reform to bring U.S. laws in line with international standards and facilitate global standards for bribery regulation and prevention.

I. Introduction

On December 2, 1823, President James Monroe delivered an address to Congress on the role of European Powers in the Western Hemisphere.[1] The European Powers paid little attention to his address at the time; however, this speech, later known as the Monroe Doctrine, had a profound impact on America's foreign policy and continues to guide the actions of the Legislative and Executive branches. [2] The Monroe Doctrine established a break between the New World and the Old and declared that the United States would defend the newly independent Latin American States from the imperialistic forces of

[1] *Monroe Doctrine, 1823: 1801-1829 Milestones,* U.S. Dept. of State, Office of the Historian, available at History.state.gov/milestones/1801-1829/Monroe.
[2] Id.

Russia, Britain, Spain, and the rest of Europe. [3] Eighty years later, President Theodore Roosevelt expanded the meaning of the Monroe Doctrine, using it as a basis to establish the United States as a police power in Latin America.[4] Roosevelt stated:

> Chronic wrong-doings, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power…

This established what is known as the Roosevelt Corollary to the Monroe Doctrine, allowing the United States to intervene in the affairs of other nations whenever aid is required. However, in modern days, the United States has been less than "reluctant" to exercise this international police power and has regularly been extending its reach in to the affairs of foreign powers. Recently, agencies of the U.S. government have sought to extend their regulatory power to foreign nations and businesses incorporated abroad, with varying degrees of appreciation from the nations they are seeking to aid. Most notably, the Securities Exchange Commission ("the SEC" or "the Agency") has sought to enforce U.S. anti-bribery regulations on publicly traded companies not active in the United States. Current trends in SEC enforcement actions show that the Agency is using increasingly tangential bases for jurisdiction to assert its enforcement power over such foreign corporations. While this is ostensibly appropriate under the Roosevelt Corollary,

---

[3] Id. Spain and France were interested in reestablishing their former colonies in Latin America. While Britain was opposed to this re-colonization, it was feared that the British Empire was only seeking to oust its own rivals from the area. Russia was poised to expand its influence over Alaska and the Oregon Territory. *See e.g.* Vinkovetsky, Ilya *(2011). Russian America: An Overseas Colony of a Continental Empire, 1804–1867. New York, NY: Oxford University Press*

[4] *The Roosevelt Corollary to the Monroe Doctrine,* University of Richmond, available at Historyengine.richmond.edu/episodes/view/5487.

the potential backlash from both corporations and foreign nations themselves show that this overreach by the SEC is neither a direct benefit to the United States, nor a source of welcome intervention on the behalf of a fellow "civilized nation". This article will first provide a background for the assertion of SEC regulation on foreign corporations, specifically via the Foreign Corrupt Practices Act ("FCPA").[5] The article will next show how the SEC has been steadily increasing its jurisdictional reach over foreign corporations since the inception of the FCPA.[6] Finally, the article will address the repercussions of this jurisdictional overreach and will outline potential solutions to bring the SEC's regulatory authority in line with the original intentions of the FCPA.[7]

II. Background

A. Legislative History

The infamous Watergate Scandal of 1972 is well known for its effects on the office of the President and U.S. domestic affairs, but it also had a profound impact on American foreign policy, prompting the adoption of the FCPA in in 1973.[8] Investigations into domestic campaign funding stemming from the Scandal led to additional inquiries into political contributions made to foreign elected officials. [9] Specifically, Archibald Cox, special prosecutor during the Scandal, publically called for any company that had made illegal contributions during the 1972 Presidential campaign to voluntarily disclose

[5] *Infra* Part I.
[6] *Infra* Part II.
[7] *Infra* Part III.
[8] *See e.g.* The Original Watergate Stories, The Washington Post (2013).
[9] Posadas, Alejandro, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345 (2000).

this information.[10] Astoundingly, the resulting disclosures revealed not only illegal contributions to the Nixon campaign, but also showed significant illegal funding being funneled to foreign political parties.[11]With this information, the SEC initiated its own investigations into several major U.S. corporations and alleged violations of securities regulations requiring accurate financial statements.[12] In April of 1975, one of the first major convictions arose resulting from the SEC inquiries. In the *United Brands* case, the SEC charged the company with securities fraud, alleging that payments of approximately $2.5 million made to senior officials in the Honduran government were a "materially relevant fact" which should have been disclosed to investors.[13] Although this case and others in the mid 1970's showed that the SEC was willing to pursue companies that were found to be involved in illicit dealings with foreign officials, the basis for SEC jurisdiction was typically due to misrepresentations of the companies' finances related to the briberies, not the briberies themselves.[14]

After a rush of SEC action, the United States legislature began to investigate the potential briberies, conducting several closed hearings before opening them up to the public. [15] The Senate Committee on Foreign Policy solicited tips from the public beginning in May of 1975.[16] Senator Frank Church, in that first public hearing, recognized that the bribery issue was not a question of morality, but rather a "major issue

---

[10] See Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. of Foreign Relations, 94th Cong. 5 (1975), CIS No. 76-S381-6 (Congress. Info. Serv.).
[11] *Id.*
[12] Posadas, *supra* n. 9 at 355.
[13] This scandal is often cited as the impetus for a military coup which ousted the Honduran President. *See JOHN T. NOONAN, BRIBES 656 (1984).*
[14] *Id.* at 674.
[15] *See* Multinational Corporations and United States Foreign Policy, *supra* n. 10.
[16] *Id.*

of foreign policy" foreshadowing the effects of SEC enforcement not only on domestic corporations, but also on international relations.[17] By the end of the year, the Congressional inquiries had revealed evidence of bribes from several U.S. corporations to foreign nations from Switzerland[18] to Korea.[19] The SEC delivered the results of its investigations and voluntary disclosures on May 12, 1976.[20] The results were staggering; the total estimated amount of questionable foreign payments accrued by 95 American companies totaled over $250 million dollars.[21] In modern currency, this amount would be equivalent to over a billion dollars.[22]

In reaction to these statistics, President Ford proposed legislation which would require corporations to report any foreign payments, but did not make these payments illegal.[23] Although the corporations' lobbyists argued that the "criminal approach" would disadvantage American companies attempting to compete internationally, the language of the Senate Report showed that Congress considered the corporate abuses to be significant enough that national policy concerns overrode the concerns of corporations abroad.[24] Senate Bill 305, as amended by the Conference Report, was eventually approved without

---

[17] *Id*.
[18] Noonan, *supra* n. 13 at 676.
[19] Several bills were introduced representing early attempts at passing anti-bribery legislature such as, Senate Bill 3133, introduced by Senator Proxmire on April 5, 1976. This bill prohibited all payments by American Corporations to any foreign nation and granted the SEC prosecutorial power. See*Foreign and Corporate Bribes, hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1976), CIS No. 76-S241-38 (Congressional Info. Serv.).
[20] *See* Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee, reprinted in 353 SEC. REG. & L. REP. 36-41 (1976).
[21] *Id.*
[22] United States Bureau of Labor Statistics, http://www.bls.gov/cpi/ (February, 2014).
[23] This proposal was seen as too conservative, and Senator Proxmire's proposal was favored over the President's. H.R. DOC. NO. 94-572, at 1 (1974).
[24] *See*, Posadas, *supra* n. 9 at 355

opposition in the Senate or the House. On December 19, 1977, President Jimmy Carter signed the Foreign Corrupt Practices Act of 1977 (FCPA) into law.[25]

The FCPA consists of two provisions, the books and records section requiring companies to meet certain bookkeeping guidelines, and the anti-bribery provisions. The anti-bribery provisions prohibited any "issuer, domestic concern, or person other than an issuer or domestic concern" from making "corrupt payments" consisting of "anything of value" to any "foreign official". These plain language descriptions still leave much to be desired in the way of definition. One of the earliest criticisms of the FCPA was the uncertainty that faced corporations attempting to comply with FCPA regulations.[26] It was clear that case law was needed to develop the definitions of who is subject to criminal liability under the act, what kind of conduct is considered "corrupt", and when a foreign entity has availed itself of the instrumentalities of interstate commerce.

B. Developmental Case Law

The first case brought under the FCPA was a civil enforcement action against a New York corporation and its officers and directors.[27] Only five months after the adoption of the FCPA, the SEC brought a civil injunctive action against Page Airways

[25] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S. C. §§ 78dd-2 (1994)) (amended by Omnibus trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.).

[26] Michael V. Seitzinger, *Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement,* Congressional Research Service (Feb 7, 2012) available at http://assets.opencrs.com/rpts /R41466_20120207.pdf.

[27] The SEC alleged that Page had been corrupt, improper, and made illegal payments to government officials from The Republic of Gabon, Malaysia, Morocco, Uganda, and the Republic of the Ivory Coast. *SEC v. Page Airways et al.*, No. 78-0645 at ¶9 (DDC April 13, 1978).

and six officers/directors of that corporation.[28] The first criminal FCPA enforcement action took place nearly two years later.[29] In a case known now as the "Postage Stamp Case", the U.S. showed that it was ready and willing to fully pursue violators of the FCPA and begin the war on international corruption in business.

Kenny International was a New York Corporation involved in the marketing and sale of printed materials. According to an August 1979 criminal information, Kenny entered into an agreement with the Cook Islands government which granted him the exclusive right to promote and sell Cook Islands postage stamps provided that the government received 50% of all proceeds.[30] In January 1978, Sir Albert Henry, a leader in the Cook Islands Party, sought reelection as Premier of the Cook Islands Legislative Assembly. The Cook Islands Party anticipated that the only way to achieve the necessary votes would be to fly in 1,800 voters from New Zealand.[31] Henry and the Party contracted with Kenny's President, Finbar Kenney, to subsidize the flights of these 1,800 voters because the exclusive contract between Kenny and the Cook Islands government could only be maintained if Henry was retained as Premier.[32] Due to these votes, Henry and the Cook Islands Party initially won a majority of seats in the Assembly, although this was later overturned when the actions of Kenney came to light. Kenny International eventually entered into a plea agreement with the Department of Justice which required

[28] The SEC complaint stated that these payments came in many forms ranging from cash transfers through subsidiaries, to substantial discounts on airline services, to gifts such as cars. *Id.* at ¶¶ 30-32.
[29] See *United States v. Kenney International Corp*. No. 79-00327 (D.D.C. Aug. 2 1979).
[30] *Id.* at 1
[31] *Id.* at 2
[32] *Id.* at 5

the company to plead guilty to criminal charges in the High Court of the Cook Islands and face fines and injunctions domestically.[33]

This initial enforcement case represents the most basic of situations where the anti-bribery provisions of the FCPA could be utilized against corrupt organizations: an American company directly using an instrumentality of interstate commerce (a commercial airplane) to secretly deliver a benefit to a foreign official in return for monetary gain. The justification for jurisdiction and enforcement was clear in this situation and set the tone for a more direct interpretation of the FCPA's language in the early years of enforcement.

These and other early enforcement actions were limited to smaller, single-actor type cases which involved domestic corporations and their officers making direct payments to foreign officials.[34] The 1980's enforcement actions began by adding a further level of separation between the American companies and the foreign officials. The *Tesoro* case showed that the SEC was becoming increasingly willing to expand the definition of corrupt payments[35] while the *Pemex* case illustrated officers of a corporation which was wholly owned by a foreign government could be considered a "foreign official" within the meaning of the FCPA.[36]

In the mid-1980's, the FCPA became heavily criticized for its vagueness and detrimental effect on international business. To alleviate these concerns, Congress

---

[33] *Id.* at 6-7
[34] See *SEC v. Katy Industries, Inc.*, Civ. No. 78-03476 (N.D. Ill. Aug. 30, 1978); *SEC v. Int'l Sys. & Controls Corp.*, No. 79-1760 (D.D.C. July 9, 1979).
[35] SEC v. Tesoro Petroleum Corp., No. 80-2961 (D.D.C. Nov. 20, 1980) (stating that excessive consulting fees could be considered a "corrupt payment" under the FCPA).
[36] *United States v. Crawford*, No. 82224 (S.D. Tex. 1982).(stating that Pemex, a corporation wholly owned by the Republic of Mexico, was an "instrumentality of foreign government").

eventually passed a set of amendments to the FCPA in 1988.[37] The amendments to the FCPA had three main purposes: 1) clarification of the accounting practices[38], 2) change the standard of culpability for third-party payments[39], and 3) clarify the "facilitating payments" exception.[40] These amendments were textually minor, but had significant effects in clarifying the language of the provisions and alleviating compliance costs and concerns of corporate executives.[41]However the Act was still not without some degree of ambiguity as arguably erroneous enforcement actions were brought in the wake of the 1988 Amendments.[42]Further, during the 1990's, the SEC and the Department of Justice (DOJ) both attempted to expand the meaning of the provisions of the Amended Act.[43]

In 1997, The United States, in an effort to curb international bribery, negotiated amendments to the FCPA under the auspices of the Organization for Economic Cooperation and Development with 32 other nations.[44] This Amendment was used to bring the FCPA in line with international business norms of policing bribery. It marked

---

[37] Foreign Corrupt Practices Act (amendments), Pub. L. 100-418, 102 Stat. 1415 (1988).
[38] The Accounting Practices provision of the FCPA had caused a 35% increase in accounting costs for many large companies. *Omnibus Trade Legislation, vol. IV: hearing on H.R. 4389 Before the Subcomm. On International Economic Policy and Trade of the House Comm. on foreign Affairs,* 99th Cong., 2d Sess. 3 (1986).
[39] Under the original language of the FCPA, the standard of "reason to know" was used to determine whether liability for third-party bribes. This was seen as an ambiguous standard that was not used elsewhere in SEC enforcement actions. *See* Id.
[40] Under the original FCPA, payments to foreign ministerial or clerical employees were not prohibited. This required a determination of the nature of foreign official's duties by American executives and was considered overly ambiguous. *Id.*
[41] Bill Shaw, *Foreign Corrupt Practices Act: Amendments of 1988*, 14 Md. J. Int'l L. 161 (1990).
[42]*See United States v. Vitusa,* No. 94-253 (D.D.C. 1994) (finding that "service fees" paid to foreign administrators used to facilitate the payment of money owed to the corporation by the foreign government violated the anti-bribery portions of the FCPA).
[43]The DOJ alleged that a former foreign official who acted for company after resigning from his official post could still be regarded as violating the FCPA *United States v. Young & Rubicam,* 741 F. Supp. 334, 337-339 (D. Conn. 1990); See also, A*brahams v. Young & Rubicam*, 793 F. Supp. 404, 407 (D. Conn 1992) (stating that the company could have a "reason to know" that illicit payments were occurring if the cumulative knowledge of a group within the company would have given the agency the necessary information to discover the alleged bribery).
[44] Statement by President William J. Clinton, Nov. 10, 1998. Available at http://www.justice.gov/ criminal/fraud/fcpa/docs/signing.pdf.

both the United States' commitment to maintaining positive relations with major global economic players, but also a new era in expansion of SEC enforcement of FCPA violations both in the U.S. and Abroad.

C. Post-1998 FCPA Enforcement

The SEC soon began taking advantage of the 1998 Amendments by expanding the purview of the FCPA. Illegal bribes made by subcontractors now brought the contracting company within the SEC's authority under the FCPA.[45] In 2004, Schering-Plough (S-P) settled a complaint for over $500,000 with the SEC because its Polish subsidiary, S-P Poland, made donations totaling $76,000to a charitable organization over a three year period.[46] The head of the charity happened to be the Director of the Silesian Health Fund, a government body which regulated the purchase of pharmaceutical products. The SEC complaint alleged that these donations induced the Director to purchase S-P Poland's products.

The common thread between *Schering-Plough* and other post-Amendment cases is that the company actually accused of paying out bribes was a foreign, but wholly-owned, subsidiary of a U.S. corporation. Because the parent company's stock was traded on a U.S. stock exchange, the wholly-owned subsidiary could be considered an arm of that company for purposes of FCPA jurisdiction. The Sarbanes-Oxley Act, enacted in 2002, also aided SEC enforcement officials by allowing them wider access to proprietary

[45] SEC claimed jurisdiction due to IBM listing subcontractor payments on Federal Tax forms. *SEC v. Int'l Bus.Machines Corp.*, Litigation Release No. 16839, 73 S.E.C. Docket 3049 (Dec. 21, 2000); Similarly, the SEC claimed jurisdiction in the Chiquita case because, even though Chiquita International had no knowledge of the illegal actions of its wholly-owned Columbian subsidiary, the parent company was located in the United States. SEC v. Chiquita Brands International, Inc., Civ. Action No. 1:01CV02079 (D.D.C.)(filed October 3, 2001).

[46] *In Re Schering-Plough Corp.*, Exchange Act Release No. 49838, 82 S.E.C. Docket 3644 (Jun. 09, 2004)

corporate information.[47] The provisions of the Sarbanes-Oxley Act also require approval of financial documents by management officers, increasing the risk of liability for senior management.[48] SEC would soon begin using this increased information and the precedents of broad jurisdiction to find more indefinite means of reaching foreign companies.

III. Discussion

Since 2006, there has been an "extraordinary upswing" in FCPA enforcement actions by the DOJ and SEC.[49]The agenciesinitiated a total of only 19 FCPA Enforcement Actions in 2006 while 47 were brought just four years later in 2010.[50] These actions were caused, in part, by the presence of ambiguities in the language of the FCPA, but can also be attributed to the SEC and DOJ exploiting those ambiguities and extending their jurisdiction via enforcement actions against entities with increasingly tangential ties to the United States markets.[51]

A. Aggressive Assertion of Jurisdiction by the SEC

The basic idea that U.S. administrative agencies can assert jurisdiction over foreign subsidiaries of U.S. companies is not contrary to the original intent of the FCPA; however, the SEC's current enforcement strategies extend beyond what Congress

[47] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745
[48] 18 U.S.C. § 1350(a) (2006).
[49] Amy Deen Westbrook, Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act, 45 Ga. L. Rev. 489, 525 (2011)
[50] FCPA Autumn Review 2010, Miller Chevalier International Alert (Oct. 08, 2010) available at http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=42304 (noting the record-breaking pace of FCPA prosecutions and presenting data showing enforcement increasing between 2006 and 2010
[51] *See* Westbrook, *supra* n. 49 at 530.

contemplated when drafting and amending the Act.[52] The legislative history of the FCPA shows that Congress was "acutely aware" of the illicit actions of U.S. subsidiaries relating to bribery; specifically, that U.S. corporations were using their foreign wholly-owned subsidiaries to funnel payments to foreign officials and could potentially circumvent FCPA enforcement by doing so.[53] However, a significant portion of the increase in FCPA actions is due to charges brought against subsidiaries despite a clear showing that Congress did not intend to extend jurisdiction to these subsidiaries under the FCPA.[54].

In recent years, the SEC has increasingly used negotiable securities called American Depositary Shares or American Depositary Receipts (ADRs) to establish jurisdiction against companies that are neither domestic concerns nor subsidiaries of U.S. issuers.[55] American Depositary Shares are equity shares of a foreign-based company issued by depository banks in the U.S. under contract with the foreign issuer.[56] There are three levels of ADRs: Level 1 ADRs allow foreign companies to establish a trading presence on the over-the-counter market and requires the least amount of SEC disclosures, Level 2 ADRs allows companies to establish trading presence on a major stock exchange such as the NYSE or NASDAQ, and Level 3 ADRs may be used to establish a trading presence for the foreign company on a major U.S. exchange and raise

[52]*Id.* at 549.
[53]*See* H.R. Rep. No. 95-640, at 12 (1977), available at http://www.justice.gov/criminal/fraud/fcpa/history /1977/houseprt-95-640.pdf (defining "domestic concern" to include foreign subsidiaries of U.S. companies).
[54] Cort Malmberg & Alison B. Miller, *Foreign Corrupt Practices Act*, 50 Am. Crim. L. Rev. 1077, 1091 (2013).*See e.g.*, Miller Chevalier, *supra* n. 50.
[55]*See* 15 U.S.C. § 78m; The SEC alleged jurisdiction against a Norwegian Oil company which had no offices in the U.S. but occasionally transported oil.to the U.S. Statoil, ASA, Exchange Act Release No. 54599 (Oct. 13, 2006), http://www.sec.gov/ litigation/admin/2006/34-54599.pdf.
[56]*Investor Bulletin: American Depositary Receipts*, SEC Office of Investor Education and Advocacy (Aug. 2012) available at http://www.sec.gov/investor/alerts/adr-bulletin.pdf.

capital for the company.[57] Level 2 and 3 ADRs require more disclosures to the SEC, and the Agency has relied heavily on these certificates to extend its reach to foreign companies.[58]

The major criticism of the SEC's use of ADRs to establish jurisdiction is that the companies often have no minimum contacts with the United States other than the sale of negotiable certificates on American exchanges and often the alleged briberies have no effect on U.S. affairs.[59] This policy subjects foreign companies to potential liability when they may not be aware that they are subject to SEC regulation in the same capacity that domestic corporations would be.[60] After enforcement actions are initiated against foreign corporations, the litigation rarely reaches the point where jurisdiction will be challenged.[61] Typically, foreign corporations settle before the case reaches its conclusion to avoid potentially devastating sanctions and fines.[62]

There is another bar to enforcement that the SEC has been hurdling with increasing efficiency. The FCPA requires that the actions of "issuers" take place "in the territory of the United States".[63] The SEC has broadly defined this requirement to allow it to exercise jurisdiction over any corporation who has had even the most minimal contacts with the U.S.[64] Examples of this imposition of jurisdiction include using wire transfers

---

[57] *Id.*
[58] *Id.*
[59] *See* Carolyn Lindsey, More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act, 35 Ohio N.U. L. Rev. 959, 960 (2009).
[60] *Id.* at 961.
[61] Brandon Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1782 (2011).
[62] *Id.*
[63] 15 U.S.C. § 78dd-3.
[64] *See e.g.*, Miller Chevalier, *supra* n. 50.

cleared via U.S. bank accounts and mail delivered to U.S. addresses. [65] This is inapposite to typical "minimum contacts" requirements for jurisdiction in the United States.[66]*International Shoe* standards require that the defendant be "essentially at home" to be subject to jurisdiction.[67] Such minimal interactions with domestic entities have not been shown to subject foreign corporations to enforcement pursuant to causes of action other than FCPA enforcement.[68] When the Amendment was first adopted, the Ninth Circuit observed that the "sufficient nexus" for criminal cases under the FCPA "serves the same purpose as the 'minimum contacts' test in personal jurisdiction".[69] Recently, the Supreme Court has even abrogated the *International Shoe* test as it relates to domestic corporations. In *Daimler AG v. Bauman*, the Court ruled that a corporate defendant is subject to personal jurisdiction only in the states where it is incorporated or has its principal place of business.[70] This decision has the paradoxical implication of limiting jurisdiction over multistate corporations while the SEC and DOJ regularly expand jurisdiction over multinational corporations.[71] The SEC has adopted its own, substantially more liberal, test for jurisdiction. In 2006, Latham Watkins issued a practice guide for the corporate counsel seeking to comply with FCPA provisions.[72]That guide stated that while foreign persons conspiring to smuggle drugs into the U.S. would reasonably anticipate

---

[65] Complaint at 19, United States v. Kellogg Brown & Root LLC, No. H-09-071, 2009 WL 7199517 (S.D. Tex. Feb. 6, 2009); Complaint, United States v. Siemens AG, No. 1:08-CR-367-RJL (D.D.C. Dec. 15, 2008)
[66]*Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945).
[67]*Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2851 (U.S. 2011).
[68]*See Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 597 (8th Cir. Mo. 2011).
[69]*United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting *World-Wide Volkswagen*, 444 U.S. at 297)).
[70]*Daimler AG v. Bauman*, No. 11-965, 2014 WL 113486 (U.S. Jan. 14, 2014)
[71] Scott M. Pearson and Carrie P. Price, *Goodbye International Shoe: Supreme Court delas massive blow to plaintiffs with new standard for general jurisdiction*, Association for Corporate Counsel (Jan. 24, 2014).
[72] Robert W. Tarun, *Basics of the Foreign Corrupt Practices Act: What Every General Counsel, Transactional Lawyer and White Collar Criminal Lawyer Should Know*, Latham Watkins 14 (April 2006)

being hauled into a U.S. court, "the same result is not necessarily true for a defendant with little or no contacts to the United States…particularly where the conduct at issue causes no material consequences in the United States."[73]While this assumption appears logical, as it seems unreasonable for a corporation which has never transacted any business in the United States to expect to be subject to multi-million dollar fines by an American regulatory agency, SEC enforcement has taken opposing view.

Because of the heavy cost of litigation in a foreign jurisdiction and the risk of losing the ability to conduct business in the United States that comes with losing a criminal battle with the SEC, most foreign corporations facing charges under the FCPA choose to settle.[74] However, *SEC v. Straub* is a case where the corporation chose to bring the issues to court, and the case represents the culmination of the SEC's increasingly aggressive assertions of jurisdiction over foreign companies. The SEC's claim in *Straub* involves allegations of a multimillion dollar bribery scheme by Hungarian telecom giant, Magyar Telecom, PLC ("Magyar").[75] The complaint stated that Magyar concealed bribes from the Macedonian government by charging them as consulting and marketing services through a Greek subsidiary.[76] In denying Magyar's motion to dismiss, the Southern District Court of New York concluded that the SEC could exercise personal jurisdiction over the defendants because the activities were directed at the American public, despite the fact that there were no allegations that the American public was the target of any of the illicit activities.[77] The SEC again used American Depositary Receipts traded on the NYSE to support its jurisdiction. These ADRs were publicly traded, requiring Magyar to

[73]*Id.*
[74]*See e.g.*, Miller Chevalier, *supra* n. 50.
[75]*SEC v. Straub*, 921 F. Supp. 2d 244, 245 (S.D.N.Y. 2013).
[76]*Id.*
[77]*Id.* at 254.

make annual disclosures to the SEC.[78] The SEC alleged, and the District Court agreed, that the bribes harmed the American public by disclosing false information to U.S. investors.[79] The Court relied on other cases from the Southern District in which a foreign entity was found to have minimum contacts due to misrepresenting financial information to U.S. investors; however, in those cases, the misrepresentations were mischaracterizations of the entities' financial situations in that they showed the company to be more profitable than it truly was.[80] In *Straub*, the financial reports accurately represented the income and financial situation of Magyar, but failed to show that the alleged bribes were taking place.[81]

After establishing minimum contacts with the United States, the Court questioned whether it would be reasonable to subject Magyar, a corporation who had never directly conducted business on U.S. soil, to jurisdiction in Federal Courts.[82] The court stated the usual test for reasonableness:

> In determining the reasonableness of exercising jurisdiction in connection with a particular defendant, courts must evaluate:(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiffs interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.[83]

[78] *Id.* at 255
[79] *Id.*
[80] *See* In re Parmalat Sec. Litig., 376 F. Supp. 2d 449, 456 (S.D.N.Y. 2005).
[81] *SEC v. Straub, 921 F. Supp. 2d at 457.*
[82] *Id.* at 258
[83] *Id.* (citing *Metro Life Ins. Co. V. Robertson-Ceco Corp.*, 84 F. 3d 560 at 568 (2nd Cir. 1996).

The Court recognizes federal precedent which states that "inconvenience" does not excuse a defendant from jurisdiction once minimum contacts are established.[84] Judge Sullivan, however, seems to glaze over the remaining five factors, that the Court itself had set out, essentially ignoring 1) the lack interest the forum state has in adjudicated a case involving only foreign parties with no showing of harm to U.S. citizens, 2) the relatively minor interests of the SEC in adjudicating the case compared with issues of the local courts, 3) the lack of efficiency in subjecting foreign corporations to U.S. Federal jurisdiction rather than allowing adjudication in local courts, and 4) the lack of an interest from any other state in furthering social policy where no American citizen, let alone a citizen of states with "shared interests", was harmed.

Despite these increasingly controversial issues over the application of the FCPA, perhaps the most radical is the court's ruling regarding Magyar's usage of a "means or instrumentality of interstate commerce".[85] The court concluded that Magyar "intended" to use an instrumentality of interstate commerce when it sent emails that were routed through U.S. servers.[86] The Court found that "intent" applied to the underlying bribery and did not relate to the Defendants knowledge that the emails would go through the United States servers.[87] Given that a majority of online activity eventually passes through servers in the United States, this decision not only broadens the SEC's jurisdiction, but also makes it almost obligatory for a court to rule that the SEC is pleading a *prima facie* case for FCPA violations whenever the foreign company uses email to communicate.

---

[84] *Id*. at 259.
[85] *Id. at 263.*
[86] Stanley S. Arkin & Robert Angelillo, *Should the United States Be Doing This? The Straub Decision Raises The Specter of Claims of U.S. Jurisdictional Overreach*, 21 Bus. Crim. Bull. 3 (Nov. 2013).
[87] *Id*. at 4.

B. Attempted Limitations on SEC Jurisdiction

Despite the increasingly aggressive actions by the SEC, courts have attempted to place limits on the Agency's ability to assert jurisdiction. However, these attempts have not staunched the flood of enforcement actions brought against foreign actors. In *Sharef*, the SEC alleged that Steffen and Sharef, former executive officers of Siemens S.A. Argentina, engaged in bribery of Argentine officials.[88] The Court analyzes the case under the same two-pronged inquiry for minimum contacts and reasonableness as *Straub*, but more explicitly recognizes Due Process concerns under the Fifth Amendment.[89] The Court also acknowledges the "ample (and growing) support in case law for the exercise of [SEC] jurisdiction", specifically citing *Straub* as support for this assertion.[90] Because Steffan had not authorized bribes, directed cover-ups, or truly participated in the bribes at any level, the Court cautioned that finding minimum contacts in such a scenario would subject nearly every executive in a corporation making illicit payments to "jurisdiction of U.S. courts no matter how attenuated their connection with the [violation]".[91] The Court would go on to dismiss the case against Steffan for lack of personal jurisdiction.[92] Such a holding shows that the Courts are beginning to recognize the overly expansive reach of the SEC and are beginning to place limits on the Agency's jurisdiction. Unfortunately, these jurisdictional fetters have only been placed upon the SEC in actions against individual agents of the corporations while jurisdiction over the corporate entities themselves remains unchained.

---

[88] *SEC v. Sharef*, 924 F. Supp. 2d 539, 542 (S.D.N.Y. 2013).
[89] *Id.* at 544.
[90] *Id.* at 447.
[91] *Id.*
[92] *Id.* at 549.

The "facilitating payments" exception is another area where the courts have placed more stringent pleading requirements on the SEC (albeit still in the case of individual defendants). The facilitating payments exception in the FCPA is a threshold exception which allows payments for the limited purpose of "expedit[ing] or secur[ing] the performance of a routine government action".[93] Specifically, the FCPA allows payments for routine governmental action such as "obtaining permits, licenses, or other official documents; processing governmental papers, …; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections".[94] However, the definition of "routine governmental action" specifically excludes payment made for any decision by a foreign official.[95] In many countries, these payments are considered "costs of doing business" and are the norm for business transactions. In the *Noble* case, executives of a Swiss-based company were accused of bribing Nigerian government officials to maintain large oil contracts.[96] While most of the executives settled, Defendants Jackson and Reuhlen challenged the SEC's jurisdiction, arguing that the SEC must allege sufficient facts to show that the allegedly improper payments are not "facilitating payments" under the FCPA exception.[97] In the related *Jackson* case, thecourt ruled that the SEC did not sufficiently plead that the payments were not made simply in facilitation of routine government actions such as obtaining permits, but gave leave for the SEC to amend the complaint to include facts showing that the payments did not fit the

[93] 15 U.S.C. § 78dd-1(b); *see e.g.* U.S. v. Kay, 359 F. 3d 738 (5th Cir. 2004).
[94] *Lay Person's Guide to the FCPA*, United States Department of Justice (2012).
[95] *Id.*
[96] Press Release, Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $ 156 Million in Criminal Penalties (Nov. 4, 2010), available athttp://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.
[97] *SEC v. Jackson*, 908 F. Supp. 2d 834, 858-589 (S.D. Tex. 2012).

very narrow exception.[98] This ruling is likely to have little practical effect other than possibly deterring the SEC from bringing claims in rare situations where the companies are unlikely to settle in order to avoid potential fines. Despite the fact that the Agency knows the payments would fall under the exception, a more prudent decision for the SEC would be to bring the enforcement action anyway, knowing that the company would rather settle than enter into lengthy court proceedings.[99]

The FCPA itself is not a faulty statute and the principles underlying foreign bribery prevention are sound; it is merely the SEC's overbroad interpretation of their jurisdiction that endangers the U.S.'s standing among international economic powers. The *Siemens* case is often touted as one of the FCPA's greatest success stories for several reasons.[100] Most notably, from a foreign relations perspective, this was not the U.S. alone conducting investigations, but it was a multinational endeavor involving the DOJ and SEC acting in conjunction with similar agencies from Germany, Switzerland, Austria, and Italy.[101]*Siemens* was seen as a great success because of the major reform instituted by the multinational telecommunications corporation to comply with international anti-bribery norms and to rectify past harm.[102] Although a great win for U.S. foreign relations, it is distinguishable from more recent enforcement actions such as *Straub* and *Sharef*.[103] While Siemens is a massive, multinational corporation, the companies involved in the *Straub* and *Sharef* enforcements were more localized, dealing only in a few regional

[98] *Id.* at 858.
[99] Richard C. Smith, *Combating FCPA Charges: Is Resistance Futile?*, 54 Va. J. Int'l L. 157, 165 (2013).
[100] Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1785 (2011).
[101] *Id.*
[102] *Id.* at 1786.
[103] See *Straub*, 921 F. Supp. 2d,; *Sharef*, 924 F. Supp. 2d 539

markets.[104] Further, those two cases do not represent the SEC and DOJ working in conjunction with foreign agencies, but rather show the SEC initiating actions where local agencies have specifically declined to enforce local anti-bribery laws.[105] The SEC and DOJ are straying further and further from the international cooperative values embodied in the OECD Convention and, instead, seem to use successes such as*Siemens* to justify enforcing U.S. anti-bribery statutes globally.

C. Negative Effects of the SEC's Overreach

The steady increase of SEC enforcement actions under the FCPA has already had an effect on domestic corporations. Approximately 51% of all international business initiatives are unduly delayed because of unclear FCPA regulations and the fear of SEC fines.[106] Additionally, 15% of those initiatives are abandoned entirely.[107] The decreased willingness to deal with foreign nations will undoubtedly have a negative effect on the domestic economy as international corporations choose to do business elsewhere rather than suffer losses from delay. Recent decisions such as *U.S. v. Kay* in the Fifth Circuit show that the SEC and DOJ are increasingly bringing enforcement actions against companies who have regularly made payments considered to be facilitating payments under local laws.[108] By refusing to grant exceptions in these cases, the SEC and DOJ are disadvantaging corporations who can no longer maintain existing contracts through facilitating payments. These corporations subsequently lose those contracts to companies

---

[104] *Id.*
[105] *Id.*
[106] Press Release, Dow Jones, *Dow Jones Survey: Confusion About Anti-Corruption Laws Leads Companies to Abandon Expansion Initiatives* (Dec. 9, 2009), http://fis.dowjones.com/risk/09survey.html
[107] *Id.*
[108] *United States v. Kay*, 359 F.3d 738, 740 (5th Cir. 2004) (convicting executives of an American company of bribery in conjunction with making payments to Haitian officials which are considered a "cost of doing business" within the Haitian economy).

from other nations whose anti-bribery laws provide for broader exceptions.[109] Otherwise, American companies may choose to forego competing on an uneven plane in emerging nations such as Haiti, increasing costs domestically and depriving emerging economies of valuable American investments.[110] Continuing this pattern of enforcement would realize one of Congress' fears in drafting the original version of the FCPA: that the statute would significantly disadvantage American companies doing business internationally.[111]

The recent willingness by the SEC to bring actions against foreign companies using ADRs to raise capital on U.S. markets may also have the undesirable effect of having these foreign companies pull out of the U.S. stock exchanges rather than be subjected to harsh fines or criminal prosecution under the FCPA.[112] This represents a significant loss to U.S. investors and also deprives foreign companies of American investments, especially affecting technological and pharmaceutical developers, which have been subjected to exceptional SEC scrutiny since the early 2000's.[113] This deprives not only the U.S., but all nations, of potential technological advances only possible with capital investments from the United States.[114] Alternatively, these foreign corporations in need of capital may not forego investments entirely, but instead may seek financial assistance from one of the United States' economic competitors, such as China or Russia, whose foreign anti-bribery regulations are less strict than the FCPA.[115] Russia is a fellow

---

[109] Pete J. Georgis, Comment: *Settling With Your Hands Tied, Why Judicial Intervention is Needed to Curb an Expanding Interpretatoin of the Foreign Corrupt Practices Act*, 42 Golden Gate U.L. Rev. 243, 261 (2012).
[110] *Id.* at 262.
[111] *See*, Posadas, *supra* n. 9 at 355
[112] Arkin, *supra* n. 86 at 4.
[113] *See e.g.*, Miller Chevalier, *supra* n. 50.
[114] *Id.*
[115] Elizabeth K. Spahn, *Local Law Provisions Under the OECD Anti-Bribery Convention*, 39 Syracuse J. Int'l L. & Com. 249, 250 (2012).

member of the OECD along with the United States; however, their laws are more focused on policing domestic concerns dealing internationally or international concerns acting within Russian territory rather than actively seeking to enforce Russian anti-bribery provisions abroad.[116] China, which is quickly moving towards joining the global anti-bribery trend, and other OECD signatories also follow this approach over the United States'.[117]

In addition, foreign countries which have not adopted attitudes towards international bribery similar to the United States may instead adopt a retaliatory position towards U.S. enforcement against their local corporations.[118] Foreign countries will soon recognize that their own corporations are being heavily fined because of the strict bribery laws of the United States and the SEC's willingness to pursue enforcement against companies with little connection to the U.S.[119] In response, foreign nations could choose to initiate anti-bribery actions against U.S. companies that either do business in those countries or list securities on their stock markets.[120] The retaliation could include international treaty negotiations, legislative amendments, or even simply increased judicial scrutiny of U.S. corporations abroad.

D. Proposed Legislative and Judicial Action to Limit SEC Overreach

In November 2011, Representative Ed Perlmutter introduced H.R. 3531, which would allow for private causes of action under the FCPA for damages to domestic

---

[116] *See* Id.
[117] *Id.*
[118] Arkin, *supra* n. 86 at 4.
[119] *Id.*
[120] *Id.*

businesses by foreign entities.[121] In December, Representative Peter Welch introduced the Overseas Contractor Reform Act which provided that government contracts would not be awarded to individuals or companies found to be in violation of the FCPA, but also provided for debarment 30 days after a final judgment is issued.[122] The issue with the trigger for debarment is that the SEC typically resolves conflict through settlement or alternative dispute resolution, thereby rendering the changes practically inert.[123] A more effective reform bill could combine parts of both Representatives' proposals.

By allowing, and favoring, private causes of actions, such a combination would alleviate many of the controversial minimum contact concerns of FCPA enforcement. From an investor's standpoint, a private right of action under the FCPA would resemble a shareholder derivative suit. If owners of negotiable instruments such as ADRs which contain foreign shares are harmed financially due to bribes or the announcement of bribery by a foreign corporation, those investors would have a right to bring claims against the foreign corporation. Also, if a U.S. corporation can show that it was harmed by an alleged bribery such as being denied contracts with a foreign government, then the corporation would have the right to bring an action against the foreign company under the revised FCPA. If no damages to U.S. citizens or corporations are cognizable, then the idea that the alleged act must be directed at the United States for purposes of establishing jurisdiction becomes an increasingly academic construct rather than a practical limitation on SEC jurisdiction. If private rights of action were favored in legislation, there would

[121] H.R. 3531, 112th Cong. (2010), http://www.gpo.gov/fdsys/pkg/BILLS-112hr3531ih/pdf/BILLS-112hr3531ih.pdf.
[122] H.R. 3588, 112th Cong. (2011), available at http://www.govtrack.us/congress/billtext.xpd?bill=h112-3588.
[123] Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. Pa. J. Bus. L. 1, 23 (2012).

necessarily have to be cognizable damage before a claim could be brought against a foreign company, thus the SEC would only be able to bring enforcement actions when international or domestic policy concerns substantially supersede individual concerns.

Further, by allowing for debarment instead of crippling fines, such legislation would limit the SEC's ability to threaten foreign corporations with massive fines and effectively eliminate their access to U.S. courts. Debarment would harm a foreign company that directs its product or services at the United States by forcing to comply with FCPA guidelines or forego profits made from U.S. sales. Simply put, it is difficult to terrorize a foreign company that does no business in America with debarment when they have no business interests in America to begin with. Therefore, this would prevent situations such as in *Straub* where the foreign company strictly did business outside of the United States. Allowing for "non-lethal" forms of enforcement would also bring U.S. anti-bribery policy more in line with the policies of European OECD nations.[124]

Increased judicial scrutiny is another area where limitations could be placed on the jurisdiction of the SEC. By adhering more closely to the minimum contacts standard set forth in *International Shoe* and its progeny, the Judiciary could limit the increasingly tangential assertions of minimum contacts by the SEC. The traditional minimum contacts approach used by courts in one state to assert jurisdiction over a defendant from another state asks if the party's contacts with the state in which the court sits are such that the party "could reasonably expect to be haled into court" in that state.[125] The multi-factor test for determining whether a non-resident has minimum contacts is whether they have

[124] Garrett, *supra* n. 61 at 1792.
[125] *Int'l Shoe*, 326 U.S. at 316 (U.S. 1945).

1) direct contact with the state[126], 2) direct contact with a resident of the state[127], 3) place a product into the stream of commerce such that it reaches the forum state,[128] 4) directed solicitation towards residents of the forum state[129], 5) satisfied the Calder effects test[130], or 6) have a non-passive website viewed within the forum state[131]. Although it is clear under these tests that an e-mail directed at a party in the United States would be sufficient for a court to assert jurisdiction, an e-mail is simply bounced off of a U.S. server without knowledge or intent to direct the message at any party in the United States, neither U.S. nor E.U. case law has shown that a court should find jurisdiction.[132] Additionally, the courts could dismiss cases on the grounds of *forum non conveniens* if the actions against the foreign company would be better addressed by courts of the company's native state.[133]

The FCPA already contains an affirmative defense for payments if "the payment…was lawful under the written laws and regulations of the foreign official's…country."[134] This was part of the 1988 amendments that addressed the concern that the United States was merely attempting to promulgate its own domestic securities

---

[126] *Id.*
[127] *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 227 (1957).
[128] *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 120 (1987).
[129] *Id.* at 116.
[130] *Calder v. Jones*, 465 U.S. 783, 791 (1984) (involving the publication of a libelous assertion in a widely circulated magazine with circulation in the forum state).
[131] *Zippo Manuf. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (establishing a "sliding scale" to determine whether a website is passive and merely makes information accessible online, and when a website is clearly created to conduct business online and intends to enter into contracts with residents of a foreign jurisdiction).
[132] Richard Freer, *American and European Approaches to Personal Jurisdiction Based Upon Internet Activity*, No. 07-15, Emory University School of Law Public Law & Legal Theory Research Paper Series at 5-8 (2007).
[133] See, e.g., Sinochem Int'l. Co. Ltd. v. Malaysia Int'l. Shipping Corp., 549 U.S. 422, 429 (2007); Ford v. Brown, 319 F.3d 1302, 1306-07 (11th Cir. 2003) ("The doctrine of forum non conveniens authorizes a trial court to decline to exercise its jurisdiction, even though the court has venue, where it appears that the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum.")
[134] 15 U.S.C. § 78dd-1(1)(2010).

laws abroad.[135] The scope of this provision has been severely limited by judicial interpretation. Courts have held that the defense is only applicable to written laws, not custom or practice, and also the payment must be legal and foreign law exceptions to criminal liability do not affect jurisdiction under the FCPA.[136] A possible remedy to this narrow interpretation would be that the judiciary interprets the local law defense to include customs and practices of doing business in foreign nations or that they allow the defense to apply to the "corrupt intent" portion of the FCPA allegations. This would give teeth to the provision of the FCPA instituted by Congress by specific amendments and would also prevent unfair enforcement if the party reasonably believed that the payment was proper under local law, and therefore not "corrupt" within the meaning of the FCPA.[137] This interpretation would also bring federal court decisions in line with the Restatement of the Foreign Relations Law of the United States which advises discretion in prosecution of foreign entities governed by foreign law and is frequently cited by the Supreme Court in similar disputes.[138]

Conclusion

The SEC has shown it has been increasingly willing to use the provisions of the Foreign Corrupt Practices Act to become a police power internationally. The recent enforcement actions against foreign corporations without even the barest minimum of

[135] U.S. Congressional Research Service, Foreign Corrupt Practices Act, (Mar. 3 1999) by Michael V. Seitzinger ("In response to … criticisms, Congress for a number of years considered amending the 1977 Foreign Corrupt Practices Act … [and] [a]fter a great deal of debate through at least three Congresses, the Foreign Corrupt Practices Act Amendments of 1988 were signed into law as Title V of the Omnibus Trade and Competitiveness Act of 1988 on August 23, 1988").
[136] See *United States v. Kozeny,* F. Supp. 2d 535, 540 (S.D.N.Y. 2008).
[137] *See* Kyle Sheahan, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act,* Wisconsin Int'l Law Journal (forthcoming).
[138] Restatement (Third) of the Foreign Relations Law of the United States §403 (1987) (describing limitations of prescriptive jurisdiction); see e.g., *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993); *C & L Enters. V. Citizen Band,* 532 U.S. 411 (2001).

contacts with the United States represent the SEC extending its jurisdictional reach too far. The intent of the OECD Treaty prompting the 1998 Amendments to the FCPA was to create an international trading platform free of bribery and fair for all. The SEC's current actions, however, have the potential to isolate American investors by scaring off foreign corporations seeking capital. The Legislature must enact reforms to combat this extension of jurisdiction by clarifying the limits of FCPA enforcement. The Judiciary must be willing to limit the jurisdiction of the SEC to traditional minimum contacts norms and more broadly interpret affirmative defense provisions of the FCPA. If successful, these actions won't be seen as weakening the U.S.'s stance on bribery, but rather as the United States allowing foreign issues to be adjudicated in the proper jurisdiction.