USING FOREIGN RELATIONS LAW TO LIMIT EXTRATERRITORIAL APPLICATION OF THE FOREIGN CORRUPT PRACTICES ACT

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ABSTRACT

Because the Foreign Corrupt Practices Act (FCPA) can be used to regulate conduct that has but a tangential connection to the United States, the statute exemplifies the potential difficulties of applying U.S. criminal law extraterritorially. The FCPA's heightened enforcement environment and the norm of deferred-prosecution agreements that settle FCPA charges out of court combine to increase the probability that a foreign individual or firm will be prosecuted under the FCPA for bribery that occurred in and affected a foreign country. This Note proposes drawing from the presumption against extraterritoriality, a concept from foreign relations law, to find a reasonable limit to the territorial provision of the FCPA, which applies to foreign individuals and foreign companies that are not listed as issuers in the United States.

INTRODUCTION

JGC Corporation (JGC), a construction and engineering firm headquartered in Japan, entered into a deferred-prosecution agreement with the United States Department of Justice (DOJ) on April 6, 2011.[1] As part of the agreement, JGC agreed to pay a fine of more than $200 million and to waive certain rights as a criminal defendant in the United States in exchange for a deferred-prosecution agreement that would most likely lead to

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1. Deferred Prosecution Agreement at 1, United States v. JGC Corp., No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf.

nonprosecution.[2] The proceedings in the Southern District of Texas stemmed from an alleged violation of U.S. law that began in Europe and occurred in Nigeria.[3] The U.S. law at issue was the Foreign Corrupt Practices Act (FCPA),[4] which criminalizes bribery of foreign officials for commercial gain.

In the affair, JGC and three joint-venture partners used European and Asian agents to pay bribes to obtain construction contracts for a project in Nigeria (the Bonny Island Project).[5] One of the joint-venture partners, Kellogg, Brown & Root, Inc. (KBR), corresponded regarding the Bonny Island Project through facsimiles and e-mails from its Houston, Texas, headquarters,[6] and funds were electronically routed through New York when agents wired money from Dutch to Swiss bank accounts.[7] Once the Bonny Island Project bribery came to light, the DOJ initiated investigations of all of the joint-venture partners and involved individuals.[8] JGC initially refused

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2. *Id.* at 2. The agreement required JGC to pay a $218.8 million penalty, take remedial measures to improve its corporate-compliance program, and cooperate in ongoing DOJ investigations. *Id.* at 3–8. Nonprosecution agreements allow prosecutors to file charges and then put those charges on hold for a period of time while exacting fines and instituting internal compliance programs. Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, CRIM. JUSTICE, Summer 2006, at 36, 36. There is disagreement about the fairness and efficacy of deferred-prosecution and nonprosecution agreements for corporate compliance. *See, e.g.*, Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 859–61 (2007) (arguing that deferred-prosecution agreements are an effective means of achieving reform within corporations but that they may lead to prosecutorial overreaching); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 312–13 (2007) (discussing the "gap in the constitutional protections afforded those individual defendants" that are subject to deferred-prosecution agreements).

3. Deferred Prosecution Agreement, *supra* note 1, Attachment A at 10–17.

4. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2006 & Supp. IV 2011).

5. Deferred Prosecution Agreement, *supra* note 1, Attachment A at 2, 7.

6. *Id.* Attachment A at 8, 10, 16.

7. *Id.* Attachment A at 10.

8. *E.g.*, *id.* at 1; Plea Agreement at 1, United States v. Tesler, No. 4:09-cr-00098 (S.D. Tex. Mar. 11, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tesler/tesler_plea_agmt.pdf; Deferred Prosecution Agreement at 1, United States v. Snamprogetti Neth. B.V., No. 4:10-cr-00460 (S.D. Tex. July 7, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-dpa.pdf; Deferred Prosecution Agreement at 1, United States v. Technip S.A., No. 4:10-cr-00439 (S.D. Tex. June 28, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/technip-sa/06-28-10-technip-agreement.pdf; Plea Agreement at 1, United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tex. Feb. 11, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-11-09kbr-plea-agree.pdf; Plea Agreement at 1, United States v. Stanley, No. 4:08-cr-00597 (S.D. Tex. Sept. 3, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/stanleya/09-03-08stanley-plea-agree.pdf.

to cooperate because it felt that the United States lacked jurisdiction,[9] but the Japanese company later acquiesced and signed the offered agreement.[10] Each entity that was implicated eventually signed a deferred-prosecution or plea agreement with the government;[11] in total, the DOJ collected more than $1.5 billion in fines from the companies that participated in the Bonny Island Project bribery.[12]

How was a Japanese company haled into court in Texas for conduct—bribing foreign officials to obtain business—that was initiated in Europe, the effects of which were felt in Africa, and that had only a tangential connection to the United States? The DOJ relied on a combination of two U.S. connections to establish U.S. jurisdiction: (1) that JGC possessed vicarious liability through agency relationships with an American joint-venture partner,[13] and (2) that wire transfers through New York banks served as a territorial act in furtherance of the crime.[14] To understand the potential significance of these connections, it is necessary to understand the FCPA's

9. Deferred Prosecution Agreement, *supra* note 1, at 3.

10. *Id.* at 1, 3.

11. *See supra* note 8.

12. Press Release, U.S. Dep't of Justice, JGC Corp. Resolves Foreign Corrupt Practices Act Investigation and Agrees To Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

13. *See* Deferred Prosecution Agreement, *supra* note 1, Attachment A at 8 ("Officers, employees, and agents of JGC . . . and their co-conspirators willfully used the mails and means and instrumentalities of interstate commerce corruptly in furtherance of the authorization, promise, and payment of bribes to Nigerian government officials pursuant to the scheme. Stanley, other officers, employees, and agents of KBR, and other co-conspirators committed acts in furtherance of the scheme in Houston, Texas, and elsewhere in the United States."). Joint-venture partners are considered agents of one another and can thus be held liable for the FCPA violations of another partner. STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 65 (2d ed. 2010). This joint liability extends from the common comparison of joint ventures to partnerships. *See, e.g.*, *In re* Groff, 898 F.2d 1475, 1475 (10th Cir. 1990) ("[R]ules governing partners' interests in partnership assets also apply to joint ventures."); 48A C.J.S. *Joint Ventures* § 24 (2004) ("As in a partnership, in respect of their mutual rights and liabilities, each member of a joint venture has the dual status of principal for himself or herself and agent for his or her associates within the scope of the enterprise.").

14. *See* Deferred Prosecution Agreement, *supra* note 1, Attachment A at 16–17 ("[E]mployees, agents, and co-conspirators of JGC willfully . . . caused the commission of FCPA violations by KBR, a domestic concern within the meaning of the FCPA, by aiding and abetting KBR in causing wire transfers of $39.8 million from [the joint venture's] bank account in Amsterdam, The Netherlands, via a correspondent bank account in New York, New York, to a [Swiss] bank account . . . , intending that the money would be used, in whole or in part, to pay bribes to Nigerian government officials."). Although the deferred-prosecution agreement focuses on wire transfers through New York as a possible alternative basis for jurisdiction, the agreement's cover does not cite the FCPA's territorial provision. *See id.* at 1 (listing only 15 U.S.C. § 78dd-2 (2006)).

structure.[15] The FCPA's antibribery provisions[16] apply to three classes of persons: 15 U.S.C. § 78dd-1 applies to issuers of securities on U.S. exchanges;[17] § 78dd-2 applies to domestic concerns;[18] and § 78dd-3 applies to all other persons or entities when acting within the United States.[19] Each section also provides for vicarious liability for companies whose agents or employees violate the provision.[20] Because JGC was neither an issuer[21] nor a domestic concern,[22] it was subject only to § 78dd-3—which provides for jurisdiction over acts that occur within the United States, that is, territorial jurisdiction[23]—as well as the FCPA's vicarious-liability provisions.[24]

Prosecutions under the FCPA of companies like JGC—companies that are incorporated and headquartered in foreign countries and that do not issue stock on American exchanges—pose challenging questions regarding the extraterritorial application of U.S. law. Although the prosecutors, as members of the executive branch, theoretically consider foreign-policy implications of their

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15. For more information on the structure of the FCPA, see *infra* Part I.A.

16. The FCPA also contains recordkeeping requirements. 15 U.S.C. § 78m(b) (2006).

17. *Id.* § 78dd-1 (2006). This section applies to companies that are considered "issuers" under section 12 of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. §§ 78a–78pp (2006 & Supp. IV 2011), which is codified at 15 U.S.C. § 78*l*, and to companies that are required to file reports under section 15(d) of the 1934 Act, which is codified at 15 U.S.C. § 78o(d). The 1934 Act defines an "issuer" as "any person who issues or proposes to issue any security." *Id.* § 78c(a)(8). A "person" is "a natural person, company, government, or political subdivision, agency, or instrumentality of a government." *Id.* § 78c(a)(9).

18. 15 U.S.C. § 78dd-2. Domestic concerns include U.S. citizens and residents, as well as companies incorporated under U.S. law. *Id.* § 78dd-2(h)(1).

19. *Id.* § 78dd-3. For a detailed discussion of what it means to act within the United States, see *infra* Part II.A.

20. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a); *see also supra* note 13.

21. *See Foreign Companies Registered and Reporting with the U.S. Securities & Exchange Commission*, U.S. SEC. & EXCH. COMM'N (Dec. 31, 2010), http://www.sec.gov/divisions/corpfin/internatl/foreigngeographic2010.pdf (listing foreign companies registered as issuers in 2010); *Foreign Companies Registered and Reporting with the U.S. Securities & Exchange Commission*, U.S. SEC. & EXCH. COMM'N (Dec. 31, 2004), http://www.sec.gov/divisions/corpfin/internatl/foreignalpha2004.pdf (listing foreign issuers in 2004, the last year of the alleged criminal bribery in the Bonny Island Project case).

22. Deferred Prosecution Agreement, *supra* note 1, Attachment A at 2.

23. *See* 15 U.S.C. § 78dd-3(a) (stating that "[i]t shall be unlawful for any person other than an issuer . . . or a domestic concern . . . *while in the territory of the United States*, . . . to do any . . . act in furtherance of" the crime of bribing a foreign official (emphasis added)).

24. *See id.* (stating that "[i]t shall be unlawful for . . . any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, . . . to do any . . . act in furtherance of" the crime of bribing a foreign official).

enforcement decisions, broad application of the FCPA to foreign companies in practice has the potential to contravene international jurisdictional norms and seriously implicate American foreign policy.[25] The pressure upon international defendants such as JCG to settle is so high that companies may acquiesce to a non- or deferred-prosecution agreement, even if their actions may fall beyond the scope of the law or the jurisdiction of the DOJ or the Securities and Exchange Commission (SEC) to enforce the law.[26] Furthermore, these questions are especially pressing in a context of increasingly aggressive enforcement patterns.[27] Clearly defined limits to the agencies' jurisdiction would solve this potentially politically sensitive problem.

This Note's two goals are to describe the current state of the law and to delineate the outer boundaries of justifiable jurisdiction[28] over foreign companies whose actions occur extraterritorially. It concludes with a proposed interpretation of what this Note calls the territorial provision, § 78dd-3, which would restrict the FCPA's application to actions that have only a tangential territorial connection to the United States, by using the presumption against extraterritoriality. Unlike the text of the rest of the antibribery provisions of the FCPA, § 78dd-3 specifically includes an element of *territoriality* in its application to nonissuers and nondomestic concerns.[29] This territorial provision, ambiguous in a simple textual or purposive analysis, finally gains an appropriate meaning when viewed in light of the longstanding presumption against extraterritoriality. This proposed

25. *See* H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 521 (1999) ("Congress recognized that this exercise of extraterritorial jurisdiction risked offending the sovereignty of other nations and the concomitant harm to U.S. international relations."). For more information on the foreign-policy effects of extraterritorial application of American law, see generally David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 285–87 (1987).

26. These two agencies have joint responsibility for enforcement of the FCPA. DEMING, *supra* note 13, at 4.

27. *See infra* notes 99–108 and accompanying text.

28. In this Note, the term "jurisdiction" refers to the scope of the conduct that the FCPA actually proscribes, rather than a court's authority to hear a case brought under the statute. For a more detailed explanation of jurisdiction and the FCPA, see *infra* Part I.B. For a more detailed discussion of the concepts of territoriality and jurisdiction, see *infra* Part III.A.

29. *Compare* 15 U.S.C. § 78dd-3 (stating that the proscribed conduct must occur within the territory of the United States), *with id.* § 78dd-1 (lacking such a territorial requirement). For more explanation, see *supra* notes 17–24.

reading removes significant foreign-policy concerns and provides clarity to a law that is ambiguous as currently applied.

Part I provides the necessary background for this Note's analysis. It begins with a detailed description of the FCPA's provisions. The remainder of Part I discusses the FCPA's origins in the wake of the Watergate scandal, the legislative history surrounding its 1977 enactment and subsequent revisions, and current enforcement patterns. Part II lays out the basic interpretive methods relevant to imposing limits on the application of the FCPA's antibribery provisions.[30] It applies traditional statutory-interpretation techniques to the question of the FCPA's extraterritoriality, examining the plain meaning of the statute's text and also analyzing the statute's legislative history, including the history of the Organisation for Economic Co-operation and Development's (OECD's) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[31] Both interpretive methods establish as ambiguous the degree of territoriality required to trigger § 78dd-3, necessitating Part III's turn to foreign relations law, the study of the interrelation between U.S. and international law.[32] This Part examines the FCPA's relationship to international law and places the FCPA within the broader American jurisprudence regarding extraterritoriality. It identifies several interpretive canons from foreign relations law and explains why the presumption against extraterritoriality should apply to the FCPA's jurisdictional questions. Although foreign relations law seems inherently relevant to an analysis of the FCPA's jurisdiction over foreign entities, it has been

30. This analysis focuses on the antibribery provisions of § 78dd-1 to § 78dd-3, rather than the more nebulous recordkeeping provisions contained in § 78m(b). The antibribery provisions mirror more closely the standard actus reus requirement of a criminal offense, whereas the accounting provisions impose an affirmative duty on companies that register to issue and conduct transactions with securities on American exchanges under section 12 of the 1934 Act, 15 U.S.C. § 78*l* (2006 & Supp. IV 2011).

31. Organisation for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *done* Dec. 18, 1997, 37 I.L.M. 1 (1998).

32. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES & MATERIALS, at xix (2d ed. 2006) ("This casebook examines the constitutional and statutory law that regulates the conduct of U.S. foreign relations. The topics covered include the distribution of foreign relations authority between the three federal branches, the relationship between the federal government and the states in regulating foreign relations, and the status of international law in U.S. courts.").

largely missing from current scholarship.[33] Therefore, this Note adds a new, largely theoretical approach to answering questions about the legal limits of the FCPA's jurisdictional reach.

I. THE FOREIGN CORRUPT PRACTICES ACT: CONTENT, HISTORY, AND PRESENT ENFORCEMENT ENVIRONMENT

This Part provides background information, providing context for subsequent layers of interpretive techniques. Part I.A treats the history and content of the FCPA in depth, focusing on the antibribery provisions. It sets out the elements of the crime and discusses the origins of the FCPA in the fallout from the Watergate scandal of the early 1970s. It then traces the legislative history of the original 1977 enactment through the 1988 and 1998 amendments. Part I.B begins by describing why the FCPA poses significant jurisdictional questions. Part I.B also explains various theories under which regulators may pursue foreign entities for foreign conduct that violates the FCPA.

A. Background: Text and Purpose

1. *Origins of the FCPA.* Instances of overseas commercial bribery surfaced in the wake of the Watergate scandal, spurring Congress to enact the world's first anticorruption statute,[34] the FCPA,

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33. *See, e.g.*, Henry Klehm III, Joan E. McKown & Emily A. Posner, *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis with a Call for Greater International Cooperation, but Where Will That Lead?*, 13 U. PA. J. BUS. L. 927 (2011) (leaving extraterritoriality out of a discussion of regulators' "increased efforts to combat corruption and bribery at a global level"); Roger M. Witten, Kimberly A. Parker, Jay Holtmeier & Thomas J. Koffer, *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691 (2009) (lacking significant discussion of jurisdiction despite giving "practical advice on the compliance programs"). *But see* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 487–500 (2009) (including a thorough analysis of jurisdictional issues when arguing that section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2006), should be interpreted to protect FCPA whistleblowers). Scholarship on the FCPA has been heavily practitioner-focused, with the vast majority of the seven hundred secondary sources on the subject written for practicing lawyers rather than for scholars. Most of the relevant materials were found in the form of continuing legal education materials, newsletters, and texts and treatises as opposed to law-review articles (data found through Westlaw searches conducted on January 4, 2012).

34. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 87 (2007); Arthur F. Matthews, *Internal Corporate Investigations*, 45 OHIO ST. L.J. 655, 662 (1984).

in 1977.[35] The new law prohibited businesses and their agents and employees from making payments or gifts to foreign officials.[36] Earlier in the decade, dozens of large American companies had voluntarily disclosed to the SEC that they had made bribes that helped them obtain business in a number of foreign countries.[37] The 1976 report issued by the SEC, *Report of the Securities Exchange Commission on Questionable and Illegal Corporate Payments and Practices*,[38] disclosed past bribery and provided the impetus for the FCPA.[39] The SEC report contained information about SEC investigations, revealed the widespread practice of commercial bribery of foreign public officials, and analyzed eighty-nine disclosures of questionable payments.[40] More than three hundred American companies were implicated.[41]

During this period before the FCPA was enacted, the SEC brought public enforcement actions for illicit payments to foreign officials against well-known companies, such as Gulf Oil, Phillips Petroleum, General Tire & Rubber, Lockheed, and United Brands.[42] Enforcement continued after the FCPA was enacted with actions against Boeing, International Telephone & Telegraph, Page Airways, Firestone Tire & Rubber, and International Systems & Controls.[43] The most famous scandal, dubbed "Bananagate," involved a $1.25 million payment by United Brands to the president of Honduras to

35. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2006 & Supp. IV 2011)).

36. *Id.* §§ 103–104, 91 Stat. at 1494–98 (codified as amended at 15 U.S.C. § 78dd-1 to -2 (2006)).

37. Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 715 (PLI Corp. L. & Practice, Course Handbook Series No. B-1665, 2008).

38. U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976).

39. S. REP. NO. 95-114, at 1–2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099; *see also* U.S. SEC. & EXCH. COMM'N, *supra* note 38, at 57 ("[T]he question of illegal or questionable payments is obviously a matter of international concern, and the Commission, therefore, is of the view that limited-purpose legislation in this area is desirable in order to demonstrate clear Congressional policy with respect to a thorny and controversial problem.").

40. S. REP. NO. 95-114, at 1–2, 1977 U.S.C.C.A.N. at 4099.

41. *Id.* at 3, 1977 U.S.C.C.A.N. at 4101.

42. Matthews, *supra* note 34, at 664.

43. *Id.* at 664–65.

avoid an export duty on bananas.[44] According to a contemporary commentator, the revelations of these payments "[shook] foreign governments, rocked American corporate management, and tarnished the image of American private enterprise both at home and abroad."[45]

It was thus in response to these illicit payments made by American companies that the original version of the FCPA was passed in 1977. The Senate report on the bill that became the FCPA[46] states that the bill "[m]akes it a crime for U.S. companies to bribe a foreign government official."[47] The original version of the FCPA only applied to issuers[48] and domestic concerns.[49] Since the original enactment, Congress amended the FCPA twice, each time in response to concerns that the prohibition on payments to foreign officials was a significant burden on American businesses vis-à-vis their foreign competitors.[50]

2. *Contents of the FCPA.* The FCPA, part of the Securities Exchange Act of 1934 (1934 Act),[51] is divided into two parts: the antibribery provisions, which make it a crime to bribe foreign officials,[52] and the accounting provisions, which impose upon companies various bookkeeping obligations.[53] The former follow the traditional pattern of a crime, with a requisite actus reus and mens rea,[54] whereas the latter impose affirmative obligations on companies.[55] Companies that are defined as issuers under section 12

44. John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1116 (1977).

45. Charles R. McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 215 (1976) (footnotes omitted).

46. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1495 (codified as amended at 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2006 & Supp. IV 2011)).

47. S. REP. NO. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100.

48. Foreign Corrupt Practices Act of 1977 § 103, 91 Stat. at 1495–96 (codified as amended at 15 U.S.C. §§ 78*l*, 78dd-1 (2006)).

49. *Id.* § 104, 91 Stat. at 1496–98 (codified as amended at 15 U.S.C. § 78dd-2 (2006)).

50. *See infra* Part I.A.3.

51. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2006 & Supp. IV 2011).

52. *Id.* §§ 78dd-1 to -3.

53. *Id.* § 78m(b).

54. *See, e.g.*, *id.* § 78dd-1(a) (describing what constitutes the prohibited act of bribing a foreign official); *id.* § 78dd-1(f)(2) (defining the mental culpability required to violate the FCPA).

55. *See id.* § 78m(b)(2) (requiring issuers to, *inter alia*, "make and keep books, records, and accounts" and "devise and maintain a system of internal accounting controls").

of the 1934 Act[56] or that are required to file reports subject to section 15(d) of the 1934 Act[57] are subject to both sets of provisions.[58] Individuals may also be prosecuted for criminal acts of bribery.[59]

The antibribery provisions are composed of three separate sections, each regulating different types of entities. The first section, § 78dd-1, applies to issuers,[60] which consist of foreign and domestic companies that are publicly listed on U.S. stock exchanges or that are required to register with the SEC pursuant to other provisions of the 1934 Act.[61] The second section, § 78dd-2, proscribes bribery committed by "domestic concerns," who are nonissuers that are U.S. citizens, nationals, or residents as well as companies that are either incorporated in the United States or that have their principal place of business in the United States.[62] Sections 78dd-1 and 78dd-2 both contain "alternative jurisdiction" provisions that specifically proscribe issuers' and domestic concerns' acts of bribery that occur outside of the United States.[63] The final section, § 78dd-3, regulates the conduct of entities not covered by § 78dd-1 or § 78dd-2, including foreign citizens, residents, and corporations.[64] Unlike the first two provisions, § 78dd-3 specifically states that it has only territorial application.[65] It requires that acts that further the crime occur "*while in the territory of the United States*."[66]

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56. Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78*l*.

57. *Id.* § 15(d), 15 U.S.C. § 78o.

58. *E.g.*, 15 U.S.C. §§ 78*l*, 78m(b)(2), 78o(d), 78dd-1 (2006 & Supp. IV 2011).

59. Each section applies to "any officer, director, employee, or agent" of the issuer, domestic concern, or other entity. *Id.* §§ 78dd-1 to -3.

60. *See id.* § 78j-1(f) (defining the term "issuer").

61. *Id.* § 78dd-1.

62. *Id.* § 78dd-2.

63. *Id.* §§ 78dd-1(g), 78dd-2(i). This type of alternative jurisdiction rests on the "nationality" principle of jurisdiction, which allows states to "exercise prescriptive jurisdiction over their own nationals, even when they are located outside national territory." JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 346 (3d ed. 2010); *see also* Blackmer v. United States, 284 U.S. 421, 433, 442–43 (1932) (holding a U.S. citizen living in France guilty of contempt of court in the United States based upon this principle).

64. 15 U.S.C. § 78dd-3(a).

65. *Id.* This section does not have a similar alternative-jurisdiction provision for extraterritorial application. *See id.* § 78dd-3.

66. *Id.* § 78dd-3(a) (emphasis added). More fully, § 78dd-3 states that "[i]t shall be unlawful for any person . . . while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of" the crime. *Id.*

To violate the FCPA's antibribery provisions, all elements of the crime—which are identical for each of the three sections—must be met. The actor must (1) commit an act in furtherance of (2) "an offer, payment, promise to pay, or authorization of the payment" (3) "of any money, or offer, gift" or "the giving of anything of value to" (4) "any foreign official" (5) for a listed corrupt purpose that aids the actor "in obtaining or retaining business for or with, or directing business to, any person."[67] The listed purposes include influencing a foreign-government actor's official decisions, inducing a foreign official to do or to omit to do an act that violates the law, "securing any improper advantage," or inducing a foreign official to use his or her influence to affect the decision of a foreign government or instrumentality.[68] Furthermore, the law proscribes payments for similar purposes to foreign political parties, party officials, or candidates for office.[69] The FCPA also makes it unlawful to pay a third party "while knowing that all or a portion of such money or thing of value" will be given to a foreign official to gain a business advantage.[70]

All three provisions contain the additional qualification that the actor must "make use of the mails or any means or instrumentality of interstate commerce corruptly."[71] This requirement, however, need not be met when invoking the alternative-jurisdiction provisions, which establish "nationality" jurisdiction for issuers' or domestic concerns' actions abroad regardless of the interstate-commerce nexus.[72] In addition to making use of interstate commerce corruptly, nonissuer nondomestic concerns must also commit an act "in the territory of the United States."[73] The FCPA also contains several exceptions or affirmative defenses that allow an actor to escape liability for what would otherwise be an illegal act of bribery.[74]

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67. *Id.* § 78dd-2(a). The elements of the crime are the same in the other sections. *Id.* §§ 78dd-1, -3.

68. *Id.* §§ 78dd-1(a)(1), -2(a)(1), -3(a)(1).

69. *Id.* §§ 78dd-1(a)(2), -2(a)(2), -3(a)(2).

70. *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

71. *Id.* §§ 78dd-1(a), -2(a), -3(a).

72. *Id.* §§ 78dd-1(g), -2(i); *see also supra* note 63 and accompanying text.

73. 15 U.S.C. § 78dd-3(a).

74. The major exception covers "facilitating or expediting payment[s]" with the purpose of simply hastening or "secur[ing] the performance of a routine governmental action." *Id.* §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). Some commentators argue, however, that prosecutors and practitioners have read this exception narrowly, so that it applies only in very limited circumstances. *See, e.g.*, F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British*

3. *The FCPA's Subsequent History.* The FCPA was first amended by the Foreign Corrupt Practices Act Amendments of 1988,[75] enacted as part of the Omnibus Trade and Competitiveness Act of 1988.[76] The amendments attempted to address the public perception that the FCPA placed American businesses at a disadvantage in the world marketplace.[77] Despite this concern, the amendments did not attempt to regulate the conduct of foreign persons through domestic criminal law.[78] Ten years later, Congress amended the FCPA again, this time to prepare the United States for accession to the OECD Convention[79] through the International Anti-Bribery and Fair Competition Act of 1998.[80]

The OECD Convention is a binding treaty implemented via the respective domestic anticorruption laws[81] of its thirty-nine signatory states.[82] The United States provided the impetus for the OECD

Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption, 46 TEX. INT'L L.J. 1, 42 (2010) ("The area of facilitating payments is a particularly thorny one for FCPA compliance. . . . [M]any practitioners increasingly fear that U.S. regulators have simply read the exception out of the statute."). Additionally, an affirmative defense covers payments and gifts that are "lawful under the written laws . . . of the foreign official's . . . country." 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1). Another affirmative defense applies to a payment or gift that was "a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official . . . and was directly related to" promoting or showing products or services or the performance of a contract with the foreign government. *Id.* §§ 78dd-1(c)(2), -2(c)(2); -3(c)(2).

75. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. I, §§ 5001–5003, 102 Stat. 1415 (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to -2, 78ff (2006 & Supp. IV 2011)).

76. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of the U.S. Code).

77. Beverley H. Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 CLEV. ST. L. REV. 549, 551–52 (1989). At that time, the FCPA was still the world's only foreign anticorruption law, more than a decade after its enactment. *Id.* at 552.

78. *See* Foreign Corrupt Practices Act Amendments of 1988 §§ 5001–03, 102 Stat. at 1415–25.

79. Low et al., *supra* note 37, at 715; *see also* 144 CONG. REC. 27,653 (1998) (statement of Sen. Conrad Burns) ("The amendments to the Foreign Corrupt Practices Act (FCPA) [were] approved by the Senate today, to implement in the United States the OECD Convention . . . ."); 144 CONG. REC. 27,350 (1998) (statement of Rep. Thomas Bliley, Jr.) ("This legislation is designed to help level the playing field for American companies doing business overseas.").

80. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).

81. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, arts. 1–10, 37 I.L.M. at 4–6.

82. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of April 2012*, OECD, http://www.oecd.org/daf/

Convention, encouraging other developed nations to adopt similar antibribery laws so that American businesses regulated by the FCPA would not be significantly disadvantaged in the world marketplace.[83] Although important parts of the OECD Convention are patterned after the FCPA,[84] the United States still had to modify its existing domestic law to ensure compliance with certain treaty sections, including Article 4, which is the OECD Convention's provision on jurisdiction.[85] This article states that a signatory 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" and prosecute its own nationals for acts conducted abroad to bribe foreign officials if the country allows such extraterritorial jurisdiction.[86]

The 1998 amendments to the FCPA, which implemented the OECD Convention, introduced the alternative jurisdiction sections to § 78dd-1 and § 78dd-2, which explicitly call for extraterritorial application.[87] Section 78dd-3 broadened the FCPA's reach beyond issuers and domestic concerns for the first time.[88] Congress expanded the FCPA's application primarily, if not solely, in response to the

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briberyininternationalbusiness/anti-briberyconvention/40272933.pdf (last visited Oct. 5, 2012). Recent scholarship suggests that only four nations have actively enforced its provisions, while another twenty ratifying nations have conducted little or no enforcement. *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1285 (2011).

83. *See* H.R. REP. NO. 105-802, at 10 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt802/pdf/CRPT-105hrpt802.pdf ("Beginning in 1989, the U.S. government began an effort to convince our trading partners at the OECD to criminalize the bribery of foreign public officials. Achieving comparable prohibitions in other developed countries and combating corruption generally has been a major priority of the U.S. business community, the U.S. Congress, and successive Administrations since the late 1970s."); *see also id.* ("[The 1998] legislation, coupled with implementation of the OECD Convention by our major trading partners, is designed to result in a substantial leveling of the playing field for U.S. businesses.").

84. *See* Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 486 (2000) ("An important component of the Convention is its emulation of the corporate accountability approach of the Foreign Corrupt Practices Act (FCPA) to detect corrupt payments." (citations omitted)).

85. *See infra* notes 87–90 and accompanying text.

86. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, art. 4, 37 I.L.M. at 5. If an act occurs for which multiple signatory nations could have jurisdiction, the parties are to consult to determine the best country to prosecute the corruption. *Id.*

87. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 2–3, 112 Stat. 3302, 3302–05 (codified at 15 U.S.C. §§ 78dd-1(g), -2(d) (2006)).

88. *Id.* § 4, 112 Stat. at 3306–09 (codified at 15 U.S.C. § 78dd-3 (2006)).

OECD Convention requirements.[89] In fact, when enacting these jurisdictional expansions, Congress paid special attention to do so only "when consistent with national legal and constitutional principles."[90]

B. Extraterritoriality and the FCPA

The FCPA presents particular problems that arise from extraterritoriality because it regulates conduct abroad, lacks certain delineation of its scope, and is actively enforced. This Section first explains why these three qualities make the FCPA particularly problematic in the extraterritorial context and then turns to the various jurisdictional theories that would bring foreign companies and individuals under the law's scope.

1. *Problems Arising from Extraterritorial Application of the FCPA.* First, FCPA prosecutions have the potential to spark foreign-relations tensions. Any prosecution of a foreign corporation can have significant policy implications, including "host country resentment" and "transnational tension and strife."[91] FCPA prosecutions have the potential to be especially controversial because the FCPA regulates conduct with an *international* effect, so the connection that creates an American interest in foreign corporations' activities abroad is often particularly tenuous.[92] To compound the issue, enforcement against

89. *See* S. REP. NO. 105-277, at 2–3 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt277/pdf/CRPT-105srpt277.pdf ("[T]he OECD Convention calls on parties to cover 'any person'; the current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and 'domestic concerns.' The Act, therefore, expands the FCPA's coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States." (quoting Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, art. 1(1), 37 I.L.M. at 4; and Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1994))).

90. *See id.* at 3 ("This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles . . . . It is within the constitutional grant of power to Congress to 'regulate Commerce with foreign Nations' and to 'define and punish . . . Offenses against the Law of Nations.'" (last alteration in original) (quoting U.S. CONST. art. I, § 8, cls. 3, 10)).

91. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 433 (1999).

92. *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, 240 (2001) ("[E]nlargement of the extraterritorial effect of the [FCPA's] antibribery provisions may prove to be the most significant and challenging foray by the United States into the regulation of international business . . . ."); *id.* at 358–59 ("[T]he

foreign entities has become a new norm; eight of the ten largest FCPA settlements in American history involve foreign companies.[93]

Second, deferred-prosecution agreements have become the norm in FCPA actions, which has led to a dearth of judicial guidance on the FCPA's jurisdictional scope.[94] Companies shy away from litigating FCPA violations because of uncertainty, expense, and the potential for reputational harm.[95] Because most companies settle with the DOJ or SEC, the judiciary rarely produces opinions on the FCPA.[96] As a result, "a multitude of legal issues associated with the FCPA have yet to be subject to judicial review," and courts may interpret key provisions differently from the way that the DOJ and SEC have previously presented them.[97] In light of this phenomenon, one district

jurisdictional reach of the amended FCPA with regard to foreign nationals extends to virtually any contact with the United States, however glancing.").

93. Richard L. Cassin, *J&J Joins New Top Ten*, FCPA BLOG (Apr. 8, 2011, 4:43 PM), http://www.fcpablog.com/blog/2011/4/8/jj-joins-new-top-ten.html.

94. *See* DEMING, *supra* note 13, at 4 ("[The FCPA's] provisions have rarely been subject to judicial scrutiny."); Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 156 (2010) ("[T]he number of precedents developed under the FCPA remains quite low despite great legal uncertainty surrounding the law, in large part due to the use of DPAs [deferred-prosecution agreements] and NPAs [nonprosecution agreements]."); *see also* Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred?: Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869–70 (2005) (discussing the limited judicial role in deferred-prosecution agreements).

95. *See, e.g.*, Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 441–42 & n.9 (2010) (explaining the cost of lawsuits to companies and the possibility of lost revenues from damaged reputations). In addition to these costs, companies found liable under the FCPA may also be liable under other criminal statutes, such as the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006 & Supp. IV 2011)) that use an FCPA violation as a predicate offense, Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 134 (2010); *see also, e.g.*, Dooley v. United Techs. Corp., 803 F. Supp. 428, 438 (D.D.C. 1992) ("The Travel Act[, 18 U.S.C. § 1952 (1988 & Supp. III 1992), is] . . . one of the enumerated predicate acts of racketeering under RICO . . . . Dooley charges that the British and Saudi defendants committed Travel Act violations because their actions violate the Foreign Corrupt Practices Act. . . . Thus, the success of plaintiff Dooley's RICO-related claim that the . . . defendants committed Travel Act violations, hinges on whether these defendants violated the FCPA."). Some have argued that this application conflates the meaning of both statutes. *See, e.g.*, Raymond J. Dowd, Note, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT'L L.J. 946, 947 (1990) ("This Note argues that civil RICO should not provide a remedy for a party claiming injury due to the commercial bribery of a foreign official.").

96. *See* Brooks, *supra* note 94, at 138 ("[T]he long-term consequences of [deferred or nonprosecution] agreements perpetuate ambiguities surrounding enforcement of the FCPA.").

97. DEMING, *supra* note 13, at 4. In fact, this different interpretation has occurred in at least one case; the judge acquitted the defendant due to a lack of jurisdiction. Daniel Matzkin,

court judge described the current state of FCPA enforcement as "a stew of confusion and hypocrisy."[98]

Finally, the international and domestic focus on anticorruption has grown dramatically in the past fifteen years. Both developed countries and emerging economic powers have adopted antibribery legislation prohibiting payments to foreign officials for the purpose of obtaining business.[99] International financial institutions' devotion of resources to anti-money-laundering enforcement efforts in the wake of 9/11,[100] coupled with the Sarbanes-Oxley Act of 2002,[101] have led to a greater focus on corporate compliance, ethics programs, and accurate recordkeeping.[102] The DOJ and SEC also began to enforce the FCPA more proactively,[103] leading to increases in prosecutions, penalties, and voluntary disclosures.[104] From 2004 to 2009, the number of FCPA enforcement actions brought by the DOJ and SEC increased eightfold, rising from five to forty.[105] By 2011, fines of more than $20 million were not uncommon as criminal penalties,[106] and payments in the eight largest settlements have ranged from $137 million to $800 million.[107] Although self-reporting has risen

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District Judge Issues Unprecedented Limitation on FCPA's Jurisdictional Reach, ANTICORRUPTION BLOG (June 15, 2011), http://www.anticorruptionblog.com/foreign-corrupt-practices-act/district-judge-issues-unprecedented-limitation-on-fcpas-jurisdictional-reach ("The Court rejected the government's argument for FCPA jurisdiction over Patel . . . founded on Patel's mailing a DHL package containing a purchase agreement in furtherance of a corrupt scheme from the United Kingdom to the United States.").

98. SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011).

99. DEMING, *supra* note 13, at xvii. For example, the United Kingdom's Bribery Act, 2010, c. 23, §§ 1–20, passed in April 2010 and effective in July 2011, created a wave of publicity in the business community, *see, e.g.*, Warin et al., *supra* note 74, at 7 (discussing how the United Kingdom's Serious Fraud Office "was gearing up for action" by "increas[ing] the number of officials assigned to overseas corruption matters" and "adopt[ing] new strategies to combat international corruption").

100. Low et al., *supra* note 37, at 715.

101. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

102. Low et al., *supra* note 37, at 716.

103. Thomas, *supra* note 95, at 439–40.

104. Low et al., *supra* note 37, at 742–43.

105. F. Joseph Warin, John W.F. Chesley & Patrick F. Speice, Jr., *Nine Lessons of 2009: The Year-in-Review of Foreign Corrupt Practices Act Enforcement*, 38 SEC. REG. L.J. 19, 21 (2010).

106. *See* Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 779 (2011) (describing fines of $24.8 million for Lockheed Corp. and $26 million for Vetco International Ltd. in 2007).

107. Cassin, *supra* note 93. Increased enforcement has created resistance, ranging from a U.S. Chamber of Commerce legal team striving "to make the case that the law is out of date" to members of Congress publicly announcing a desire to overhaul the FCPA. Carrie Johnson,

dramatically due to perceived favorable treatment for voluntary disclosures of violations, the Federal Bureau of Investigation (FBI) has also taken a more active investigatory role.[108] This atmosphere of heightened enforcement, coupled with uncertainty about the law's scope and its potential foreign relations implications, make the jurisdictional questions surrounding its application particularly vexing and relevant.

2. *Foreign Parties Within the FCPA's Scope.* Given the three problems raised by the FCPA's application to foreign parties, it is necessary to consider the four ways in which the conduct of foreign parties[109] may become governed by the FCPA. The first is when foreign companies choose to list stock on American exchanges and become issuers.[110] This jurisdictional hook is uncontroversial, because issuers are subject to the bulk of the federal securities laws.[111] The second is when a company commits an act in furtherance of a crime in United States territory.[112] This hook is again uncontroversial, because jurisdiction in criminal law generally rests upon a theory of territoriality: if an individual commits a criminal act in a certain territory, that territory's sovereign has jurisdiction.[113] The last two

Businesses Push Back on Foreign Bribery Law, NPR (Oct. 19, 2011), http://www.npr.org/2011/10/19/141473145/businesses-push-back-on-foreign-bribery-law.

108. McSorley, *supra* note 106, at 779. There were reportedly at least six ongoing FBI FCPA investigations in 2011, *id.* at 779–80, including an undercover FBI sting operation that led to a highly publicized arrest of twenty-two individuals for FCPA violations, Press Release, Fed. Bureau of Investigation, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.fbi.gov/washingtondc/press-releases/2010/wfo011910.htm.

109. This Section uses foreign companies as an example, although it is important to note that FCPA prosecutions of individuals, including foreign individuals, have also been on the rise. *See, e.g.*, Roger M. Witten, Kimberly A. Parker, Jay Holtmeier & Lillian H. Potter, *The Increased Prosecution of Individuals Under the FCPA: Trends and Implications*, BLOOMBERG L. REP. RISK & COMPLIANCE, Dec. 2009, at 1, 1–3 (discussing the prosecutions of several individuals, including two foreign executives of companies subject to the FCPA, under similar theories as those described in the Introduction, *supra*).

110. 15 U.S.C. § 78dd-1 (2006).

111. 79A C.J.S. *Securities Regulation* § 130 (2011).

112. 15 U.S.C. § 78dd-3.

113. *See, e.g.*, State v. Butler, 724 A.2d 657, 660 (Md. 1999) ("Territorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory . . . may the case be tried in that state."); People v. McLaughlin, 606 N.E.2d 1357, 1359 (N.Y. 1992) ("Because the State only has power to enact and enforce criminal laws within its territorial borders, there can be no criminal offense unless it has territorial jurisdiction."). This concept of territorial jurisdiction is different from venue,

methods, those used in JGC's deferred-prosecution agreement, are more controversial.[114] One applies expansive vicarious-liability theories using agency relationships.[115] The other interprets the territorial provisions of § 78dd-3 as covering acts in furtherance of the bribery that are minor or merely pass through the United States.[116] Although both vicarious liability under § 78dd-1 and § 78dd-2 and an extremely broad application of § 78dd-3 are accepted in theory, difficulties may arise in practice when foreign companies question American enforcement agencies' jurisdiction over their conduct.[117]

This final jurisdictional theory, using minor or pass-through acts as the basis for U.S. jurisdiction, can be the most problematic, as the wire transfer in the JGC case illustrates. In several cases, the DOJ has put forth the theory that wire transfers through American correspondent bank accounts—that is, accounts at other banks maintained to service customers through an interbank relationship—are sufficient for a territorial act in furtherance of a crime, even if the money is not knowingly or intentionally routed to the United States and does not remain in the United States for a significant length of time.[118] Possibly because of the shaky legal foundations on which this

which is the location within the territory at which the trial should be held. *Butler*, 724 A.2d at 665.

114. *See* Brown, *supra* note 92, at 359 ("By failing to link a violation of U.S. law to a demonstrable prejudice of national interest, the jurisdictional reach of the FCPA exceeds the legitimate grasp of U.S. legislative and enforcement authorities."); PHILIP UROFSKY ET AL., SHEARMAN & STERLING LLP, IT DOESN'T TAKE MUCH: EXPANSIVE JURISDICTION IN FCPA MATTERS 1 (2009), *available at* http://www.shearman.com/lt-030409-expansive-jurisdiction-in-fcpa-matters (noting that such an "expansive jurisdictional claim" "poses both risks and opportunities for foreign companies as they do business in the global economy").

115. DEMING, *supra* note 13, at 59. Vicarious liability for actions taken by an agent subject to the FCPA is predicated upon knowledge of or a high probability of a violation. *Id.* at 60–64. Its imposition stems from both the language of the FCPA and from general accomplice-liability principles of criminal law. *Id.* at 59. Vicarious liability also gives the accounting provisions of the FCPA a very broad scope. Warin et al., *supra* note 74, at 33.

116. *See* Warin et al., *supra* note 74, at 10 ("U.S. regulators have construed relatively minor acts, such as routing a payment through a U.S. bank account or e-mail traffic to the parent company in the U.S., as 'act[s] in furtherance' sufficient to trigger FCPA jurisdiction." (alteration in original)).

117. *See supra* text accompanying note 9.

118. *See* Bruce Bean, *Beyond All Boundaries: The Extraterritorial Grasp of Anti-Bribery Legislation*, FCPA PROFESSOR BLOG (Oct. 24, 2011), http://www.fcpaprofessor.com/beyond-all-boundaries-the-extraterritorial-grasp-of-anti-bribery-legislation ("In practice , . . the commerce clause nexus of the FCPA is met when a dollar wire transfer between two offshore jurisdictions clears through a New York money center bank, even though there was no 'intent' by either of the parties involved to have any connection with the U.S."). This theory was also used in the prosecution of three of Siemens' wholly foreign subsidiaries. *See* Complaint at 1, 3, SEC v.

jurisdictional theory rests, prosecutors have never relied exclusively upon it.[119] Because of its contentiousness, however, the theory has received particular emphasis in practitioner pieces,[120] one of which described the FCPA's jurisdiction under § 78dd-3 as "near limitless."[121] Therefore, the next two Parts of this Note seek to propose a limit, using traditional methods of statutory interpretation, such as plain meaning and legislative history, and interpretive canons of foreign relations law.

II. STATUTORY INTERPRETATION: TEXT AND LEGISLATIVE INTENT

This Part analyzes the FCPA using traditional statutory-interpretation techniques. It seeks to discover the proper application of the statute to foreign nonissuers and pays special attention to the issue of merely tangential territorial connections, such as wire transfers of bribery funds or the simple act of mailing a package that will pass through the United States. Therefore, each Section examines whether the given mechanism of statutory construction clearly indicates where a dividing line should be placed between conduct that falls within the FCPA and conduct that does not. Part II.A examines the plain meaning of the territorial provision of § 78dd-3, and Part II.B scrutinizes the legislative history of the FCPA and its amendments. Both lines of analysis ultimately fail to provide a clear answer regarding the extent of the U.S. jurisdiction under the FCPA, necessitating the use of substantive canons from foreign relations law in Part III to resolve the ambiguity.[122]

Siemens Aktiengesellschaft, No. 08-cv-02167-RJL (D.D.C. Dec. 15, 2008), *available at* http://www.siemens.com/press/pool/de/events/2008-12-PK/SEC.pdf (alleging a violation of the FCPA stemming from "elaborate payment schemes to conceal the nature of . . . corrupt payments" that ultimately "made use of the means or instrumentalities of interstate commerce").

119. *See* UROFSKY ET AL., *supra* note 114, at 3 (noting that the DOJ and SEC cited alternative jurisdictional grounds in both *SEC v. Siemens Aktiengesellschaft*, No. 08-cv-02167-RJL (D.D.C. Dec. 15, 2008), and the Bonny Island Project cases).

120. *See, e.g.*, *id.* at 1 (noting that the "threat" of expansive jurisdiction "poses both risks and opportunities for foreign companies as they do business in the global economy").

121. Mauro M Wolfe, *Does the US Government Have Limitless Jurisdiction Enforcing the FCPA?*, 3 NEWSL. CRIM. L. SEC. LEGAL PRAC. DIVISION INT'L B. ASS'N, May 2010, *reprinted in* MAURO M WOLFE, DOES THE US GOVERNMENT HAVE LIMITLESS JURISDICTION ENFORCING THE FCPA? 1 (2010), *available at* http://www.martindale.com/members/Article_Atachment.aspx?od=299343&id=1055878&filename=asr-1055918.pdf.

122. Without statutory ambiguity, of course, there is no need to resort to jurisdiction-limiting principles. *Cf., e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 88–89 (2001)

A. The Plain Meaning of the FCPA's Territorial Provision

The FCPA specifically provides that foreign companies, unlike issuers or domestic concerns, must commit an act in furtherance of the bribe within the United States for their conduct to fall within the statute. Because the text of the statute itself is the root of statutory construction,[123] this Section looks at whether a plain meaning to § 78dd-3 can be gleaned from the text alone. The Supreme Court uses many canons of construction but begins with the plain meaning of the text:[124] and "[w]hen the words of a statute are unambiguous . . . this first canon is also the last."[125]

Section 78dd-3, the only prong of the FCPA's antibribery provisions that applies directly to foreign nonissuers, reads: "It shall be unlawful . . . *while in the territory of the United States*, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of" bribing a foreign official.[126] The text contains the phrase "in the territory of the United States" as a necessary condition of the crime. This inclusion is particularly significant because § 78dd-3's sister provisions, § 78dd-1 and § 78dd-2, do not contain a similar clause. In fact, the parallel provisions relating to issuers and domestic concerns explicitly provide for extraterritorial application in an "alternative jurisdiction" section that § 78dd-3 lacks.[127] These differences in language suggest a more limited extraterritorial application of § 78dd-3, but they do not express the degree of that limitation.

The actual inquiry regarding the scope of § 78dd-3 is not as simple as the phrase "while in the territory of the United States" might suggest. Within the confines of the statute, it is not clear what it means to be "in the territory of the United States" while one is committing an act in furtherance of the crime or using an

(refusing to apply the plaintiff's preferred canon of construction when the statute in question was deemed unambiguous).

123. Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).

124. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (noting that before turning to other available canons of construction, courts should first apply the "cardinal canon" that "courts must presume that a legislature says in a statute what it means and means in a statute what it says").

125. *Id.* at 254.

126. 15 U.S.C. § 78dd-3(a) (2006) (emphasis added).

127. *Compare* § 78dd-1(g) (accommodating a theory of "alternative jurisdiction" that allows extraterritorial jurisdiction), *and id.* § 78dd-2(i) (same), *with id.* § 78dd-3 (lacking an alternative-jurisdiction section that would provide for extraterritoriality).

instrumentality of interstate commerce. Conduct by a foreign entity that occurs primarily in a foreign country raises the particular difficulty of defining what constitutes such an "act" of bribery taking place while in the territory of the United States. Does the simple transfer of money, unintentionally through an American bank account, fall within those words? Does the act of mailing a package that will land on U.S. soil qualify? Looking within the confines of the FCPA alone, there is no definitive answer to these questions.

The next line of inquiry is to deduce the meaning of the phrase "while in the territory of the United States" by looking at similar sections of the U.S. Code dealing with extraterritorial jurisdiction or jurisdiction over foreign parties.[128] For example, anti-money-laundering laws specify that jurisdiction exists over foreign parties who violate the law in a "financial transaction that occurs in whole or in part in the United States."[129] The statute criminalizing transnational acts of terrorism lays out jurisdiction, alternately, for specified acts committed "within the United States" and for extraterritorial acts intended to cause substantial harm within the United States.[130] Other sections of the U.S. Code explicitly provide for jurisdiction over acts that violate that section but occur abroad by including the phrase, "[t]here is extraterritorial jurisdiction over [a violation of this provision]," which obviates any question as to the extent of jurisdiction.[131]

128. *See* Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1598 (1991) ("Justice Scalia has urged an abandonment of the Court's traditional use of legislative history to interpret statutes. In place of this historical or intentionalist approach Justice Scalia has argued that, generally speaking, the only legitimate source for interpretive guidance in statutory cases is the text of the statute at issue, *or related provisions of enacted law which shed light on the meaning of the disputed text*." (emphasis added)).

129. 18 U.S.C. § 1956(b)(2)(A) (2006 & Supp. IV 2011).

130. *See* 18 U.S.C. § 2332b(a)(1) (2006) ("Whoever, involving conduct transcending national boundaries and in a circumstance described [elsewhere in the section] (A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or (B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States; in violation of the laws of any State, or the United States, shall be punished . . . .").

131. *E.g.*, 18 U.S.C. § 351(i) (2006); 18 U.S.C. § 1039(f) (2006); *see also, e.g.*, 18 U.S.C. § 2339B(d) (2006 & Supp. IV 2011) (providing for extraterritorial jurisdiction over an offense under certain conditions). These provisions are typically a separate subsection of the statute. *E.g.*, 18 U.S.C. § 351(i). The direct statements regarding extraterritorial application of American

This survey of territoriality and extraterritoriality in U.S. Code sections that define criminal offenses adds little insight to the meaning of § 78dd-3. First, the phrase "while in the territory of the United States" is unique.[132] Because this phrase occurs nowhere else in thousands of U.S. Code provisions, determining a precise line that separates "while" one is or is not in the United States for FCPA purposes is difficult. Second, other U.S. Code provisions that indicate that an element of a crime must occur within the United States are often much clearer on exactly what conduct must occur within the United States.[133] This key difference makes it difficult to extrapolate an interpretation from another provision of the U.S. Code to the FCPA. The fact that Congress has used significantly clearer provisions when defining territoriality and when providing for extraterritoriality helps to highlight the ambiguity of the territoriality provision of the FCPA. Although a strict textualist would end the inquiry with the text,[134] others would turn to legislative history to interpret congressional intent to add meaning to the text. This Note next turns to the legislative history of the FCPA and its amendments to determine what must occur within the United States for conduct to fall within the ambit of § 78dd-3.

B. *Legislative Intent Behind the Enactment of the Territorial Provision*

This Section examines legislative history to determine congressional intent as to the scope of the FCPA's application to foreign parties. When enacting the statute in 1977, Congress was faced with more than three hundred known instances of American

law stem from the Supreme Court's clear-statement rules about extraterritoriality. *See infra* note 173 and accompanying text.

132. This figure came from an exact-phrase search of the "USCA" database within Westlaw.

133. *See supra* notes 129–131 and accompanying text. For example, the money-laundering statute states that the territorial aspect involves a financial transaction, 18 U.S.C. § 1956 (2006 & Supp. IV 2011), *as amended by* Border Tunnel Prevention Act of 2012, Pub. L. No. 112-127, 126 Stat. 371, and the terrorism statute lays out four crimes that may trigger the statute, 18 U.S.C. § 2332b(a).

134. *See, e.g.*, Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 655 (2011) ("[Justice Scalia] is particularly averse to the use of legislative history, not only because he believes it is an unreliable measure of congressional intent, but also because he fundamentally rejects the entire project of seeking legislative intent. To Justice Scalia, only the words of a statute have gone through the legislative process, and thus only the words are law." (citations omitted)).

companies bribing foreign officials[135] and with American companies creating "slush funds" for illicit payments overseas.[136] The original House and Senate reports do not reference any instances of foreign bribery by foreign corporations.[137] Additionally, around the same time that Congress deliberately created a narrow jurisdictional basis when enacting the FCPA, it amended[138] the Export Administration Act of 1969[139] to "intentionally grant[] broad extraterritorial authority."[140] This is only a partial picture, however, because the relevant provisions creating extraterritorial jurisdiction for issuers and domestic concerns, as well as the entirety of § 78dd-3, were not added to the FCPA until 1998.[141] It is thus the legislative history of the International Anti-Bribery and Fair Competition Act, the statute that amended the FCPA to add those provisions, that is most relevant.

The legislative history of the 1998 amendments does give some indication that Congress interpreted the phrase "while in the territory of the United States" rather literally. The House report that accompanied the legislation stated that the act in furtherance of the crime must be "taken within the territory of the United States."[142] The use of "taken within" instead of "while" strongly implies a deliberate action by the perpetrators in the United States rather than a simple electronic transfer that passes through the United States. Elsewhere, the report states:

> Although this section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while *physically present* within the territory of the United States, Congress does not thereby intend to

135. S. REP. NO. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.

136. S. REP. NO. 105-277, at 1 (1998) (internal quotation marks omitted), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt277/pdf/CRPT-105srpt277.pdf.

137. S. REP. NO. 95-114; H.R. REP. NO. 95-831 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4121; H.R. REP. NO. 95-640 (1977).

138. Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. III, 91 Stat. 1629, *replaced by* Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401–2420 (2006 & Supp. IV 2011)).

139. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841, *replaced by* Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401–2420).

140. Small, *supra* note 25, at 285.

141. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).

142. H.R. REP. NO. 105-802, at 21 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt802/pdf/CRPT-105hrpt802.pdf.

> place a similar limit on the exercise of U.S. criminal jurisdiction over foreign nationals and companies under any other statute or regulation.[143]

This quotation offers a compelling indication that, to Congress, the phrase "while in the territory of the United States" from § 78dd-3 indicates a tangible physical presence, such as that of a person, rather than the fleeting electronic presence of an asset in a bank account. The House and Senate reports also contain somewhat contradictory statements about the degree of territoriality necessary to trigger § 78dd-3,[144] including the phrase, "an extensive physical connection to the bribery act is not required."[145] Therefore, although there are some indications that Congress intended the territorial provision of § 78dd-3 to be taken literally, the presence of conflicting interpretations within the legislative history requires more than a cursory examination and compels consideration of the context of these seemingly conflicting sections.

When passing the 1998 amendments to the FCPA, Congress was concerned with "achieving a level playing field" so that American companies prohibited from paying bribes were not at a disadvantage on the world marketplace.[146] Congress's method for realizing this purpose was to "[a]chiev[e] comparable prohibitions in other developed countries" by cooperating with international governments rather than unilaterally policing foreign nations' illicit payments to other foreign nations' officials.[147] The OECD Convention was the end result.[148] Congress considered the International Anti-Bribery and Fair Competition Act, including the added § 78dd-3 providing liability for territorial acts of foreign parties, to be implementing legislation for the OECD Convention.[149] Thus, because all of the 1998 changes incorporate treaty provisions, the FCPA as currently written must be

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143. *Id.* at 22 (emphasis added).

144. The legislative history indicates both that territoriality "should be interpreted broadly" and that jurisdiction is "limit[ed] . . . to instances in which the foreign national or company takes some action while physically present within the territory of the United States." S. REP. NO. 105-277, at 6 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt277/pdf/CRPT-105srpt277.pdf.

145. *Id.* (internal quotation marks omitted).

146. H.R. REP. NO. 105-802, at 10.

147. *Id.*

148. *See supra* notes 81–86 and accompanying text.

149. H.R. REP. NO. 105-802, at 11 ("This legislation amends the FCPA to conform it to the requirements of and to implement the OECD Convention.").

considered in light of the OECD Convention according to norms for implementing legislation.[150]

III. CANONS OF FOREIGN RELATIONS LAW

Part III applies canons of foreign relations law to elucidate the proper boundaries of the FCPA's application to foreign entities. Part III.A examines theories of territoriality and extraterritoriality, by first broadly examining the concept of extraterritoriality in international law and in the Restatement (Third) of the Foreign Relations Law of the United States. Part III.A also examines the jurisprudence of the territorial-effects test and applies recent case law to the FCPA. Part III.B examines possible criticisms of the presumption against territoriality as applied to the FCPA and defends the application of the presumption, and Part III.C explains why two alternative canons are inapplicable to the present law.

A. The Presumption Against Extraterritoriality

1. *An Introduction to Territoriality and Extraterritoriality.* Problems associated with one nation applying its laws to foreign nationals occur frequently in an increasingly globalized world.[151]

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150. Part III.A.1, *infra*, discusses this principle in detail and applies the interpretive techniques that have developed around treaty-implementing legislation to the FCPA.

151. *See* DUNOFF ET AL., *supra* note 63, at 325 ("Many of the most difficult and controversial international legal disputes arise when states seek to assert authority over persons, property, or events abroad. These disputes often involve the extraterritorial application of domestic law in ways that harm the interests of other states and at times are contrary to international legal limits on the exercise of jurisdiction."). Perhaps the most famous example of the exertion of extraterritorial jurisdiction is the prosecution of Nazi war criminal Adolph Eichmann in Israel under a universal-jurisdiction theory. MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW 63 (2005). The significant foreign-relations and policy implications of sweeping extraterritorial jurisdiction have been widely discussed. *See, e.g.*, John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 379 (2010) ("Avoiding inadvertent international conflicts is an important reason to limit the reach of U.S. statutes, as the Supreme Court has recognized since its earliest cases."); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1478 (2008) ("Academics and courts have unwisely underestimated the problems created by the effects test, and with it the problems associated with countries applying their law beyond their borders."); *Developments in the Law—Extraterritoriality*, *supra* note 82, at 1286 ("It is thus not a surprise that 'host country resentment' and 'transnational tension and strife' result when, under the FCPA, the United States 'monitor[s] and seek[s] to control sensitive affairs host countries would prefer to govern themselves.'" (alterations in original) (citations omitted) (quoting Salbu, *supra* note 91, at 133; and Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2928 (2005))).

Today, countries frequently seek to regulate, and therefore assert jurisdiction over, extraterritorial acts that have effects within the country exercising jurisdiction.[152] Therefore, this Section more closely examines domestic and international law on extraterritorial jurisdiction.

There are three types of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.[153] Under international law, a nation has the power to prescribe conduct under five principles: (1) territorial jurisdiction or territorial effects; (2) nationality; (3) passive-personality jurisdiction; (4) protective jurisdiction; and (5) universal jurisdiction.[154] The last principle, universal jurisdiction, only pertains to egregious or heinous crimes; it was first invoked during the Holocaust war crimes tribunals in the wake of World War II.[155] Nationality jurisdiction, as its name implies, rests upon residence or citizenship.[156] Passive-personality jurisdiction and protective jurisdiction apply to conduct that occurs outside of a nation's territory but that harms or threatens a state's nationals (passive-personality) or a state's existence or core functions (protective).[157]

The remaining basis of jurisdiction to prescribe conduct—territorial jurisdiction—supports, potentially controversially, the FCPA's asserted jurisdiction over parties under § 78dd-3. This basis of jurisdiction has also spawned a complicated American jurisprudence in an attempt to define a territorial effect sufficient to bring foreign conduct under the purview of American law, which is presumed to have only territorial application.[158] Section 402(1) of the Restatement (Third) defines territorial jurisdiction in the following manner:

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152. One common example is antitrust, or competition, law. Small, *supra* note 25, at 283.

153. DUNOFF ET AL., *supra* note 63, at 325–26.

154. *Id.* at 332, 346–49.

155. *Id.* at 349. *See generally* INAZUMI, *supra* note 151 (examining the concept of universal jurisdiction in modern international law, with a special focus on its impact on human rights).

156. DUNOFF ET AL., *supra* note 63, at 346.

157. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.").

158. William S. Dodge, Morrison*'s Effects Test*, 40 SW. L. REV. 687, 687 (2011).

> [A] state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory.[159]

The Restatement (Third) also places certain limits on the exercise of jurisdiction, even when one of its aforementioned bases is present, through a multifactor balancing test for reasonability that examines the regulating state's link to the activity being regulated, the connections between the person responsible and the regulating state, the character and importance of the activity being regulated, the importance and compatibility of regulation to the international system, and the interest of and likelihood of conflict with another state in regulating the activity.[160] Thus, the Restatement (Third) gives some guidance, though no definite rules, on the exercise of jurisdiction against a foreign company, such as JGC, for an act that occurs in a foreign country but that has at least some territorial nexus to the regulating country. The next Subsection, therefore, turns to specific Supreme Court precedent on extraterritoriality and territorial effects.

2. *Territorial Effects and Extraterritoriality in American Law*. There is a strong presumption that American laws, including the FCPA, do not apply abroad if there is no clear indication of congressional intent to do so.[161] The Supreme Court has long resisted applying American laws to noncitizens for actions taken outside of the United States despite Congress's constitutional authority to

159. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402. The Restatement (Third) is considered to be quite authoritative in this field and is cited by the Supreme Court in foreign-relations cases. *E.g.*, Samantar v. Yousuf, 130 S. Ct. 2278, 2285 n.6, 2290 n.15 (2010); Medellín v. Texas, 552 U.S. 491, 506 n.3 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331, 346, 377, 381 (2006).

160. RESTATEMENT (THIRD) THE OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403.

161. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code).

legislate extraterritorially.[162] The Supreme Court's jurisprudence surrounding territoriality and the territorial-effects test has wavered between a balancing test similar to that advocated by the Restatement (Third) and more categorical modes of analysis, but the core hesitance to apply American law to noncitizens and nonterritorial conduct has remained.[163] This reluctance is particularly

162. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.").

163. This footnote provides a brief analysis of the history of extraterritoriality in American jurisprudence to demonstrate the resilience of the presumption against extraterritoriality throughout the past century and to introduce the key cases and concepts that are discussed throughout Part III.A.2.

Until the second half of the twentieth century, the United States followed a strict territoriality rule; courts applied only domestic legislation to acts that occurred within the country. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined by the law of the country where it is done."), *overruled by Morrison*, 130 S. Ct. 2869. Following World War II, the Second Circuit, sitting on a special panel as the nation's highest court, extended the reach of the territorial principle by replacing strict territoriality with a test examining the foreign conduct's effect in the forum state, creating a broader jurisdictional reach. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 444 (2d Cir. 1945) ("[I]t is settled law . . . that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders which the state reprehends."). Increasing globalization had rendered strict territoriality too restrictive to meet American needs abroad. DUNOFF ET AL., *supra* note 63, at 333. *Alcoa*, 148 F.2d 416 (2d Cir. 1945), became well established in courts as the territorial-effects doctrine, which holds actors liable for extraterritorial actions if three conditions are met: (1) Congress intends extraterritorial application; (2) defendants intend their actions to produce effects within the United States; and (3) defendants' actions do produce substantial effects within the United States, *see, e.g.*, Rivard v. United States, 375 F.2d 882, 887 (5th Cir. 1967) (applying the territorial-effects doctrine). Because lower courts had varying interpretations of what establishes substantial effects within the United States, the Ninth Circuit attempted to clarify this standard in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), *superseded by* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (2006)), by creating a balancing test to weigh domestic and international interests in a manner similar to that which was later articulated in the Restatement, *see supra* notes 159–160 and accompanying text.

The next major Supreme Court decision in this area significantly swung the pendulum of extraterritorial jurisdiction back toward a more categorical presumption against extraterritorial application of American law. *Aramco*, 499 U.S. at 250–56. The Court, however, outlined a different test in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, asking whether a "true conflict" between compliance with U.S. law and foreign law exists, *id.* at 798. Although this test appears to be a departure from prior jurisprudence, it still reiterates the key presumptions that American laws are territorial in nature and should not be interpreted in a way that violates international law. Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 140 (2010). The latest case in this line, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), applies the presumption against extraterritoriality with renewed vigor, *see id.* at 2877 ("When a statute gives no clear indication of an extraterritorial application, it has none."). The Supreme relevant in criminal law.[164] As the Supreme Court clarified in *Morrison v. National Australia Bank*,[165] this presumption is particularly strong when the intended effects of the illegal action are felt outside of the United States.[166]

Morrison examined, and rejected, a claim for extraterritorial application of another section of the 1934 Act, section 10(b).[167] The events that led to the suit began when an Australian bank whose stock was not traded on U.S. exchanges purchased a Florida mortgage-servicing company.[168] After the bank wrote down over $2 billion of the mortgage company's value, Australians who purchased the bank's shares before the write-down brought suit in U.S. District Court in New York, alleging that figures from the mortgage company's valuation models that had been represented in the bank's annual reports constituted manipulative and deceptive practices under section 10(b) and its accompanying regulations.[169] In rejecting the shareholders' claims, the Court created a more definite rule to prevent the judiciary from guessing Congress's intention in each piece of legislation with possible extraterritorial application; after *Morrison*, courts simply apply a presumption against extraterritoriality across the board.[170] If Congress desires the application of a law to conduct abroad, it must specifically state that

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Court's stance in *Morrison* is much more direct than *Hartford Fire*'s "true conflicts" test or the balancing tests of *Timberlane* and the Restatement (Third). *Morrison*, therefore, holds the key to analyzing the FCPA's application abroad.

164. *See* Blackmer v. United States, 284 U.S. 421, 436–39 (1932) (holding that a citizen of the United States can be held criminally liable for violations of American laws committed abroad, but that unless Congress makes clear an intent for the law to apply extraterritorially, a criminal statute only applies within the United States); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 620, 641–42 (1818) (holding that criminal piracy committed by a foreigner can only be tried by the courts of the United States if the piracy is a violation of the law of nations because "congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences").

165. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

166. *Id.* at 2883–85.

167. *Id.* at 2875; *see also* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006) ("It shall be unlawful . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance . . . . "). The suit in *Morrison* was brought as a private right of action. *Morrison*, 130 S. Ct. at 2876. FCPA cases, by contrast, are brought as enforcement actions by the government.

168. *Morrison*, 130 S. Ct. at 2875.

169. *Id.* at 2875–76.

170. *Id.* at 2881.

in the text.[171] Justice Scalia justified the presumption as the only way to avoid "[t]he results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court."[172]

The FCPA's regulation of foreign companies, somewhat surprisingly due to its international character, fits remarkably well into *Morrison*'s framework for the application of the presumption against extraterritoriality. First, the presumption against extraterritoriality is *very* strong and can only be rebutted by a clear indication of congressional intent for extraterritorial application.[173] As shown in Part II.B, the FCPA's legislative history indicates, if anything, that Congress was reluctant to prescribe conduct for foreign entities without a meaningful connection to the United States, rather than eager for the broad applicability underlying current enforcement practices.[174]

Second, and most critically, the presumption against extraterritoriality even applies to cases when there are some domestic connections.[175] There will usually be some aspect of territoriality in any FCPA case that attracts DOJ enforcement, but a limited territorial connection—such as a wire transfer in which funds pass through the United States or an e-mail sent to the United States—should not be not sufficient to disturb the presumption against extraterritoriality. *Morrison* itself proves that the presumption applies even in cases with a significant connection to the United States. In that case, a company allegedly fraudulently manipulated its financial models and made "misleading public statements" in Florida.[176] Because "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," and the securities in question in *Morrison* were

171. *See id.* at 2881 n.5 ("But when it comes to 'the scope of [prohibited conduct], the text of the statute controls our decision.'" (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994))).

172. *Id.* at 2881.

173. *See id.* at 2878 ("When a statute gives no clear indication of an extraterritorial application, it has none."). For examples of such a clear indication, see *supra* note 131 and accompanying text.

174. *See supra* notes 135–143 and accompanying text.

175. *See Morrison*, 130 S. Ct. at 2884 ("For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.").

176. *Id.* at 2883–84.

only being traded abroad, the Court held that the United States should decline jurisdiction.[177] Although the FCPA is not exactly analogous to the 1934 Act, the same "focus analysis" can be applied to FCPA cases—the focus of the FCPA is the place of the *origin* of the bribery and the place of the *act* entailing the crime.[178] Territorial liability should not be premised upon a mere pass-through or tangential connection.

Third, the presumption against extraterritoriality is a statutory canon of construction designed to deal with ambiguity in a U.S. statute.[179] The division between extraterritoriality and territoriality in § 78dd-3 is deeply ambiguous. As Parts II and III.A have shown, there are two plausible constructions of this provision: one which offers a near-limitless application to foreign nonissuers' actions abroad or another which offers a constrained application that gives meaning to the territorial clause of § 78dd-3. Without the presumption, courts would be forced to choose one of these two viable alternatives when examining whether any given conduct with a minimal territorial connection meets the "while in the territory of the United States" requirement. The presumption against extraterritoriality, however, makes the choice for the court: the canon adds "persuasi[on]" to what was formerly merely one of several "plausible" constructions.[180]

Fourth, the presumption against extraterritoriality applies "regardless of whether there is a risk of conflict between the American statute and a foreign law."[181] This is particularly important in the case of the FCPA, which occupies a field in which there is significant foreign legislation and several international treaties.[182] If

177. *Id.* at 2884.

178. The FCPA prohibits particular acts that issuers and their agents may take to obtain business. *See* 15 U.S.C. § 78dd-1 (2006) (defining the actus reus of the crime as "mak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value"); *id.* § 78dd-2 (same); *id.* § 78dd-3 (same); *see also supra* Part I.A.

179. *Aramco*, 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code).

180. *See id.* ("We need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application . . . . Each is plausible, but no more persuasive than that.").

181. *Morrison*, 130 S. Ct. at 2877–78.

182. *See supra* Part I.A.3.

international norms on the subject mandated extraterritorial application to the broadest extent possible, courts could still apply this presumption instead of relying on other canons of foreign relations law, such as those considered in Part III.C.[183] This aspect of the presumption against extraterritoriality is important in its application to the FCPA because it provides a simplicity that analysis of foreign relations law often lacks.[184]

Finally, this approach has two additional benefits. First, it avoids a construction of the statute that could have negative foreign-policy effects because the presumption against extraterritoriality discourages courts from extending American jurisdiction beyond the outer limits of what is internationally acceptable.[185] This is a logical result because avoiding conflict with other nations motivates the presumption against extraterritoriality in the first place.[186] A powerful presumption against extraterritoriality also obviates certain separation-of-powers concerns that accompany the nonpolitical branch's involvement in an issue wrought with policy decisions, like international corruption.[187] Because there is a clear rule, the judiciary's decisions do not appear to be made on an ad hoc or inconsistent basis. The second benefit is that this approach is in line with recent precedent from the United States District Court for the District of Columbia. In 2012, Judge Richard Leon acquitted a defendant charged with an FCPA violation for want of jurisdiction.[188] Judge Leon rejected the DOJ's argument that a United Kingdom citizen who mailed a package from London to the United States committed an act that established jurisdiction under § 78dd-3.[189]

183. Some scholars would disagree with this statement, but others would embrace the courts' narrow construction of international law without clear congressional intent to apply it domestically. *See infra* note 213 and accompanying text.

184. *See, e.g.*, *supra* Part II and note 163.

185. *See supra* notes 91–93 and accompanying text.

186. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (justifying strict territoriality on the grounds that it forestalls conflict with a foreign sovereign), *overruled by Morrison*, 130 S. Ct. 2869 (2010).

187. For an analysis of separation-of-powers concerns in foreign-relations issues, see generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

188. United States v. Goncalves, No. 09-335 (D.D.C. 2012) (granting motion to dismiss).

189. *See FCPA Summer Review 2011*, MILLER CHEVALIER (July 13, 2011), http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=60408 ("I would think the more cautious, conservative interpretation would be that each act has to be while in the territory of the United States." (quoting Judge Leon) (internal quotation marks omitted)); *see also* Indictment at 5, United States v. Goncalves, No. 1:09-cr-00335-RJL4 (D.D.C. Apr. 16,

B. Rebutting the Critics

Critics may argue that the international nature of the FCPA negates the presumption against extraterritoriality; after all, other parts of the FCPA contain an alternative-jurisdiction provision specifically providing for extraterritoriality. This argument, however, actually strengthens the presumption's applicability to § 78dd-3, which provides for application only "while in the territory of the United States." The absence of an alternative-jurisdiction provision coupled with the territorial phrase in § 78dd-3 creates a sharp contrast with the other two of the FCPA's antibribery provisions. Therefore, courts should give meaning to Congress's clear omission.[190] In *Morrison*, the Court used a similar line of analysis, juxtaposing section 10(b) against section 30(b) of the 1934 Act, a similar provision that, unlike section 10(b), does explicitly provide for extraterritorial application.[191]

Similarly, although the Court justified the presumption against extraterritoriality by reasoning that Congress's primary concern is the domestic sphere,[192] this statement does not refute the presumption against extraterritoriality with regard to the inherently international FCPA. First, the presumption that Congress is focused on domestic effects is merely a presumption; it is not a mandatory statement of the only circumstances in which this canon may apply. The text of § 78dd-3 overcomes an argument that the FCPA is out of the reach of the presumption against extraterritoriality by its explicit statement of territorial effect. A second, alternative counterargument focuses on the legislative history. Congress passed the original FCPA to regulate *American* entities; subsequent amendments were passed to benefit American companies, who argued that they were disadvantaged by the regulations.[193] Even though the FCPA deals with an international

2010) ("[Pankesh Patel] was a citizen of the United Kingdom and, as such, was a 'person' other than an issuer or a domestic concern as that term was defined in the FCPA." (quoting 15 U.S.C. § 78dd-3(f)(1) (2006))); *id.* at 24–25 (alleging that, in violation of the FCPA, Patel mailed a package to the United States in connection with the bribery).

190. *See, e.g.*, Lindh v. Murphy, 521 U.S. 320, 330 (1997) (discussing and applying the canon of construction of "negative implications raised by disparate provisions").

191. *Morrison*, 130 S. Ct. at 2882–83; *see also* Securities Exchange Act of 1934 § 30(b), 15 U.S.C. § 78dd(b) (2006) ("The[se] provisions . . . shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate to prevent the evasion of this chapter.").

192. *Morrison*, 130 S. Ct. at 2877.

193. *See supra* note 146 and accompanying text.

problem, it is solidly rooted in the domestic arena, over which Congress is presumed to legislate.

Other critics may cite *Pasquantino v. United States*,[194] a 2005 Supreme Court case holding that Canadian defendants violated 18 U.S.C. § 1343, the wire-fraud statute, by making simple phone orders from American liquor stores and developing a subsequent plan to smuggle the liquor into Canada to avoid paying Canadian taxes.[195] Despite the lack of territorial connection other than the phone call, the Court found the defendants liable because the statute criminalizes the "scheme" itself, so the criminal act was completed as soon as defendants used the telephone to set it up.[196] In *Morrison*, however, the Supreme Court distinguished *Pasquantino* because *Pasquantino* dealt with the wire-fraud statute, which, unlike section 10(b) of the 1934 Act, was "without any requirement that it be 'in connection with' any particular transaction or event."[197] The same analysis distinguishes a violation under the wire-fraud statute that was at issue in *Pasquantino* from an FCPA violation under § 78dd-3, which is predicated on an act occurring "while in the territory of the United States."

C. Foreign-Relations Alternatives to the Presumption Against Extraterritoriality

Because the presumption against extraterritoriality is merely one of several canons of construction used in foreign relations law, this Section examines possible alternatives to the limiting theory posited in the previous Section. It begins with the borrowed-treaty rule and follows with an examination of the *Charming Betsy* canon. Both subsections first describe the relevant interpretive technique and then apply that method to the FCPA's provisions on territoriality.

1. *The 1998 Amendments as Implementing Legislation.* Foreign-relations-law scholars explore the interplay between statutory interpretation and treaty text, and one scholar has recently developed

194. Pasquantino v. United States, 544 U.S. 349 (2005).

195. *Id.* at 353–55.

196. *Id.* at 371.

197. *See Morrison*, 130 S. Ct. at 2887 ("Section 10(b) by contrast, punishes not all acts of deception, but only such acts 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.' Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of the statute." (quoting Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b))).

an interpretive framework for legislation that, like the FCPA's 1998 amendments, incorporates treaty provisions.[198] The so-called "borrowed treaty rule" suggests that "the court's interpretation of an incorporative statute should always be consistent with its interpretation of the source treaty text unless there is compelling evidence that Congress, in enacting the statute, intended to deviate from the rule set forth in the treaty."[199] Though the term "borrowed treaty rule" is a scholarly creation, the Supreme Court has frequently used this interpretive technique.[200] Although the 1998 FCPA amendments—as implementing legislation of the OECD Convention—seemingly fit well within this foreign-relations-law mechanism, examining the OECD Convention yields no more information than this Note's prior examination of the legislative history of the FCPA amendments on the scope of the FCPA's exterterritorial application.

The FCPA and the OECD Convention fit well into the framework of the borrowed-treaty rule for three reasons. First, the legislative history indicates on multiple occasions that the FCPA amendments are implementing legislation for the OECD Convention.[201] Second, the 1998 amendments directly mirror the text of the treaty, which had in turn used the FCPA as a template.[202] Third, the legislative history from 1998 pulls understandings directly from the official commentaries to the OECD Convention that explain the

198. *See* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 663 (2010) ("The goal of this Article is to develop a framework that provides a more robust and comprehensive understanding of those statutes that incorporate language and concepts derived from treaties to which the United States is a party.").

199. *Id.* at 669–70 (emphasis omitted).

200. *See, e.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 534–37 (1995) (interpreting section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. app. §§ 1300–1315 (1994), in line with the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Aug. 25, 1924, 51 Stat. 233, on which the American statute was modeled); INS v. Cardoza-Fonseca, 480 U.S. 421, 436–41 (1987) (construing the term "well-founded fear" in the statutory definition of a refugee in accordance with Article 1(2) of the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, to which the United States was a signatory). *But see* INS v. Stevic, 467 U.S. 407, 427–28 (1984) (finding no ambiguity in a questioned term in section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h) (1976), and thus refusing to turn to a relevant treaty on the subject).

201. S. REP. NO. 105-277, at 1, 2, 3–6 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt277/pdf/CRPT-105srpt277.pdf.

202. *See supra* Part I.A.3.

meaning of certain OECD Convention provisions.[203] Given the strength of the connection between the 1998 amendments and the OECD Convention, it is logical to use the OECD Convention to interpret the amendments' ambiguities. Furthermore, the context of the jurisdictional amendments suggests that they fall within the borrowed-treaty framework.[204]

Although on a theoretical level the OECD Convention should shed light on the DOJ's prosecution of foreign companies for foreign bribery, it actually does not add relevant information to the domestic legislative history. Article 4(1)'s territorial standard—that signatories must criminalize offenses "committed in whole or in part in its territory"[205]—provides no more guidance than the ambiguous provision in 15 U.S.C. § 78dd-3. It is silent on the borderline cases, such as that of JGC, that involve a simple transfer of funds or electronic messages through a particular territory.

The OECD Convention's Commentaries provide some clarification: "The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[206] This explanation again does not add insight beyond the contradictory legislative history of the FCPA, which provides an identical statement: "Congress intends that the 'territorial basis for jurisdiction should be interpreted broadly so that

203. H.R. REP. NO. 105-802, at 22 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt802/pdf/CRPT-105hrpt802.pdf ("As envisioned in the OECD the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." (citing Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, cmt. para. 25, 37 I.L.M. at 10)).

204. Congress thought of the jurisdictional changes to the FCPA as implementing the OECD Convention Article 4(4) requirement that a signatory "shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps." Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, art. 4(4), 37 I.L.M. at 5. Specifically, Article 4(1) mandates that a signatory "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," *id.* art. 4(1), 37 I.L.M. at 5, which formed the basis for the addition of 15 U.S.C. § 78dd-3, *see supra* text accompanying note 85. Article 4(2), the impetus for the addition of the alternative-jurisdiction provisions that apply to issuers and domestic concerns, requires that a signatory nation takes adequate steps to "prosecute its nationals for offences committed abroad" if the nation's laws allow for extraterritorial jurisdiction based on the nationality principle. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, art. 4(2), 37 I.L.M. at 5.

205. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, art. 4(1), 37 I.L.M. at 5.

206. *Id.* cmt. para. 25, 37 I.L.M. at 10.

an extensive physical connection to the bribery act is not required.'"[207] The OECD Convention has no official drafting history to provide additional guidance on the extent of the territorial connection.[208] Thus, this alternative foreign-relations-law technique falls short of offering limiting principles that are provided by the presumption against extraterritoriality.

2. *The* Charming Betsy *Canon.* From the earliest days of the nation, the Supreme Court has chosen to interpret American law with the presumption that Congress does not intend to violate international norms.[209] This presumption, dubbed the *Charming Betsy* canon, "became the bedrock for a series of later decisions involving international law and judicial construction"[210] and continues to be influential.[211] One of its traditional uses has been to avoid potential conflicts between statutes and customary international law, often in questions of extraterritorial effects.[212] The *Charming Betsy* canon "is relevant to determining the substantive reach of a statute because 'the law of nations' . . . includes limitations on a nation's exercise of its jurisdiction to prescribe."[213] The canon emerged to safeguard against the possible effect of judicial decisions on American foreign policy

207. S. REP. NO. 105-277, at 6 (1998) (quoting Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, cmt. para. 25, 37 I.L.M. at 10), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt277/pdf/CRPT-105srpt277.pdf.

208. OECD, OECD ANTI-BRIBERY CONVENTION: OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 1 (2011), *available at* http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/46510795.pdf.

209. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801) ("[W]e think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.").

210. Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 213 (1993).

211. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other Nations. . . . This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (Scalia, J., dissenting) ("[S]tatutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.").

212. Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 489 (1998).

213. *Hartford Fire*, 509 U.S. at 815.

due to the sensitive nature of international relations.[214] Although scholars have argued against its broad use to incorporate international norms into American law through the judiciary,[215] it remains an important interpretive tool in U.S. law.[216]

Often, the *Charming Betsy* canon is used to invoke the norms of customary international law.[217] International norms against public corruption, however, have not yet reached the level of *jus cogens* or customary international law, so treaties form the basis of the international law analysis.[218] Because the OECD Convention is one of the primary treaties against which norms of antibribery laws' scope can be determined, this Subsection looks first to that document. The

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214. *See* Coyle, *supra* note 198, at 701 ("Although the [*Charming Betsy*] Court is not explicit on this point, it appears from the decision that the importance of avoiding a conflict between the statute and those rights possessed by neutral parties under international law informed the Court's decision to adopt two specific constructions of the Non-Intercourse Act[, Act of Feb. 27, 1800, ch. 10, 2 Stat. 7].").

215. *See id.* at 708–09 ("Professor Bradley [argues that] an expansive reading of the *Charming Betsy* canon is undemocratic in that it amounts to 'a mandate for court-supervised incorporation of international law' and that the canon 'simply allows courts to avoid unintended clashes with international law,' leaving 'the ultimate questions of incorporation and international law compliance to the U.S. political branches.'" (citation omitted) (quoting Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 546–47 (1999))). Instead of taking an internationalist view, Professor Bradley justifies the canon from a separation-of-powers perspective. *See* Bradley, *supra* note 212, at 525 ("[T]he separation of powers conception views the *Charming Betsy* canon as a means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government.").

216. Because there is a debate about the extent to which courts employing the *Charming Betsy* canon should seek out international norms to incorporate them into domestic law, this Note takes a narrow approach and only examines jurisdictional provisions of the leading antibribery treaties.

217. *See* Bradley, *supra* note 212, at 488–90 (noting that the *Charming Betsy* canon has been used to avoid possible conflicts with treaties as well as "to avoid constructions of statutes that would violate customary international law").

218. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 325 (2d Cir. 2007) ("Without an analysis of the laws enacted by the various signatories, it is impossible to draw any conclusions regarding the practice of states with regard to the issue of the degree of corporate liability for violation of international law norms. Indeed, as Professor Bassiouni has observed, although 'contemporary international efforts to deal with organized crime, corruption, and drug trafficking' are moving in the direction of corporate liability 'these new concepts of corporate criminal responsibility have not yet found their way into [customary international law].'" (footnote omitted) (alteration in original) (quoting M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 377 (2d rev. ed. 1999))), *aff'd for lack of quorum sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 333 (2009) (noting that although corruption is frowned upon, a norm against corruption is not recognized as *jus cogens*).

OECD Convention's Commentaries contain broad notions of territorial application. That is, "an extensive physical connection to the bribery act is not required."[219] The OECD Convention's recommendations, however, also contain the significant caveat that a signatory should act "in conformity with its jurisdictional and other basic legal principles."[220] Given its acquiescence to domestic law, the OECD Convention appears to establish neither limitations to a broad construction of the FCPA's territorial section nor positive obligations to apply a limited territorial nexus to the questioned provision.

The other key treaty establishing international norms on anticorruption enforcement is the 2003 United Nations Convention Against Corruption,[221] hailed as "the most widely accepted international anti-bribery agreement."[222] This treaty has a specific article devoted to the "Protection of Sovereignty," which explicitly states that "[p]arties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[223] Although this article "refuses to endorse the kind of extraterritorial prosecutions of foreign bribery pursued by the United States,"[224] it also provides for broad signatory autonomy on issues of jurisdiction in Article 42(6).[225]

219. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 31, cmt. para. 25, 37 I.L.M. at 10.

220. Council for Further Combating Bribery of Foreign Pub. Officials in Int'l Bus. Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions art. 3, *in* OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS 20, 21 (2011).

221. United Nations Convention Against Corruption, *opened for signature* Dec. 9, 2003, S. TREATY DOC. NO. 109-6 (2005), 2349 U.N.T.S. 41. Several regional organizations also have localized anticorruption conventions. *E.g.*, African Union, Convention on Preventing and Combating Corruption, *opened for signature* July 11, 2003, 43 I.L.M. 5 (2005); Council of Europe, Criminal Law Convention on Corruption, *done* Jan. 27, 1999, Europ. T.S. No. 173; Organization of American States, Inter-American Convention Against Corruption, *done* Mar. 29, 1996, 35 I.L.M. 724 (1996).

222. *Developments in the Law—Extraterritoriality*, *supra* note 82, at 1286.

223. United Nations Convention Against Corruption, *supra* note 221, art. 4(1), S. TREATY DOC. NO. 109-6 at 26, 2349 U.N.T.S. at 147.

224. *Developments in the Law—Extraterritoriality*, *supra* note 82, at 1286.

225. *See* United Nations Convention Against Corruption, *supra* note 221, art. 42(6), S. TREATY DOC. NO. 109-6 at 43, 2349 U.N.T.S. at 164 ("Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.").

Therefore, it is not evident that adoption of expansive jurisdictional reach would explicitly violate the OECD Convention.

The undefined scope of the phrase "in the territory" contained in the various conventions coupled with their general deference to domestic law preclude the use of the *Charming Betsy* canon to determining the scope of the FCPA's extraterritorial application.[226] It only applies when an ambiguous U.S. statute, such as 15 U.S.C. § 78dd-3, can be interpreted as either conforming with or deviating from established international law. Here, the international norms contain the same ambiguity as the FCPA itself. Thus, much like the possibility of interpreting the FCPA in light of the OECD Convention, the *Charming Betsy* canon does not provide any information beyond the traditional interpretive techniques discussed in Part II. Therefore, the presumption against extraterritoriality appears to be the best limiting principle to curb the current application of the FCPA to foreign parties for foreign actions.

CONCLUSION

FCPA enforcement actions have expanded in number, size, and scope, and prosecutorial decisions have directed enforcement actions at an expanded range of violators, including foreign individuals and foreign companies that do not issue stock on American exchanges. These developments have led to many cases, such as the prosecution of JGC, which illustrate the same phenomenon: expansive jurisdictional theories that push the statute's text and history to its outermost limits. Because deferred-prosecution agreements are so prevalent, courts have not ruled on the propriety—or legality—of the DOJ's expansive theories of jurisdiction arising from vicarious liability and merely tangential territorial connections. Therefore, this Note tests these broad prosecutorial theories against a range of interpretive techniques.

In the end, the strengthened, post-*Morrison* presumption against extraterritoriality defines the ambiguity in the FCPA's text regarding

226. A broader application of the *Charming Betsy* canon to incorporate customary international law could be used to advocate a more limited jurisdictional theory in relation to territorial acts of foreign parties. This Note's goal, however, is to propose a framework for interpreting the FCPA rather than to broadly comment on the scope of the *Charming Betsy* canon. Because the narrower presumption against extraterritoriality resolves the FCPA's ambiguity, *see supra* Part III.A.2, this Note does not broadly consider customary international-law norms.

territoriality and provides a limiting principle for the scope of the FCPA. This Note, therefore, urges the application of foreign-relations-law canons of construction, such as those used here, to settle questions regarding the application of American law abroad and limit expansive corporate crime statutes' extraterritorial effects. Although the presumption against extraterritoriality is best applied to the FCPA's provisions, another foreign-relations canon may provide the answer for a different U.S. statute.