International In-house Counsel Journal
Vol. 8, No. 30, Winter 2015, 1

Bringing Fairness to FCPA[1] Settlements: Protecting the Corporate Form through *Respondeat Inferior* Subsidiary Liability

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The 2012 United States Department of Justice (DOJ) and Securities Exchange Commission (SEC) resource guide[3] to the FCPA (Guide) suggests two theories for imposing liability on an issuer for violations of the FCPA committed by one of its subsidiaries. First, a parent can be found to have directed a violation of the FCPA if it "participated sufficiently" in a subsidiary's actions.[4] Second, a parent will be found liable if it is found to control the subsidiary under principles of *respondeat superior*.[5] In that case, a parent will be held liable if any agent under its control engages in a violation of the Act.

Without defining the terms "agent" and "control," the Guide goes on to state that regardless of whether a parent "participates sufficiently" or is found to be vicariously liable, the DOJ and SEC categorically believe that "[I]f an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary's employees."[6] In effect the Guide indicates that the SEC and DOJ have moved beyond the statute to provide themselves with plenary powers to hold any parent strictly liable for the violation of any agent's acts under their control.[7] Under the Guide, FCPA enforcement has thus become "a crude system" in which any corporate entity (but

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[1] The United States Foreign Corrupt Practices Act is codified under 15 U.S.C. 78m and 78dd-1 of Section 30A of the '34 Act. It allows for the prosecution of securities issuers or those who act on their behalf when they engage in corrupt practices and states: "[I]f an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary's employees," if they engage in corrupt practices in foreign countries. The FCPA requires that issuers operating internationally (a) issue proper reports, (b) maintain appropriate books and records, (c) not engage in commerce to further "an offer, payment, promise to pay, or authorization" of payment to any foreign official or political party to influence their decision-making or to help obtain or expand the issuer's business in the foreign country.

[2] The author would like to thank his mentors at the University of Pennsylvania Law School, the Wharton School, and Boston University School of Law and especially Professor Babak Boghraty for comments on earlier versions of this paper.

[3] *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.

[4] Guide at 27.

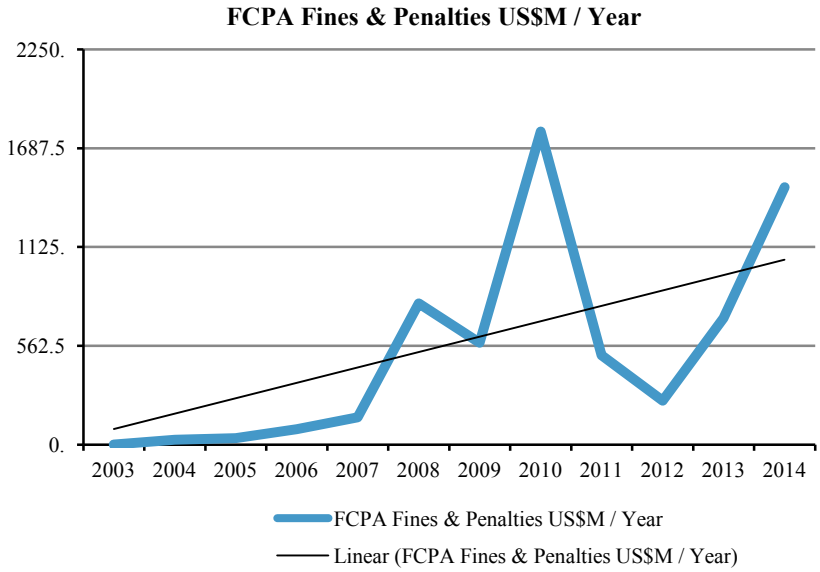
[5] "[U]nder traditional principles of *respondeat superior*, a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company."

[6] Guide at 27.

[7] The Guide (27). At least one commentator makes the argument that a strict liability standard more effectively accomplishes the FCPA's policy objective of incentivizing American entities to prevent corrupt practices. *See* Smith, Lena E. *Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery*? 79 BROOKLYN L. REV. 1801, 1827-31 (Summer 2014).

particularly the issuer parent) in an affiliated group can be found liable for the violations of another.[8]

The results are palpable. As the following graph[9] shows, while growth in fines and penalties collected for FCPA violations between 2003 and 2012 had been increasing linearly at about US$100 million per year since 2012 (when the Guide was implemented), fines and penalties collected have dramatically grown at an annual rate of US$500 million per year. This dramatic growth in fines and penalties collected since 2012 underscores the need for a critical analytical framework that takes into account applicable, clearly articulated corporate law principles. This is because principles of law that provide a swift and sure source of benefits to an injured party are often found to be "fundamentally unsound."[10]



The SEC and DOJ in the FCPA context have created a risk disequilibrium that undermines traditional notions of corporate separation of powers and *ultra vires* principles.[11] On the one hand, the Guide indicates that (outside direct control), a parent may be able to avoid liability for a subsidiary's acts if it can show that it is not vicariously liable for the subsidiary's actions in the particular case being investigated. On the other hand, the Guide says that any type of agency relationship is sufficient to

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[8] *Cf.* Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 135-36 (2d Cir. 1991) ("enforcement of shareholder liability for corporate obligations began as a 'crude system in which any creditor with an unsatisfied judgment against the corporation sued any shareholder at common law") (*quoting* Blumberg, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS §2.02 (1987)).

[9] Data for this graph was collected from various resources available on the internet, including **FCPA Professor, DOJ Enforcement of the FCPA – Year in Review** (January 8th, 2014), accessed online on February 8, 2015 at http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-4 and U.S**. Securities and Exchange Commission**, **SEC Enforcement Actions: FCPA Cases**, accessed online on February 8, 2015 at http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

[10] Billy v. Consolidated Mach. Tool Corp., 51. N.Y.2d 152, 159, 432 N.Y.S.2d 879, 883, 412 N.E.2d 934, 939 (Ct. Appls. NY 1980).

[11] For a general and thought-provoking essay on the paradox of compliance *see* Laufer, William S., **Corporate Liability, Risk Shifting, and the Paradox of Compliance**, 52 VAND. L. REV. 1343 (1999).

evidence the control required to trigger liability under the FCPA. Yet, a look at the FCPA statute reveals that Congress only used the word "control" in the context of accounting controls.[12] And then Congress only required issuers, "to the extent reasonable under the issuer's circumstances, to cause [the] … foreign firm to devise and maintain" accounting controls.[13] In other words, there is nothing in the FCPA statute that embeds liability in the nature of the parent's ***control*** over its subsidiaries.

Equally significant, in promulgating the FCPA statute, Congress deemed an agent to be one of several persons "acting on behalf of [an] issuer."[14] Thus, while Congress provided the SEC with broad discretion to implement the FCPA, it limited, by its definition, the scope of liability to persons (including agents) ***acting on behalf of*** *[an] issuer*. Thus, Congress preempted the possibility that an issuer could be held strictly liable for any FCPA violation conducted by any agent or subsidiary under an issuer's control (whether acting on behalf of that issuer, or not). Rather, the FCPA statute asks that the conduct of those "acting on behalf of" an issuer be scrutinized, thus articulating Congress's intent that subsidiary liability be the cornerstone of FCPA enforcement. This paper discusses the parameters of subsidiary liability under the FCPA and proposes an analytical framework under the proposed principle of *respondeat inferior subsidiary liability*.[15]

Case Law

The corporation is set up as a legal entity separate and distinct from its shareholders for the purpose of shielding them from liability for injuries or damage that may be excessive or beyond their control.[16] This principle is so fundamental that even in the case of a wholly-owned subsidiary, absent generally accepted exceptions of *ultra vires* acts or fraud, "limited liability will not be abrogated" and the corporate veil will not be pierced.[17]At the same time, the corporate veil can be pierced where the subsidiary is so dominated by the parent that the subsidiary is deemed a "mere instrumentality" of the parent.[18] For such domination to be found, however, the parent must supervise the subsidiary's daily operations, commingle its funds and assets with those of the subsidiary's, share work forces and business offices, and undercapitalize the subsidiary such that it cannot stand on its own as a corporate entity.[19] Other factors indicating parental domination include interlocking directorates, use of the same corporate logo, shared corporate headquarters, and shared supervisory staff and management.[20]

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[12] Under 15 U.S.C. 78m(b)(2)(B)(5) issuers of securities are required "to implement a system of internal accounting controls." The accounting controls are meant to insure that (i) "transactions are executed in accordance with management's … authorization," (ii) they are "recorded as necessary" to help prepare financial statements, and (iii) assets are accessed only when authorized. 15 U.S.C. 78m(b)(2)(B).

[13] 15 U.S.C. 78m(b)(2).

[14] 15 U.S.C. 78dd-1(a).

[15] The Restatement 3rd of Agency categorically rejects a theory of *respondeat inferior* where the agent's conduct is not implicated. RESTATEMENT (THIRD) OF AGENCY §7.01 (2006). *Respondeat Inferior* as used in this paper reflects the idea that a parent should not be implicated for its agent's conduct where the agent's harm is not engaged in on behalf of the parent.

[16] For a general theory of the personhood of corporations *see* ORTS, ERIC W., BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013).

[17] Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 513 (3rd Cir. 1996) (*citing* Mueller v. Seaboard Commercial Corp., 5 NJ 28, 34, 73 A.2d 905, 907-08 (1950)). *See also* Wm. Passalacqua Builders, Inc., *supra* 933 F.2d at 138 (liability is predicated on fraud or "upon complete control of the dominating corporation that leads to a wrong against third parties.").

[18] *Id.*

[19] *Id.*

[20] *Id.* at 514 (*citing* Daniels v. Kerr McGee Corp., 841 F.Supp. 1133 (D.Who. 1993).

In the FCPA context, these fundamental principles ask the prosecutor to analyze the independence of an issuer's foreign subsidiary where the FCPA violations arose. Under these principles that protect the corporate form, the prosecutor is required to ascertain whether the employees committing FCPA violations at the subsidiary level acted outside the parameters of the parent's control and direction. Where the parent does not dominate the subsidiary under the factors identified in the preceding paragraph and where the subsidiary operates as an independent entity, liability for any violation should be limited to that subsidiary.

This approach, which respects traditional corporate law principles, also makes sense if one takes into account the distances and expanses between American issuer parents and foreign subsidiaries – distances that are often exacerbated by poor communication, lack of infrastructure, and insufficient language skills. It follows that the greater the distance from the parent and headquarters, the more foreign the local culture of the subsidiary, the less likely that the parent could or should have been aware of any corrupt acts that could be committed in its name, and the stronger the compliance measures implemented by the parent that meet the SEC and DOJ's own guidelines, the more compelling the argument that the intermediate step of *respondeat inferior* subsidiary liability analysis should be undertaken.[21]

As with general *alter ego* analysis, whether a subsidiary is independent or not is a question of fact "which necessarily varies according to the circumstances of each case."[22] As succinctly stated by the court in Institute of Veterinary Pathology, Inc. v. California Health:

> "The trier of fact must consider whether (1) such a unity of interest in ownership exists so as to dissolve the separate corporate personalities of the parent and the subsidiary, relegating the latter to the status of an instrumentality, agency, conduit, or adjunct of the former, and (2) an inequitable result will occur if the conduct is treated as that of the subsidiary alone."[23]

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[21] Under GAAP and international accounting principles, the accounts of a subsidiary are consolidated and incorporated into reports that are a part of SEC disclosure and regular filing requirements. In this article, I am focusing on circumstances where accounting controls are properly in place and where the FCPA violations are such that their reflection in consolidated reporting fall outside the issuer's auditing powers or where the issuer's auditing finds the FCPA violations and promptly takes action and reports to the SEC and DOJ. Accounting and reporting principles requiring consolidated reports are one thing; completely disregarding the corporate form where no *ultra vires* acts or fraudulent behavior can be attributed to any entity other than the violating subsidiary is quite another. As I argue in this paper, to do so eviscerates the purpose of the corporate form and invites corporations to engage in other behaviors that could be unwelcome from various policy perspectives. Such unwelcome consequences include establishing headquarters in countries, such as Switzerland, that still respect the corporate form. In short, the corporate form is a quintessential requirement to national growth and prosperity and confounding GAAP consolidation principles with agency principles under *respondeat superior* undermines the objectives the FCPA was designed to address.

[22] Institute of Veterinary Pathology, Inc. v. California Health, 116 Cal.App.3d 111, 172 Cal Rptr. 74, 78 (Cal. Ct. App. 1981).

[23] *Id. See also*, Wm. Passalacqua Builders, Inc., *supra* 933 F.2d at 139 ("[T]riers of fact are entitled to consider factors that would tend to show that defendant was a dominated corporation, such as (1) the absence of formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are seated as independent profit centers, (9) the payment or guarantee of debts of the dominated

The Guide steps around this critical analytical step and, in combination with the non-prosecution remedies under the US Federal Sentencing Guidelines[24], unreasonably raises the bar to overcoming an indictment. Issuers facing FCPA claims have little choice but to accept responsibility for a foreign subsidiary's actions regardless of whether they could have independently detected or prevented a violation. The risk of exposure to an indictment with subsequent prosecution will encourage entering into a non-prosecution agreement and a plea bargain. The serious effects of not doing so include the inability to finance projects and operations, maintain revolving credit, or enter into ventures with other companies.

Under an intermediate framework, however, equity and fairness principles and a respect for the factual nature of the inquiry, call for prosecutors to first isolate the settlement (and limit the penalties and fines) to the violations conducted by the subsidiary. If it is found that employees who violated the FCPA were not acting on behalf of the issuer, then liability should not be passed through to the parent issuer. Any non-prosecution agreement should then be structured to require the parent to actively seek the local prosecution of the individual actors in the foreign country or to take steps to restructure the subsidiary. This should include assuming greater control, seconding parent employees to the subsidiary, engaging in acts of corporate citizenship aimed at educating employees and local populations on the vicissitudes of corruption, or withdrawing from the market altogether. Unjust loss and injury analysis must be applied fairly and meaningfully to compensate for the actual injury created and deter any future violations.[25] This approach of holding a subsidiary responsible for intentional violations of the law that are conducted "on behalf of" (but not "at the direction of") a parent is described in other areas of the law as *respondeat inferior* liability.[26]

Respondeat superior liability is a risk-shifting exception to the general rule that entities are separate. The principle imputes liability to the parent for a subsidiary's or employee's

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corporation by other corporations in the group, and (10) whether the corporation in question had the property that was used by other of the corporations [sic] as if it were its own.".

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[25] *Cf.* Wm. Passalacqua Builders, Inc., supra 933 F.2d at 138.

[26] *Respondeat Inferior* has been adopted in employment, municipal, and gang-related cases where the lower-ranked individual or entity acts independently to intentionally violate a legal prescript. *See* Rosky, Dianne, Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials, 36 U.C. Davis L. Rev. 895 (2003). *See also generally* Wilson, Elizabeth A., Is Torture all in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials, 6 Rutgers J.L. & Pub. Pol'y 175 (2008) (arguing that employees who engage in violent or criminal acts, such as torture, should not be immune from prosecution under *respondeat superior* principles), Figley, Paul F., Understanding the Federal Tort Claims Act: A Different Metaphor, 44 Tort Trial & Ins. Prac. L.J. 1105 (2009) (discussing the confusion that arises from the FTCA not providing immunity for intentional acts committed by government employees), Barron, David J., Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 Yale L.J. 2218 (2006) (discussing circumstances where municipalities act independently to implement constitutional interpretations locally that are at odds with state policy or interpretation), and Baker, Martin, Crips and Nuns: Defining Gang-Related Crime in California Under the Street Terrorism Enforcement and Prevention Act, 40 McGeorge L. Rev. 891 (2009) (underscoring that gang members should be prosecuted individually when they act on behalf of the gang but engage in independent crimes because to hold the gang liable for gang members actions undermines the deterrent effect of prosecution). *But see e.g.* Clark, Karen P., Respondeat Inferior: The Rule of Vanderpool v. Grange Insurance Association, 110 Wash.2d 483, 756 P.2d 111 (1988)?, 64 Wash. L. Rev. 419 (1989) (arguing that holding an employee liable for their actions undermines the fairness and risk distribution policies underlying *respondeat superior*) and Barloon, Joseph L. An Economic Analysis of Group Crime and the Federal Sentencing Guidelines, 84 Geo.L.J. 2261 (1996) (arguing that it is more efficient to go after kingpins than after individuals and that therefore, *inter alia*, *respondeat inferior* is an inefficient approach to prosecuting gang violence and crime).

acts where the parent knew or should have known of the existence of a violation but took no proactive steps to prevent it from continuing.[27] But *respondeat superior* liability "can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention by the parent in the management of the subsidiary to such an extent that 'the subsidiary's paraphernalia of incorporation, directors, and officers' are completely ignored."[28] That is, there must be more than just "the capability of control, even if it was never utilized" before an issuer is required to pay fines and penalties beyond those that its subsidiary pays for the violations the latter commits.[29] In contrast, a *respondeat inferior* standard balances the benefits of limited liability with those of the FCPA's remedial purpose, i.e. putting an end to corruption by focusing prosecution and deterrence efforts on the source of the evils that are sought to be eliminated.

Punishing the issuer parent, as the current practice under the FCPA, has little impact locally. Punishing the local subsidiary, on the other hand, will go further to fulfill the policy objectives of the FCPA: to reduce corruption and bribery as a cornerstone of how business is conducted. Punishments will go much further if they include dismissals, locally publicized fines and penalties, public campaigns highlighting the corruption and bribery that was the subject of the settlement, the steps that have been taken to ensure ethical business practices, and local prosecutions in the subsidiary's locale where the violations occurred.

Principle

The subsidiary structure in international operations should allow the corporate parent to shield itself from the effects of corruption and illegal activities when employees or agents do not act on the parent's behalf. That extra protection allows parents to focus more on disincentives and incentives that maximize law abidance where the distances in time and space between the issuer-parent and the subsidiary situs can be vast. By shifting liability under the FCPA to its source and origin, *respondeat inferior* allows for an increase in vigilance and a focus on compliance. The more legitimately a parent can show that the acts of its subsidiary were driven by rogue employees, the easier it should become for the parent to avoid excessive liability that it must otherwise share collectively with its consolidated operations.

By aggressively leveraging indictments and convictions of subordinate entities, the DOJ and SEC (and issuers) would be sending clear messages to actual perpetrators and managers alike: if you ignore compliance requirements and engage in traditional or accepted bribing activities, you will lose your job and you will be prosecuted. More importantly, you alone must indemnify the corporation at large for your actions and assume the costs of your violations. In that sense, *respondeat inferior*, is not a liability-shifting mechanism like its mirror opposite, *respondeat superior*. Rather, *respondeat inferior* is a find-the-blame-in-the-right-place mechanism that allows for liability to attach at the source of the violation.

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[27] *Cf.* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) (holding parent company not liable for a subsidiary supervisor's actions where the parent acted immediately to prevent any violations from continuing once it became aware of their existence).

[28] Billy v. Consolidated Mach. Tool Corp., supra at 163, 432 N.Y.S.2d at 886, 412 N.E.2d at 941 (Ct. Appls. NY 1980) (*quoting* Lowenthal v. Baltimore & Ohio R.R. Co., 247 App.Div. 144, 155, 287 N.Y.S. 62 *aff'd* 272 N.Y. 360, 6 N.E.2d 56).

[29] *Cf.* Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1221 (3rd Cir. 1993) (holding that an 'authority-to-control' standard (as also adopted in the Guide) "sweeps too broadly").

The objective of local corruption eradication conforms with "the policy behind the presumption of corporate independence and limited shareholder liability — encouragement of business development — [being] outweighed by the policy justifying disregarding the corporate form — protecting those who deal with the corporation."[30] In a cultural environment with a predisposition for corruption, locally-targeted, surgical, action will be more effective in the long-run.

Indeed, targeted prosecution and punishment of corruption at its source should, over time, undermine cultural predispositions that allow mafia-type, politically-encouraged, gangs and groups to flourish and thrive by bullying businesses and companies into coughing up payments in kind or paying bribes for basic services and procurement activities (*inter alia*). As (a) one American company after another, with the support of the SEC and DOJ ,throws its weight at ensuring any deviance is appropriately punished and (b) local prosecutors are encouraged by business interests, with American prosecutorial support, to go after corrupt employees, government officials, and their patrons, kingpins, and bosses will find less and less fertile soil to feed their machinations. As more and more companies refuse to pay to play, fewer opportunities for corruption and bribery will arise.[31]

In the long run, the contributions of a *respondeat inferior* approach to the social fabric and to the business bottom line are immeasurable. For companies who recognize the benefits of corporate social responsibility and for prosecutors interested not in generating fines and penalties for the national coffers but in fulfilling the policy objectives of the FCPA (ostensibly, to eliminate corruption worldwide), focusing on cutting off the wells at their springs is also cheaper and more effective. Punishing an issuer on its consolidated returns for isolated acts that are only under its control in hindsight is more expensive and detracts from the potential the FCPA promises: to paint kingpins and bosses, corrupt officials and government representatives, into a corner of honest and compliant practice.

A *respondeat inferior* approach would also reduce merger and acquisition costs. Lingering and undetected FCPA liability could be contained to the local, foreign subsidiary, level. Compliance implementation attendant with process and systems reviews would not result in unexpected liability bleed-overs. Issuers would be more likely to acquire and merge with companies abroad, implement proper compliance oversight, and grow, since they would not need to fear excessive costs of fines and penalties under the post-2012 regime. Attendant indemnification and insurance costs would also be reduced. Thus, *respondeat inferior* principles would simultaneously allow

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[30] Wm. Passalacqua Builders, Inc., *supra* 933 F.2d at 139.

[31] Under the SEC and DOJ's current approach, the belief is that punishing the parent for acts of the subsidiary will provide sufficient incentive for the parent to "clean up" an errant subsidiary's compliance. While this approach ensures that at least issuer-related companies comply (at least "internally") with the FCPA and related regulations, the approach does little to address the overall problem of corruption or to fulfill the policy objective behind the FCPA, namely the eradication of corruption. More importantly, the approach of laying blame on the parent and requiring the US parent issuer to assume full responsibility for fighting the war against corruption, relinquishes the responsibility the SEC and US prosecutors should retain and lays the foundation for resentments in multinationally-operating issuers. Instead of issuers viewing FCPA inquiries as governmental encroachment and alternative taxation (or at best just another protectionist move), were the SEC and DOJ to adopt the more proactive approach suggested in this paper, government and business would become collaborators in the fight against corruption.

for continued international expansion and meet the dual policy objectives of fighting corruption and implementing ethical business practices.[32]

To rearticulate, *respondeat inferior* subsidiary liability solves the injustice of parent issuers being called upon to assume liability for actions they can only control in hindsight and them then passing blame to "subordinate 'wayward' employees" who act as scapegoats. Instead, the principle requires a focus not on an individual or employee alone but on the responsibility of the entity through which that employee acts. For corporate structures to have any meaning this is the proper approach. Otherwise, why form an entity or structure it as a corporation? Under the DOJ and SEC's post-2012 approach, but for questions of tort and derivative liability questions, issuers may as well organize as partnerships and similar pass-through entities.

Of course, *respondeat inferior* would not absolve a parent from liability where the incentives to comply are outdone by implicit messages to deviate from the law. This conforms with Model Penal Code principles that seek to impose liability on culpable agents rather than on related, but innocent, bystanders. Thus *respondeat inferior* is not a blame-shifting tool. Rather, the principle follows the traditional notion that where a subsidiary acts *de viris* and *sua sponte*, then public policy requires examples to be set locally. This should be done by taking action that sends a clear and effective message necessary and sufficient to deter corruption and mitigate its ill side-effects.

Policy

From a policy perspective, imposing stricter compliance makes sense. But all commentators agree that there are meaningful limits to compliance including responsible risk-shifting and liability allocation that respect and protect the corporate form. Agency problems are not restricted to parent-subsidiary relationships. They arise from the effects of contract design, incentive systems, internal controls, labor, capital, and product markets – and legal rules.[33] Under traditional agency views, bad corporate governance induces compliance and social-responsibility activities which increase long-term costs and dilute shareholder returns. Agency driven ideas can be encountered more frequently in companies with entrenched management, high retained earnings, low debt, and few shareholders.[34]

On the other hand, corporate social responsibility adherents believe that good compliance will reduce agency problems and result in "better managerial decisions, thus higher leverage and lower liquidity (cash and free-cash flows)."[35] This is because dividends and debt cause external actors to require the implementation of appropriate compliance controls which constrain managers from diverting cash or committing cash to unprofitable ventures that generate private benefits to insiders.[36] Thus, as Ferrell et al. have shown, "firm-level CSR measurements are closely related to country-level societal sustainability ratings."[37]

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[32] For a thought provoking and in-depth review of the collective strategies that can be undertaken to fight corruption *see* Petkoski, Djordjija, Danielle E. Warren, and William S. Laufer, Collective Strategies in Fighting Corruption: Some Intuitions and Counter Intuitions, 88 Journal of Business Ethics 815 (2009).

[33] Ferrell, Allen, Hao Liang, and Luc Renneboog, Socially Responsible Firms, European Corporate Governance Institute (ECGI) – Finance Working Paper No. 432/2014 at 3 (July 2014) *accessed online on February 8, 2015* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464561.

[34] *Id.* at 10-11.

[35] *Id.* at 4.

[36] *Id.*

[37] Id. at 10.

Assuming the "value-enhancing CSR view" is correct,[38] *respondeat inferior subsidiary liability* principles should apply where the subsidiary's leadership – in seeking to achieve profitability goals – entrenches itself by focusing only on local priorities, veils its activities in secrecy, and prevents managers of the issuer parent company from gaining insight into the subsidiary's day-to-day operations. This situation arises particularly where entry is into a third country with development challenges: home country expertise is lacking, supervisory systems are not yet in place or are circumvented, or where an acquisition or restructuring of the foreign entity creates resentments that can arise among the employees or agents of the acquired entity / subsidiary because of the perceived insensitivities, or better-than-thou attitudes, of acquiring home-country company personnel.

Accordingly, once a firm moves from poor governance to good governance and adopts compliance systems that meet SEC/DOJ and OECD[39] requirements, implements them, notifies appropriate authorities immediately on any issues that may raise concern, or responds promptly to any notice of a suspected violation, that firm should be allowed to shield itself from liability arising from actions committed by corrupt individuals or groups in foreign subsidiaries. To do otherwise, undermines the very reason for structuring businesses in the corporate form and confounds accounting principles that allow for the consolidation of accounts with the need to prosecute and deter certain criminal behaviors that often are outside management control. Of course, the FCPA focuses on operations and process-oriented aspects of the corporate life-cycle (bookkeeping, reporting, conduct), but the statutory language seeks to punish transactions-related conduct in less-controllable environments; where conduct is better defined, characterized, and prescribed in hindsight than through proactive prevention.

Conclusion

The fight against corruption is a broader one. It falls under the mantle of the OECD and has been taken up by the World Bank and development lenders. This is because corruption has been unequivocally shown to be linked to wealth elimination, poverty, and social unrest.[40] Thus, the FCPA is a policy tool that can be effectively used to ferret out and eradicate international corruption. For it to be effective, however, enforcement must incentivize issuers to eliminate corruption. To accomplish that goal, issuers must be allowed to find corruption and strike at it without having to be concerned about incurring excessive penalties and fines that must be distributed throughout the entire corporation's consolidated earnings. Targeted, surgical, incisions into corruption on the local level send the message to local actors: We will not tolerate corrupt behaviors.

Such incisions have the necessary deterrent effect of enforcement that can be clear, extensive, and effective. Local enforcement that includes collaboration with anti-corruption activists, law enforcement, anti-corruption politicians, and business agents and suppliers will allow a culture of compliance and ethics to catch hold and disseminate. Cooperation with local authorities can ensure that enforcement includes penalties based on the subsidiary's earnings, the potential for the subsidiary's continued viability in the market, the elimination and dismissal of the employees engaging in the violations despite education and training of suppliers, agents, and employees who remain on staff or who

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[38] Id. at 19-20.

[39] OECD (2011), *OECD Guidelines for Multinational Enterprises,* OECD Publishing. http://dx.doi.org/10.1787/9789264115415-en.

[40] For a compelling study of the effects of corruption on global security *see* Chayes, Sarah, THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY (Norton & Co. 2015).

are replacements for those dismissed. The end result of adopting the intermediate standard suggested in this paper would provide parent issuers with a safe harbor where foreign subsidiaries violate the FCPA unbenownst to them. That safe harbor would eliminate the sense that the FCPA is being used by the government as a protectionist revenue-generation tool[41] and would strengthen the statute's ultimate purpose: The long-term elimination of corruption and the establishment and spread of ethical and compliant business practices.

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LMCK Partners, LLC is a public private partnership focused on opportunities in distressed and disadvantaged communities. LMCK contributes to publicly-sponsored economic development initiatives for private sector participation in the Central New Jersey region. It assists sponsors in finding private equity and debt capital and restructuring and revitalization of underperforming assets. It also acts as financial advisor to real estate and property development organizations.

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[41] *See*, *e.g.*, Leibold, Annalisa Marie, Extraterritorial Application of the FCPA under International Law WILLAMETTE L. REV. (forthcoming) (downloaded February 11, 2015 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489675).