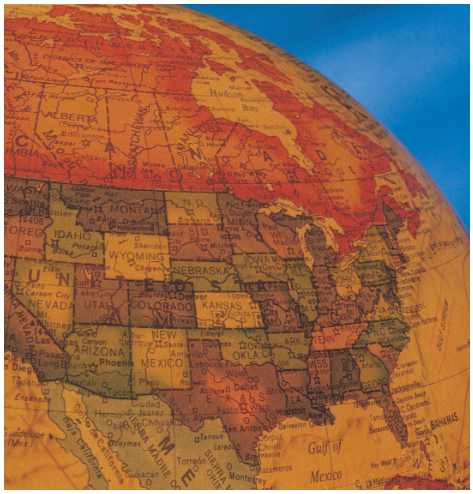
U.S. Foreign Corrupt Practices Act's Applicability To Non-U.S. Entities Sponsoring American Depository Receipts

by Matthew J. Feeley[1]

This article discusses the U.S. Foreign Corrupt Practices Act's (FCPA) bribery and accounting provisions, their jurisdictional requirements and applicability to foreign entities sponsoring American depository receipts (ADRs) on U.S. securities markets.[2] These issues continue to gain importance as the global economy becomes increasingly integrated and companies based outside the United States seek to participate in the U.S. securities markets through the sponsorship of ADRs. Many times these foreign entities are completely unaware that the simple sponsorship of ADRs on U.S. markets — without any other jurisdictional act, conduct or nexus may alone be enough to subject the foreign entity to the expansive power of the FCPA and the American federal judicial system. As such, this article is written with a mind to the international practitioners that may be attempting to evaluate potential liability and jurisdictional predicates or to pro-actively counsel an ADR sponsoring client with regard to the FCPA.

In response to various corporate scandals involving the bribing of foreign officials to obtain government contracts, in 1977 the U.S. Congress enacted the FCPA. The FCPA allows the U.S. government to pursue civil and criminal penalties against foreign and domestic entities that convey or seek to convey improper payments or benefits to foreign officials (the "bribery" provisions) and that fail to maintain accurate books and records regarding such conveyances (the "accounting" provisions). The FCPA's provisions apply to all "issuers," a term that includes sponsors of ADRs. For a U.S. court to exercise authority over an issuer, however, the court must first have both subject-matter jurisdiction over the alleged illegal conduct and personal jurisdiction over the issuer.



Although there is little case law on the subject, the statutory framework and commentary from both the U.S. Securities and Exchange Commission (SEC) and U.S. Department of Justice (DOJ) counsel that lack of subject matter jurisdiction may be asserted by an ADR sponsoring issuer as a successful defence to allegations of a violation of the FCPA bribery provisions where no communication or act in furtherance of the alleged bribery passed through or occurred in the United States. U.S. courts, however, are more likely to find subject-matter jurisdiction over a foreign ADR sponsor with respect to the FCPA accounting provisions because ADR sponsorship and the attendant required regulatory filings and disclosures may be enough to satisfy subject matter jurisdiction requirements.

Personal jurisdiction over a foreign ADR sponsor may be found by U.S. courts examining claims under both the FCPA bribery and accounting provisions because the foreign entity, as an ADR sponsor; has had "continuous and systematic" contact with the United States. While the specific factual circumstance is entirely untested in U.S. courts, an ADR sponsor's daily participation in U.S. securities markets may establish such entity's 'continuous and systematic' contact in the United States which would subject it to personal jurisdiction in connection with a potential ECPA action. While this remains an open question and, from the standpoint of SEC and DOJ enforcement, any assertion of personal jurisdiction in this context must involve significant considerations of the international communities' sensitivity to the extension of U.S. extraterritorial jurisdiction, when evaluating potential exposure a foreign ADR sponsor would be wise to consider that such a finding of personal jurisdiction is a very real possibility in U.S. courts.

FCPA bribery provisions

The FCPA bribery provisions comprise three separate statutory sections (15 USC §§ 78dd-1; 78dd-2; 78dd-3) that apply to different classes of individuals and business entities. Only one, section 78dd-1, applies to foreign entities sponsoring ADRs on U.S. markets.[3] Section 78dd-1 applies to foreign ADR sponsors as "issuers" because they are entities that have issued securities that have been registered in the United States and are required to file periodic reports with the SEC.[4]

In substance, section 15 USC § 78dd-1 of the FCPA "prohibits any issuer of U.S. securities or any officer; director, employee, or agent, thereof — from making use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an improper payment to a foreign official, political party or officer, or intermediary."

Under the FCPA bribery provisions, for a payment to be "corrupt" it must be intended to influence the recipient to "misuse his official position" in order wrongfully to direct or obtain business.[5] A "'foreign official' is any officer or employee of a foreign

government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, instrumentality, or for or on behalf of any such public international organization."[6] An "intermediary" is any person or entity that an entity utilizes as a liaison knowing that all or some of a payment made to such liaison will be passed on improperly to a foreign government official. An entity is considered to have knowledge of a payment through an intermediary if it is aware of a "high probability" that the payment will be made and consciously disregards that probability.[7]

The FCPA bribery provisions not only prohibit monetary payments and gifts, but also prohibit the giving of "anything of value." Anything of value is broadly construed to include both tangible and intangible benefits that the receiving party subjectively believes to be of value.[8] Under U.S. jurisprudence, the term has been interpreted so broadly as to include loans,[9] promises of sex,[10] stock shares,[11] the testimony of a witness[12] and information.[13]

The FCPA bribery provisions provide for criminal penalties. The maximum criminal penalty for a 'willful' violation is $25 million for business entities and $5 million and up to 20 years' imprisonment for individuals.[14]

In addition, the FCPA bribery provisions provide for civil penalties. For violations by an issuer, the SEC may bring a civil action to impose a penalty or disgorge profits ranging from $50,000 to $500,000 (or more if the "gross pecuniary gain" exceeds $500,000).[15] The SEC can also bring a civil action to enjoin any act or practice if an issuer that is or may be violative of the FCPA.[16] Fines imposed on individuals, for either criminal or civil penalties, may not be paid by the individual's employing entity.[17]

The statute of limitations for both criminal and civil FCPA bribery violations is five years.[18] When the DOJ initiates an investigation that requires it to request information from foreign countries, however, the limitations period in criminal actions may run for an additional three years once a request to a foreign country is filed with a U.S. federal court.[19] Further, the U.S. government routinely seeks to enforce the FCPA bribery provisions based on ongoing activity that began prior to when an entity became an issuer and continued into the five-year period.[20]

Subject-matter jurisdiction under the FCPA bribery provisions

To satisfy subject-matter jurisdiction, a civil claim or a criminal charge brought under the FCPA bribery provisions requires that at least one of the potential defendants make use of some instrumentality of U.S. interstate commerce in furtherance of a bribe[21] and have committed the act in furtherance of the bribe within U.S. territory.[22] If these requirements are sufficiently alleged, "subject-matter jurisdiction" is said to be satisfied and the government's legal claim under the FCPA may move forward in a U.S. court. This interstate nexus may involve use of the mails, telephone, facsimile, electronic mail, etc., in the United States.

The required nexus is also satisfied by the *intrastate* use of any interstate instrumentality in the United States.[23] Moreover, the U.S. nexus need not be present during the entire period of the alleged violation. While the subject-matter nexus requirement may be expansive — and certainly designed to allow a successful claim where the actual bribery act took place outside the United States — subject-matter jurisdiction under the FCPA bribery provisions will not be satisfied without some connection to the United States.

Significantly, a single act within the United States by just one member of any conspiracy to violate the FCPA satisfies the subject-matter jurisdiction requirement of the FCPA bribery provisions for all members of the conspiracy.[24] A U.S. court has jurisdiction over a conspirator and all those proved to be co-conspirators if the conspiracy is designed to have criminal effects within the United States and if there is sufficient proof that at least one of the conspirators committed an overt act in furtherance of the conspiracy with the jurisdiction of the U.S. court.[25]

Mail/telephone/wire

Most U.S. government actions under the FCPA bribery provisions have purported to establish subject-matter jurisdiction by demonstrating the defendant's use of the U.S. mail, telephones or wire systems in furtherance of the bribing scheme. For example, in *United States v. David H Mead and Frerik Pluimers*,[26] the DOJ considered the subject-matter nexus satisfied by proof, in part, that the defendant sent an e-mail from New Jersey to Panama in furtherance of the bribing scheme. In *United States v. Joshua Cantor*,[27] the criminal information charged that the defendant sent several faxes from England to New York and thereafter authorized a wire transfer from New York to Switzerland. In *United States v. Robert Richard King and Pablo Barquero Hernandez*,[28] the indictment alleged a series of faxes between Kansas City, Missouri, and various other places outside Missouri, including Costa Rica.

More recently, in *SEC v. ABB Ltd*,[29] the SEC brought claims against a Swiss technology company for bribing under the FCPA. The SEC alleged that the jurisdictional means was satisfied, in part, because the company wired at least $100,000 earmarked for illegal payments through a U.S. bank account.[30] ABB settled the case with the SEC and accepted an $11 million dollar penalty and disgorgement of its profits.[31]

The U.S. government has also demonstrated its position that the FCPA bribery interstate nexus can be met through a demonstration of the use of interstate travel. For example, in *Mead,* the DOJ considered the subject-matter nexus satisfied, in part, by proof that the defendant caused a subordinate employee to travel by plane from the United States to Panama in furtherance of the bribing scheme.[32]

The FCPA contains no requirement that the use of the requisite interstate jurisdictional facility be directed to the targeted foreign official. The FCPA requires only that the use of an interstate facility be "in furtherance" of the improper payment. To establish that an act was "in furtherance," it is not necessary to show that the illegal conduct would not have occurred "but for" the use of the interstate facility; it is only necessary to show that the act was related to the unlawful conduct and intended to further it in some way.[33] The subject-matter jurisdictional

facility must be used before the proscribed conduct is complete and irrevocable in order to be "in furtherance of" that conduct.[34]

FCPA conspiracy and subject-matter jurisdiction

An FCPA bribery violation can be charged as a conspiracy. To prove an FCPA criminal conspiracy, the DOJ must show an agreement between at least two people and that the agreement's objective was a violation of the law.[35] "Proof of a formal agreement is unnecessary; a tacit understanding is sufficient, and can be proved by direct or circumstantial evidence."[36] Accordingly, U.S. courts are likely to consider the overt act alone member of a conspiracy to satisfy subject-matter jurisdiction of the FCPA statute for all members of the conspiracy.[37] For example, a telephone call from one member of a conspiracy to the United States in furtherance of the conspiracy would satisfy the subject-matter jurisdiction interstate nexus requirements for all members of the conspiracy.[38] In *United States v. King*,[39] the defendant appealed his conviction for conspiracy to violate the FCPA based on the sufficiency of the evidence. The *King* court upheld the conviction and in so doing did not identify any evidence that the defendant himself used an instrumentality of interstate commerce in furtherance of the conspiracy. Instead, the court identified evidence that the defendant was involved in the overall scheme and that a co-conspirator used e-mail to communicate the agreement.[40] This concept is important because, when applied to the FCPA context, it supports the conclusion that the DOJ can prove a case for conspiracy by demonstrating the existence of a mere agreement to violate the FCPA and one act in furtherance of that agreement and that it can prosecute and convict defendants on conspiracy charges in cases in which it cannot show completed violation of the FCPA.[41]

Conclusions and guidance

As demonstrated by these examples, where bribery activity has touched the United States in any way, the interstate commerce nexus of the FCPA bribery provisions will generally be an easy element for the U.S. government to meet.[42] The interstate commerce nexus requirement, however, is nonetheless an indispensable element that must be met if a foreign ADR sponsor, as an issuer, is to be held liable under the FCPA bribery provisions.[43] Therefore, an otherwise improper payment made by, or on behalf of, an ADR sponsor that is executed wholly abroad, without any "in furtherance" interstate nexus connection with the United States, will not satisfy the FCPA bribery provisions subject-matter jurisdiction. Thus, when considering the defence of a potential FCPA bribery case, a foreign ADR sponsor should examine the precise communication, commerce, trade and transport that might be considered by the U.S. government to be "in furtherance" of alleged improper payments. Such an examination should include a thorough internal factual investigation and should include an examination of the actions of any potential co-conspirators. If all of the relevant communication, commerce, trade and transport have no relationship to the United States, the required subject-matter jurisdiction cannot be met and a FCPA bribery cause of action is not likely to be brought by the U.S. government and, if brought, should fail.

Personal jurisdiction under the FCPA bribery provisions

A U.S. court may not exercise jurisdiction over a party in a civil or criminal case unless the court is satisfied both that a defendant has sufficient minimum contacts with the United States[44] and that the exercise of jurisdiction by the U.S. court would be fair to the defendant.[45] If both of these requirements at met, courts are said to have "personal jurisdiction" over the defendant. There are two types of personal jurisdiction: specific and general. General personal jurisdiction will be established where a party's contacts with the United States are continuous and systematic such that the defendant should expect to be held accountable in U.S. courts.[46] Specific personal jurisdiction will only be found if the cause of action arises or is directly related to the party's limited, or "specific," contact with the forum.[47]

The sponsoring of ADRs by a foreign business entity, in and of itself, was sufficient to establish specific personal jurisdiction over an entity in at least one factual circumstance. In *Pinker v. Roche*,[48] a case examining misrepresentations made in violation of U.S. securities law (and therefore not brought under the FCPA), a U.S. court recognized personal jurisdiction over a Swiss corporation based on its sponsorship of ADRs. In *Pinker*, the court found personal jurisdiction because the defendant, solely by sponsoring the ADRs, had "'purposefully avail[ed] itself of the privilege of conducting activities' in the American securities market, and thereby established minimum contacts with the United States."[49] As the court stated, "[A] foreign corporation that purposefully avails itself of the American securities market has adequate notice that it may be hauled into an American court for fraudulently manipulating that market."[50] In *Pinker*, the contacts were the defendant's illegal SEC filings related to its ADR sponsorship. Therefore, the cause of action arose from the specific contact with the United States and specific personal jurisdiction was satisfied.

Whether ADR filings will satisfy personal jurisdiction under a FCPA bribery case has not been tested by U.S. courts. It appears, however, that alleged bribing conduct, unlike the official financial filings in *Pinker*, would be too attenuated from a party's ADR sponsorship and attendant responsibilities to "arise out of or relate to" that sponsorship.[51] The SEC filing required by ADR sponsorship was the core of the cause of action in *Pinker* while any potential bribery accusation under the FCPA would be removed both temporally and causally from any official filing. U.S. courts are not likely to find specific personal jurisdiction based on ADR sponsorship alone when analysing an FCPA bribery claim.

On the other hand — and this, too, remains entirely untested — U.S. courts may find general personal jurisdiction for an ADR sponsoring issuer in relation to an FCPA bribery cause of action, because the issuer's daily participation on the U.S. financial markets establishes its "continuous and systematic" contact with the United States. One U.S. court found that the registration and trading of ADRs outside the FCPA context — was "one form of continuous and systematic contact with the U.S. as a whole."[52] In

Newport, the court held that "by registering with and transacting business under the auspices of the [SEC, the defendant] has availed itself of the privileges and protections of the U.S. and its government." While the registration and trading of ADRs was but one of four factual bases the court identified as — taken together — establishing a *prima facie* showing of general personal jurisdiction over the defendant, the court's language suggested that the registration and trading of ADRs alone may establish general personal jurisdiction where the forum involved is the United States.[53] *Newport* counsels foreign ADR sponsors that under the FCPA general personal jurisdiction may be satisfied by ADR sponsorship alone.[54]

It is important to recognize, however; that even if a U.S. court refuses to find personal jurisdiction for an FCPA bribery violation, it will not prevent the U.S. government from taking some type of action against a foreign ADR sponsor. The U.S. government has alternative means of enforcement at its disposal including SEC administrative proceedings (possibly the revocation of the ADR registration), the suspension of export licences, prohibition of U.S. government procurement programs and tax consequences. These means of enforcement do not require satisfaction of personal jurisdiction, and may severely impede the foreign entities' ability to do business in the United States.

Lastly, officers, directors and employees of foreign sponsoring ADRs should be aware that personal jurisdiction can always be exercised over an individual by a U.S. court when that individual is physically present within the forum — i.e. the territory of the United States.[55] Thus, if an officer, director or employee of a foreign ADR sponsor is physically present within the territory of the United States, personal jurisdiction under the FCPA will be satisfied for that individual (but not the employer entity) if he or she is served with a subpoena or arrested within that territory.

Affirmative defenses and exception

The FCPA bribery provisions include two distinct affirmative defences. The first affirmative defence is that the alleged improper payment was lawful under the written laws of the bribing target's home country.[56] This defense explicitly focuses on the law of the target country, not the law of the situs of the ADR sponsor. Thus, under the FCPA, it would likely be fruitless to argue that a payment scheme was legal under the FCPA because it was legal under the home country of the ADR sponsor.

The second affirmative defense is that the payment was a reasonable expense (such as travel or lodging) related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency thereof.[57]

The three FCPA bribery provisions also include an exception for "grease payments" to government officials. This exception states that the FCPA prohibitions will not apply to "facilitating or expediting payment" to secure the performance of a "routine governmental action."[58] A routine governmental action is one that is normally per formed to obtain a permit, license or other similar documents, the processing of governmental papers, providing police protection, mail pick-up and delivery, or scheduling inspection, providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration, or similar actions.[59] This exception in effect permits companies to make modest payments to low-ranking government officials, to speed up or secure the performance of something that the party is already entitled to obtain.[60]

FCPA bribery provisions and ongoing conduct prior to ADR sponsorship

The U.S. government's apparent position is that it will seek to enforce the FCPA bribery provisions based on ongoing activity that began prior to when an entity became an issuer. For example, in the *ABB Ltd.* case, the SEC sued a Swiss technology company based on illegal payments made between 1998 and 2003, even though the defendant only sponsored ADRs on the U.S. markets from April 2001.[61] In its complaint, the SEC alleged the following:

> "From 1998 through early 2003, ABB's U.S. and foreign-based subsidiaries doing business in Nigeria, Angola and Kazakhstan, offered and made illicit payments totaling over $1.1 million to government officials in these countries. These payments — at least $865,726 of which were made after ABB became a reporting company in the United States in April 2001 — were made to influence acts and decisions by these foreign officials to assist ABB's subsidiaries in obtaining and retaining business, and were made with the knowledge and approval of certain management level personnel of the relevant ABB subsidiaries."[62]

By making such a statement, the SEC's apparent position was that all of the payments between 1998 and 2003 were actionable, even though ABB did not become an issue until 2001. Rather than test the SEC theory in the courts, ABB settled the SEC action, disgorged $5.9 million in profits, agreed to retain an independent consultant to supervise its accounting, paid an $11 million penalty and agreed to be enjoined from future FCPA violations.[63]

FCPA accounting provisions

In 1977, through the FCPA, Congress added provisions to the U.S. Exchange Act addressing accounting, bookkeeping and internal accounting controls.[64] These provisions require that issuers[65] make and keep books, records, and accounts, which, in reasonable detail,[66] accurately and fairly reflect the transactions and dispositions of the assets of the issuer and advise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(1) Transactions are executed in accordance with management's authorization.
(2) Transactions are recorded in conformity with generally accepted accounting principles.
(3) Access to assets is permitted only in accordance with management's authorisation.
(4) The recorded accountability for assets is the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[67]

As such, the FCPA accounting provisions are designed to compel transparency in an issuer's books so that improper payments are not concealed. The FCPA accounting provisions apply to foreign

ADR sponsors as such sponsors are "issuers." The FCPA accounting requirements are construed very broadly, encompassing most corporate record keeping. At a minimum the FCPA accounting provisions cover accounts, correspondence, memorandum, tapes, discs, papers and books.[68]

In 1988, Congress amended the FCPA accounting provisions to cover conduct related to an issuer's foreign subsidiary. After the 1998 amendments, where an issuer owns more than 50 percent of the voting shares of a foreign firm, it has an obligation to ensure that the subsidiary complies with the accounting requirements of the FCPA. Where an issuer owns less than 50 percent of the foreign subsidiary, the issuer has an obligation to proceed in good faith to use its influence to ensure compliance.[69] Thus, the FCPA accounting provisions will apply to conduct of the issuers *vis-à-vis* the entities of which they are only part owners or stakeholders. This amendment is particularly important because it expands the FCPA's coverage to conduct that may be quite attenuated from an issuer's perceived contact with U.S. markets and SEC oversight.

The SEC has brought civil suits and administrative actions based on violations of the FCPA accounting provisions.[70] The SEC will seek to impose civil fines and to bar officers or directors based on violations of the FCPA accounting provisions.[71]

Moreover, the FCPA accounting provisions are enforced criminally by the DOJ against persons or business entities that "knowingly" falsify their books and records and/or circumvent a system of internal accounting controls.[72] The "knowing" requirement is met by willful blindness or conscious attempts not to know.[73] Individuals found guilty of such willful violations can face penalties of up to a $1 million fine and 10 years' imprisonment. Corporations facing the same charges can be fined up to $2.5 million.

The FCPA accounting provisions have a five-year criminal and civil statute of limitations. There are no affirmative defenses or exceptions specifically applicable to the FCPA accounting provisions.

Subject-matter jurisdiction under the FCPA accounting provisions

In contrast to the FCPA bribery provisions, the FCPA accounting provisions do not require an interstate nexus for the assertion of subject matter jurisdiction. Thus, the FCPA accounting provisions may be applied more broadly than the FCPA bribery provisions. For example, in *SEC v. Montedison*, the SEC did not have a jurisdictional basis for a FCPA bribery provision action because the alleged bribery took place wholly outside the United States.[74] The SEC thus brought an action for violation of the FCPA accounting provisions by virtue of Montedison's sponsorship of ADRs on U.S. markets,[75] alleging that subject-matter jurisdiction was satisfied simply because Montedison was an issuer.[76] Because this case never went to trial we do not have a definitive answer on the issue from a U.S. court. Nevertheless, to exert subject-matter jurisdiction under the FCPA accounting provisions, it is clear that the U.S. government position is that it need only demonstrate that an ADR sponsor did not keep accurate accounts and did not maintain internal accounting controls, such as through a demonstration of accounting omissions,[77] accounting falsifications[78] or a defendant's failure to implement an accounting system with sufficient control.[79]

Until a U.S. court holds otherwise, based on *Montedison*, a foreign ADR sponsor should consider subject-matter jurisdiction to be satisfied simply by virtue of its ADR sponsorship when analyzing a potential cause of action under the FCPA accounting provisions.

Personal jurisdiction under the FCPA accounting provisions

The general personal jurisdiction analysis under the FCPA accounting provisions is identical to that analysis detailed, above, in "Personal jurisdiction under the FCPA bribery provisions," concerning personal jurisdiction under the FCPA bribery provisions. Under the FCPA accounting provisions, however, specific personal jurisdictions may also be found by a U.S. court, as it was in *Pinker*, because a cause of action under the accounting provisions would centre on the representations made in the improper filing made with the SEC. In such a circumstance, the accounting provision cause of action would be said to have arisen out of the ADR sponsorship and attendant SEC filings and thus that it would be fair to extend specific personal jurisdiction over the entity on SEC filings and thus that it would be fair to extend specific personal jurisdiction over the entity in a U.S. court.

Conclusion

While the FCPA's bribery and accounting provisions are sufficiently detailed by statute, open questions remain as to whether U.S. federal courts will recognize subject-matter and personal jurisdiction over a foreign ADR sponsor in the context of a claim brought by the U.S. government under the FCPA. What is clear is that U.S. courts and the U.S. government consider subject-matter jurisdiction to be satisfied for a foreign ADR sponsor under the FCPA bribery provisions where any communication or act in furtherance of an alleged bribing scheme has passed through or occurred in the United States and that a U.S. court is likely to find subject-matter jurisdiction under the FCPA accounting provisions where an ADR sponsor makes the required financial filings and disclosures with the SEC. What remains unclear, however; is how far U.S. federal courts are willing to "push the envelope" of personal jurisdiction over a foreign ADR sponsor in the FCPA context. Because it is entirely possible, within the accepted parameters of U.S. jurisprudence, for personal jurisdiction to be recognized with the type of purposeful availment and daily contact with U.S. securities markets that are seemingly essential to ADR sponsorship, foreign sponsors of ADRs should assume that personal jurisdiction will be recognised by U.S. courts for any potential claims brought by the U.S. government under the FCPA.

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2 ADRs are receipts issued by a depository bank that represent a specified amount of a foreign security that has been deposited with a foreign branch or agent of the depository, known as the custodian. See Hertz. *American Depository Receipts*, 600 PLI/Comm 237,239 (1992). ADRs may be listed on any of the major exchanges in the U.S. or traded over the counter, and are subject to the Securities Act and Exchange Act. *Id*. at 242, 246. ADRs are commonly utilized by non-U.S. corporations to participate in U.S. securities markets.

3 Section 78dd-2 does not apply to foreign entities sponsoring ADRs because it applies only to 'domestic concerns.' A domestic concern is any individual who is a citizen, national or resident of the United States and any business entity that has its principal place of business in the United States or which is organised under the laws of a political subdivision of the United States. See 15 USC § 78dd-2(h)(1). Section 78dd-3 is a bucket provision that only applies if a person or entity cannot be classified under the prior sections and if the actual impermissible conduct occurred in the United States. Section 78dd-3 was added in 1989 to expand the FCPA's coverage and bring it in line with the language of the OECD Convention.

4 See DOJ Brochure, *The Foreign Corrupt Practices Act, Anti-bribery Provisions*. http://www usdojgov/criminal/fraud/fcpa/dojdocb.htm ("DOJ FCPA Brochure")

5 See HR Conf Rep No 640. 95th Cong, 1st Sess 18 (1977)

6 See 15 USC § 78dd-1(f)(1)(A)

7 15 USC § 78dd-1(a)(3)

8 See *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir), *cert denied*, 479 US 890 (1986) (interpreting "thing of-value" under 18 USC § 1954 broadly to include tangible and intangible items)

9 See *United States v. Gorman*, 807 F.2d 1299 (6th Cir 1986), *cert denied*, 484 US 815 (1987)

10 See *McDonald v. Alabama*, 329 So.2d 583, 587-88 (1975), *cert denied*, 429 US 831 (1976)

11 See *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir), *cert denied*, 164 US 1007 (1983)

12 See *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir 1974)

13 See *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir 1980)

14 15 USC §§ 78ff(a)

15 15 USC § 78(u)

16 15 USC § 78(u)(d)

17 15 USC § 78ff(c)(3); 15 USC § 78dd-2(g)(3)

18 18 USC § 3282 (criminal); 28 USC § 2462 (civil)

19 See 18 USC § 3292(a)(1), (2)(c)(1)

20 For example, in the *ABB*, the SEC sued a Swiss technology company based on illegal payments made between 1998 and 2003, even though the defendant only sponsored ADRs on the U.S. markets beginning in April 2001. See *SEC v. ABB Ltd*, No 1:04CV01141 (DDC filed 7 July 2004)

21 See 15 USC § 78dr1-1

22 See 15 USC § 78dd-3; Response of the US to the Phase 1 Questionnaire, First Self-Evaluation and Mutual Review, submitted by the U.S. government to the OECD, art 4 1 (30 Oct 1999), at http://www.usdoj.gov/criminal/fraudfcpa/firstqu.htm

23 15 USC § 78dd-2(h) (5); see, e.g., DOJ FCPA Brochure ("Such means of instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel"); see also Schroth, 'The U.S. and the International Bribery Conventions' (2002) 50 Am J Comp L 593, 601.

24 See Brown, "Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Exceed Its Grasp?" (2001) 26 NC J Int'l L. & Com 239, 311 (making analogy to mail fraud conspiracy) (citing *U.S. v. Lothian*, 976 F 2d 1257, 1262-63 (9th Cir 1992) ([J]ust as acts and statements of co-conspirators are admissible against other participants, we also apply similar principles of vicarious liability ("knowing participants in the scheme are legally liable") for the co-schemers' use of the mails or wires.")

25 For example, a telephone call from one member of a conspiracy to the U.S. in furtherance of the conspiracy would satisfy the subject-matter jurisdiction interstate nexus requirements for all members of the conspiracy See, e.g., *King*, 351 F 3d at 863-64 Moreover, as U.S. courts do when evaluating mail fraud conspiracies, a U.S. court evaluating a FCPA bribery case might require that a co-conspirator only 'contemplate' the use of the mails or other instrumentality in order to satisfy FCPA bribery subject-matter jurisdiction for all co conspirators. See, e.g., *U.S. v. Dray*, 901 F 2d 1132, 1137 (1st Cir 1990); *U.S. v. Massey*, 827 F 2d 995, 1001-02 ("The government's burden is to demonstrate beyond a reasonable doubt that appellants agreed to engage in a scheme to defraud in which they contemplated that the mails would likely be used.")

26 Cr 98-240-01 (DNJ, Trenton Div 1998)

27 No 01 Cr 687 (SDNY 2001)

28 01-00190-01/02 CR-W (WD Mo 2001)

29 No 1:04CV01141 (DAC 2004)

30 *SEC v ABB Ltd*, No 1:04CV01141, at 4 (DDC 2004)

31 See *SEC News Digest*, Issue 2004-129, Commission Announcements (7 July 2004)

32 See Cr 98-240-01 (DNJ, Trenton Div 1998)

33 See *United States to Reyes*, 239 F 3d 722, 736 (5th Cir 2001)

34 See Mathews, "Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/SEC Consent Degree Settlements" (1998) 18 Nw J Int'1 L & Bus 303, 324 (comparing "in furtherance of" requirement of FCPA to analogous requirement of federal mail fraud statute).

35 See *United States v. King*, F 3d 859, 863 (8th Cir 2004) (citing *United States v. Jackson*, 345 F 3d 638, 648 (8th Cir 2003))

36 *Id.*

37 See Brown, "Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Exceed Its Grasp?" (2001) 26 NC J Int'l L. & Com 239, 311 (making analogy to mail fraud conspiracy) (citing *United States v. Lothian*, 976 F 2d 1257, 1262-63 (9th Cir 1992) ([J]ust as acts and statements of co-conspirators are admissible against other participants, we also apply similar principles of vicarious liability ("knowing participants in the scheme are legally liable") for the co-schemers' use of the mails or wires.")

38 See, e.g., *United States v. King*, 351 F 3d 859, 863-64 (8th Cir 2004)

39 351 F 3d 859, 863-64 (8th Cir 2004)

40 Likewise, in *United States v. Reitz*, No 01-00222-01-Cr-W-1 (WD Mo __) the U.S. government charged an individual with conspiracy to violate the FCPA, in part based on the interstate nexus established by co-conspirators.

41 See Lawler, "Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures" (1999) 32 Vand J Transact'l L 1249, 1261.

42 See Response of the United States to the Phase I Questionnaire, First Self-Evaluation and Mutual Review, submitted by the U.S. government to the OECD, art 4 1 (30 Oct 1999), at http://www usdoj gov/criminal/frand/fcpa/firstqtu.htm. There are *no cases* where a U.S. court has declined to exercise subject-matter jurisdiction related to a FCPA bribery provision charge or suit because the U.S. government has failed to show an interstate nexus. Most likely this is because the U.S. government has only sought to enforce the FCPA bribery provisions where the nexus is clearly established Commentators recognize the dearth of case law on the subject and are forced to analogize to other statutes in order to attempt to explore the contours of the FCPA interstate nexus. See, e.g., Brown at 303-17 (examining mail fraud and money laundering statutes).

43 The SEC has demonstrated that where it cannot achieve the requisite interstate nexus for a FCPA bribing action, it is willing to pursue other means including an action under the FCPA accounting provisions. See "FCPA bribery provisions" above.

44 The forum in cases concerning provisions of the Exchange Act, which includes the FCPA, is the U.S. as a whole, not a specific forum state or federal district. See *Max Daetwyler Corp v. Meyer*, 762 F 2d 290, 293 (3d Cir 1985) (nationwide forum analysis when statute. as here, allows nationwide service of process). This is due to the nationwide service of process provision contained in § 27 of the Exchange Act (15 USC § 78aa).

45 In cases involving nationwide service of process, due process analysis must proceed under the Fifth Amendment, not the Fourteenth Amendment, of the U.S. Constitution. See, e.g., *Teachers' Retirement Sys v ACLN, Ltd*, 2003 WL 21058090.*7 (SDNY 12 May 2003)

46 See *Int'l Shoe v. Washington*, 66 S Ct 154 (1945)

47 See *IMO Indus, Inc v. Kiehert AG*, 155 F 3d 254, 259 (3d Cir 1998)

48 292 F 3d 351 (3rd Cir 2002)

49 See *Pinker*, 292 F 3d 361, 371 (citing *Hanson v. Denckla*, 357 US 235, 253 (1958))

50 See *id.* at 371-72

51 More likely, as analyzed above, by virtue of their SEC filings, U.S. courts are likely to exercise personal jurisdiction over foreign ADR sponsors in connection with the FCPA accounting provisions because under those provisions the cause of action arises out of the ADR sponsor's actual financial reporting.

52 *Newport Components v. NEC Home Electronics*, 671 F Supp 1525, 1539 (CD Cal 1987)
53 *Id.*
54 Moreover, the *Statoil* case, settled on 13 October 2006 by the SEC and DOJ, demonstrates that the US Government's view is that personal jurisdiction in an FCPA context can be satisfied by a company's mere listing of securities on US markets. See *In the Matter of Statoil*, ASA, SEC Admin Proceeding, File No 3-12453, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to § 21C of the Securities Exchange Act of 1934 (13 October 2006); DOJ Press Release, *U.S. Resolves Probe Against Oil Company that Bribed Iranian Official* (13 October 2006), No 06-7000, http://www.usdoj.gov/opa/pr/2006/October/06_crm_700 html. In Statoil, the SEC and DOJ settled actions against a Norwegian oil company, Statoil, ASA, for bribes paid against Iranian officials Id Statoil's only connection to the United States was its listing on the New York Stock Exchange *Id*
55 See, e.g., *Abrams Shell v. Shell Oil Co.*, 165 F Supp 2c1 1096 (CD Cal 2001)
56 See 15 USC §§ 77dd-1(c)(1); 77dd-2(c)(1); 77dd-3(c)(1)
57 See 15 USC §§ 77dd-1(c)(2); 77dd-2(c)(2); 77dd-3(c)(2)
58 See 15 USC §§ 78dd-1(b); 78dd-2(b); 78dd-3(b)
59 See 15 USC §§ 78dd-1(f)(3)(A); 78dd-2(1)(3)(A); 78dd-3(b)(3)(A)
60 HR Rep No 640, 95th Cong, 1st Sess 8 (1977)
61 See *SEC v ABB Ltd*, No 1:04CV01141 (2004)
62 See *id.* at 1
63 See *SEC Sues ABB in Foreign Bribery Case*, SEC Lit Rel No 18775/6 July 2004
64 See 15 USC §§ 78m
65 The FCPA accounting provisions apply to issuers as defined above in the first section. See *id*. at 78m(a)
66 The FCPA accounting provisions require that record keeping be detailed enough that a reasonable inquiry would allow full determination as to the source and purpose of payments
67 See 15 USC § 78m(b)(2)
68 In 1988, Congress amended the FCPA accounting provisions to expand its coverage to an issuer's conduct related to an issuer's foreign subsidiary. After the 1998 amendments, where an issuer owns more than 50 percent of the voting shares of a foreign firm, it has an obligation to ensure that the subsidiary complies with the accounting requirements of the FCPA. Where an issuer owns less than 50 percent of a foreign subsidiary, the issuer has an obligation to proceed in good faith to use its influence to ensure compliance. See 15 USC § 78m(b)(6). Thus, the FCPA accounting provisions will apply to the conduct of issuers *vis-à-vis* the entities of which they are only part owners or stakeholders. This amendment is important because it expands the FCPA's coverage to conduct that may be quite attenuated from an issuer's perceived contact with U.S. markets and SEC oversight
69 See 15 USC § 78(b)(6)
70 See, e.g., *In re Gore*, 4 FCPA Rep 699 462 (finding respondents violated accounting provisions of the FCPA by making false entries in their books and records to conceal bribes to foreign officials); *SEC v. Triton*, SEC Lit Rel No 15266/27 February 1997 (charging defendants with improperly recording payments and failing to maintain proper internal accounting controls)
71 See, e.g., *SEC v. Dabah*, 3 FCPA Rep 6999 457 (SDNY 1995) (imposing fine of US$1,060,190 for FCPA violation)
72 See, e.g., *US v. Sam P Wallace Co, Inc.*, Cr No 83-0034 (DPR 1983) (defendant pleaded guilty to criminal FCPA accounting violation and was fined US$30,000)
73 See HR Conf Rep No 100-579, at 916 919-21
74 See SEC Lit Rid No 16948 (30 March 2001)
75 *Id.*
76 *Id. See also* Mathews, “Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/SEC Consent Degree Settlements” (1998) 18 NwJ Int'l L & Bus 303. 324
77 See, e.g., Ronald G Sherry, CPA. Accounting and Auditing Enforcement Rel No 639 (11 January 1995)
78 See, e.g., *Gore*, 4 FCPA Rep 699 462
79 See, e.g., *Triton*, SEC Lit Rel No 15266