FCPA JURISDICTION OVER FOREIGN ENTITIES

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The FCPA has broad international application. That does not mean that the United States has authority over every individual on the planet Earth.

In order to establish jurisdiction over a foreign agent of a U.S. company or non-U.S. issuer, a foreign entity must commit an act in furtherance of an FCPA violation "while in the territory of the United States." 15 U.S.C. § 78dd-3. The DOJ has interpreted this phrase to create jurisdiction if the foreign entity causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.

While no courts have specifically addressed this aggressive interpretation of the jurisdictional provisions of the FCPA as it applies to foreign entities, DOJ and the SEC have obtained settlements relying on this interpretation (e.g. where illicit payments were "authorized by the company's board chairman, while in the Central District of California, and paid in cash in Taiwan via hand-delivered, sealed envelopes")

Alternatively, the Justice Department has articulated novel "correspondent account jurisdiction" to assert jurisdiction over foreign nationals and entities for alleged FCPA violations. In *U.S. v. Christian Sapsizian*, a French citizen, who was deemed an agent or an employee of an "Issuer," was sentenced to prison for allegedly assisting in the payment of $2.5 million in bribes to Costa Rican officials on behalf of Alcatel, a French company whose shares were traded in the U.S. through ADRs. Mr. Sapsizian's "act in furtherance of the corrupt payment to take place within the territory of the United States," was that he arranged for payments to foreign officials through wire transfers that passed through U.S. financial institutions.

And in the Siemens and Halliburton and KBR actions, the DOJ and SEC included allegations that jurisdiction could be established due to illicit transactions passing through correspondent accounts. In the settlement with Technip, a French company that qualifies as an "Issuer," the Justice Department cited "wire transfers …to be sent from [a] bank account in Amsterdam…to bank accounts in New York…to be further credited to bank accounts in Switzerland and Monaco…to use to bribe Nigerian government officials." *U.S. v. Technip S.A.*, Case 4:10-cr-00439, Information (Jun. 28, 2010). Thus, if a foreign individual facilitated illicit payments to foreign officials which were routed through U.S. financial institutions or correspondent accounts, even if unknown to the actor, DOJ will try and assert jurisidiction.

It is not clear that a federal judge would uphold such a theory for assertion of personal jurisdiction. Federal judges, unlike their counterparts in the United Kingdom, have not scrutinized the legal basis for some of the government's settlements. Judges need to wake up and look behind the curtain to determine if the Justice Department's theory of jurisdiciton is supported udner the law. A settlement between the parties should not foreclose such an inquiry. Companies have no choice but to settle and give in to otherwise weak legal theories. It is by no means clear that a foreign actor who engages in bribery and wires the funds from one foreign

location to another should be subject to US jurisdiction by reason of a mere happenstance that the wired funds traveled through a US bank's correspondent account. The rule of law cannot be allowed to vary based on Justice Department policies and interpretations. Judges need to exercise responsible overview of the settlement process to guard against indefensible legal interpretations.