SHOULD A PARENT COMPANY BE LIABLE FOR THE MISDEEDS OF ITS SUBSIDIARY? AGENCY THEORIES UNDER THE FOREIGN CORRUPT PRACTICES ACT

MARCELA E. SCHAEFER*

In an effort to increase accountability and compliance with the Foreign Corrupt Practices Act (FCPA), in recent years both the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) have held parent companies liable for the anti-bribery violations of their subsidiaries. Scholars and practitioners have argued that the two government agencies are applying an aggressive enforcement policy based on an overly expansive understanding of agency principles. However, because most investigations settle with deferred or non-prosecution agreements, a paucity of FCPA case law prevents corporations, prosecutors, and even judges from clearly understanding what the correct standards are for determining when a parent company is liable for the actions of its subsidiaries—especially under a principal-agent theory of liability. This Note is the first to challenge the narrative that the DOJ and SEC are improperly enforcing the FCPA anti-bribery provisions. It delineates the ways in which a parent can be liable for the misconduct of its subsidiaries before analyzing liability predicated on a principal-agent relationship and the amount of control required to establish such a relationship. It then provides a novel formulation of the correct standard to use in assessing whether an agency relationship exists, based on the Third Restatement of Agency and corporate case law. This Note then assesses DOJ and SEC cases before concluding that while the agencies are correct in holding parent companies liable for the misconduct of their subsidiaries, they are applying agency theories inconsistently, exacerbating the existing confusion as to what the correct standards are for parent companies.

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Introduction

In January 2014, the Securities and Exchange Commission (SEC) charged Alcoa Inc. (Alcoa) with violating the anti-bribery and the books and records provisions of the Foreign Corrupt Practices Act (FCPA).[1] From 1989 to 2009, two Alcoa subsidiaries, Alcoa of Australia Limited and Alcoa World Alumina LLC, had used a consultant with connections to the Bahraini royal family as a middleman to funnel corrupt payments to retain Alcoa's business as a supplier to a government-operated aluminum plant, Aluminium Bahrain B.S.C.[2] Ultimately the SEC found that more than $110 million in illicit payments were made to officials with influence over contract negotiations between Alcoa and the Bahraini government.[3] Alcoa agreed to settle both the SEC's charges and charges in a parallel Department of Justice (DOJ) criminal case by paying a total of $384 million, as well as $161 million in disgorgement of profits and $14 million in forfeiture.[4] At the time, the Alcoa settlement was the fifth largest FCPA case of all time.[5]

1 Alcoa Inc., Exchange Act Release No. 71261, 107 SEC Docket 20 (Jan. 9, 2014), https://www.sec.gov/litigation/admin/2014/34-71261.pdf.

2 *See id.* at 20, ¶ 2.

3 *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Alcoa with FCPA Violations (Jan. 9, 2014), https://www.sec.gov/news/press-release/2014-3.

4 *See id.*; Alcoa Inc., 107 SEC Docket at 11–12; *see also* Press Release, U.S. Dep't of Justice, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $233 Million in Fines and Forfeiture (Jan. 9, 2014), https://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and (announcing the company's guilty plea to foreign bribery charges and agreeing to pay fines and forfeiture).

5 Julie DiMauro, *Alcoa Settles FCPA Charge, Pays $384 Million to DOJ, SEC*, FCPA Blog (Jan. 9, 2014, 8:28 PM), http://www.fcpablog.com/blog/2014/1/9/alcoa-settles-fcpa-charge-pays-384-million-to-doj-sec.html.

The legal community has been vocal about the settlement and its broader implications, scrutinizing the SEC cease-and-desist order and providing expert analysis,[6] advisory articles,[7] and blog posts.[8] One of the claims framing the discussion was that the Alcoa case represented the most recent example of an emerging trend of the SEC applying a prosecution theory equivalent to strict liability.[9] According to this argument, even though the SEC did not allege that any of Alcoa's officers, directors, or employees knowingly participated in the scheme to bribe a foreign government official, Alcoa was nevertheless being held liable under an impliedly incorrect interpretation of traditional agency principles.[10] "[I]f adopted more broadly, [this approach] could render virtually any subsidiary the 'agent' of its parent," warned some lawyers.[11]

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6 *See, e.g.*, ANDREW M. LEVINE ET AL., DEBEVOISE & PLIMPTON, FCPA UPDATE 4–5 (2015), https://www.debevoise.com/~/media/files/insights/publications/2015/01/fcpa_update_jan_2015.pdf; Brigida Benitez et al., *Lessons from Alcoa's Bahrain FCPA Bribery Case*, LAW 360 (Jan. 21, 2014, 6:54 PM), https://www.law360.com/articles/502603/lessons-from-alcoa-s-bahrain-fcpa-bribery-case.

7 *See, e.g.*, Drew A. Harker et al., *Recent Cases Expand Aggressive Enforcement Theory of Parent Company Liability Under the FCPA*, ARNOLD & PORTER LLP (Feb. 2014), https://files.arnoldporter.com/adv214recentcasesexpandagressiveenforcementtheoryofparentcounderfcpa.pdf; Gregory M. Williams & Richard W. Smith, *Parent FCPA Violations Based on Subsidiary Misconduct*, WILEY REIN LLP (Apr. 2014), https://www.wileyrein.com/newsroom-articles-3116.html.

8 *See, e.g.*, Mike Koehler, *The SEC's Recent Alter Ego Theories*, FCPA PROFESSOR (Feb. 29, 2016, 6:50 PM), http://fcpaprofessor.com/the-secs-recent-alter-ego-theories; Michael Volkov, *Parent Company and Subsidiary Liability for FCPA Violations: Fighting the Disinformation Campaign*, VOLKOV L. (Apr. 4, 2016), https://blog.volkovlaw.com/2016/04/parent-company-subsidiary-liability-fcpa-violations-fighting-disinformation-campaign; Gregory M. Williams, *The Alcoa FCPA Settlement: Are We Entering Strict Liability Anti-Bribery Regime?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 5, 2014), https://corpgov.law.harvard.edu/2014/02/05/the-alcoa-fcpa-settlement-are-we-entering-strict-liability-anti-bribery-regime.

9 *See, e.g.*, Harker et al., *supra* note 7 ("[T]he Alcoa case reflects another expansive theory under which the SEC is holding responsible parent corporations for the conduct of their subsidiaries. This trend . . . poses significant implications and potential liability for parent companies in the future."); Williams, *supra* note 8 ("Alcoa serves as an important marker in what appears to be a steady progression toward a strict liability FCPA regime.").

10 Traditional agency principles are agency doctrines based on federal common law, which are best articulated in the Restatement (Third) of Agency. The common law of agency encompasses the legal consequences of agency relationships and of agents' interactions with third parties. 1 RESTATEMENT (THIRD) OF AGENCY 3 (AM. LAW INST. 2006). Although courts have differed in their interpretation and application of agency principles, there does not appear to be disagreement as to what constitutes traditional agency principles. For examples of courts discussing agency principles in various contexts and citing to the Restatements of Agency, see Hollingsworth v. Perry, 570 U.S. 693, 713 (2013); Salyers v. Metro Life Ins. Co., 871 F.3d 934, 939 (9th Cir. 2017); Johnson v. Priceline.com, Inc., 711 F.3d 271, 277 (2d Cir. 2013); Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 56 (1st Cir. 2012).

11 Williams & Smith, *supra* note 7.

While there is a general consensus among scholars that a parent company can be held liable for FCPA anti-bribery violations of its subsidiary under certain circumstances, there is disagreement regarding when.[12] On one hand, both the SEC and the DOJ interpret the FCPA to mean that one of the ways in which a parent company can be liable for bribes paid by its subsidiary is if the subsidiary is deemed to be an agent of the parent under "traditional agency principles."[13] On the other hand, a growing number of scholars and commentators argue that both government agencies are incorrectly enforcing the FCPA by expanding parent-subsidiary liability under a theory that essentially amounts to strict liability.[14] They argue that to establish parent liability, a principal-agent relationship and some additional level of the parent company's knowledge and control should be required.[15] Scholars have highlighted this perceived inconsistency because corporations care immensely about which theory prosecutors and judges use to determine whether a principal-agent relationship exists and subsequently use to impose liability on a parent company. Companies need to know what standards and distinct theories of liability apply to them to better understand the FCPA and establish more useful internal compliance programs. Similarly, a common critique of FCPA enforcement generally is the lack of judicial over-

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12 For a more detailed discussion, see *infra* Section II.B.

13 U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 27 (2012) [hereinafter Resource Guide], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

14 *See supra* notes 7–9 (providing examples of scholars and commentators expressing this view); *see also* Ike Adams & Robert Keeling, *Vicarious Liability Risks Facing the Financial Industry Under the FCPA*, 9 Geo. Mason J. Int'l Com. L. 1, 27 (2017) ("The government has taken an aggressive view of liability for parent corporations based on the actions of their subsidiaries, one that is out of step with traditional principles of corporate law."); Karen E. Woody, *No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement*, 38 Cardozo L. Rev. 1727, 1763–64 (2017) (claiming that the DOJ and SEC have started to "expand liability of parent corporations for the acts of their subsidiaries, even in cases where the parent corporation has no knowledge of the subsidiaries' corrupt actions").

15 *See, e.g.*, Adams & Keeling, *supra* note 14, at 29 (arguing that the SEC "charged U.S. issuers for bribes paid by their foreign subsidiaries, without alleging the issuers authorized or even knew about the bribes," which, in their view, runs counter to the correct application of parent-subsidiary liability based on a principal-agent relationship); *see also* Sonila Themeli, Comment, *FCPA Enforcement and the Need for Judicial Intervention*, 56 S. Tex. L. Rev. 387, 406–07 (2014) (discussing the need to limit the DOJ and SEC's interpretation of a parent company's liability for the acts of a subsidiary); Laurence A. Urgenson et al., *FCPA Anti-Bribery Liability for a Subsidiary's Conduct*, Bus. Crimes Bull., Jan. 2013, at 1, 2, 6, https://www.kirkland.com/-/media/publications/article/2013/01/fcpa-antibribery-liability-for-a-subsidiarys-condu/article-pdf--printing-allowed--business-crimes-bul.pdf (discussing the SEC's allegedly expansive theory of prosecution).

sight.[16] An application of a uniform, clear standard based on traditional agency principles might encourage more corporations to proceed to trial and litigate tenuous agency assertions rather than merely settle with the DOJ or SEC. This would benefit FCPA enforcement, as any contribution to the small body of FCPA case law would help address other issues related to the FCPA.[17]

This Note is the first to examine the narrative that the DOJ and SEC are incorrectly applying an expansive theory of liability in enforcing the FCPA anti-bribery provisions. By examining traditional agency principles, this Note shows that a principal-agent relationship suffices to establish parent liability for a subsidiary's misconduct. Even though the DOJ and SEC's express policy conforms with both traditional agency principles and the FCPA, their approach is nevertheless problematic because the lack of clarity in the law leaves parent

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16 *See, e.g.*, Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 Wm. & Mary Bus. L. Rev. 37, 49 (2013) (discussing two negative outcomes that result from a lack of judicial oversight of DOJ and SEC FCPA enforcement proceedings); Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 Am. U. Bus. L. Rev. 391, 400 (2014) (stating that the absence of any meaningful check or judicial oversight "raises a host of problematic issues"); Mateo J. de la Torre, Note, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 Cornell Int'l L.J. 469, 473 (2016) ("The DOJ and SEC's FCPA enforcement practices have operated substantially without judicial oversight . . . .").

17 According to a 2012 article, over eighty percent of FCPA cases are resolved without ever going to trial. Carl Pacini, *Foreign Corrupt Practices Act: Taking a Bite out of Bribery in International Business Transactions*, 17 Fordham J. Corp. & Fin. L. 545, 553 (2012). Because a majority of FCPA cases settle, some scholars argue that this trend has exacerbated other problems related to the FCPA and its enforcement. For example, by offering non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs), which can contain policy changes, prosecutors essentially act as adjudicators with no judicial oversight. Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 Cath. U. L. Rev. 41, 65 (2012). Moreover, the DOJ is the sole and final arbiter in determining whether a company has violated an agreement (another issue that is not subject to judicial review). *Id.* While a company must comply with an NPA or DPA, these settlement agreements do not have binding judicial precedent. Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 Am. Crim. L. Rev. 121, 127 (2014). Thus, enforcement agencies are not required to consistently apply the same standards for the same kinds of FCPA violations. *Id.*; *see also* Alexander Avery, *Foreign Corrupt Practices Act: Pleading Parent-Subsidiary Liability*, 35 J. Nat'l Ass'n Admin. L. Judiciary 131, 133 (2015) (pointing out that because of a system in which it is more prudent for companies to settle FCPA charges, the DOJ and SEC frequently dole out penalties without judicial review, which goes against "the interests of justice"). *But see* Jennifer H. Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops*, *in* Criminalità D'Impresa e Giustizia Negoziata: Esperienze a Confronto 91 (Giuffrè ed., 2017) (arguing that negotiated settlements rather than trials are better at enabling governments to deter corporate crime and that settlements are a speedier resolution and a more effective means of implementing an effective corporate liability regime).

companies uncertain about what they could be liable for. To address this, I propose my own standard that more explicitly defines the level of control needed to establish a principal-agent relationship, based on the D.C. Circuit Court's formulation in *Transamerica Leasing, Inc. v. La Republica de Venezuela*[18] and the Third Restatement of Agency, as well as Delaware corporate case law.

This Note proceeds in three parts. Part I provides a statutory framework of the FCPA.[19] Section I.A summarizes who the statute applies to and the elements of the anti-bribery and accounting provisions. Section I.B provides an overview of the three theories used to apply parent-subsidiary liability: direct liability, principal-agent relationship, and alter ego. Part II focuses on discerning the level of control needed to establish a principal-agent relationship. Section II.A explains why it is so difficult to discern the correct analysis to assess whether an agency relationship exists. Section II.B highlights the DOJ, SEC, and courts' failure to distinguish whether a parent company needs to assert control over an agent generally or specifically in order to establish a principal-agent relationship. Finally, Section III.A explains what the SEC and DOJ's policy is before turning to what some scholars argue the two government agencies actually do in practice in Section III.B. Section III.C applies this Note's proposed formulation of the correct standard to three cases to evaluate whether the DOJ and SEC have been consistent in correctly applying traditional agency principles. This Note concludes that they have not been consistent, which reinforces the importance of having a single, uniform stan-

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[18] 200 F.3d 843 (D.C. Cir. 2000).

[19] This Note focuses exclusively on parent-subsidiary liability under the anti-bribery provisions because that is the heart of the ongoing debate regarding whether the DOJ and SEC are incorrectly interpreting the FCPA. There is no debate regarding the accounting provisions, since it is widely accepted that under those provisions, issuers face strict liability civilly for violating the books and records provisions. *See, e.g.*, Philip Urofsky, *The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?*, Bloomberg BNA: Sec. Reg. & L. Rep. 1 (May 6, 2013), https://www.jdsupra.com/legalnews/the-ralph-lauren-fcpa-case-are-there-an-06860 (stating that in the civil context, issuers already expect to face strict liability for their subsidiaries' books and records as well as internal controls violations); Williams, *supra* note 8 (explaining that when an issuer controls half or more of its subsidiary's voting power, the issuer can be held strictly liable for its subsidiary's violations of the accounting provisions). The rationale behind this is that because a subsidiary's books and records are consolidated into the parent's financials, any inaccuracies in the subsidiary's books will in turn affect the accuracy of the parent company's. Urofsky, *supra*, at 1; *see also* Resource Guide, *supra* note 13, at 43 ("[A]n issuer's books and records include those of its consolidated subsidiaries and affiliates."). As for internal control violations by a controlled subsidiary, parents are liable under the same standards by which they would be liable for their own violations. *Id.* If, by contrast, a parent company does not have control, it is not liable so long as it acted in good faith to ensure that the subsidiary adopted effective internal controls. *Id.*

dard to establish parent-subsidiary liability under agency principles in the FCPA context.

I
The Foreign Corrupt Practices Act

The FCPA arose out of an extensive SEC investigation and disclosure program in the 1970s, in which the agency discovered that U.S. companies were bribing foreign officials with millions of dollars to secure business.[20] After these bribery scandals damaged the reputation of corporate America both domestically and abroad, Congress passed the Foreign Corrupt Practices Act of 1977.[21] Today, the FCPA regulates international corruption through its anti-bribery and accounting provisions, and is enforced civilly by the SEC and criminally by the DOJ.[22] Section I.A outlines the anti-bribery provisions of the FCPA, and Section I.B describes the relevant principles to establish parent-subsidiary liability.

A. The Anti-Bribery Provisions

The FCPA's anti-bribery provisions prohibit covered parties from corruptly paying a foreign government official—directly or indirectly—to influence the official to misuse her official position to assist in obtaining or retaining business.[23] Cash is not the only form of corrupt payment. A corrupt payment can include giving anything of value.[24] In one case, a defendant paid the expenses of a Nigerian government official, which included "a country club membership fee, household maintenance expenses, cell phone bills, and limousine service, as well as cash payments totaling $5,000."[25] More recently, JPMorgan Chase was charged with violating the FCPA when it indirectly bribed clients and government officials in the Asia-Pacific region by providing jobs and internships to their relatives and friends in order to obtain investment banking business.[26]

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[20] Rahul Kohli, *Foreign Corrupt Practices Act*, 55 Am. Crim. L. Rev. 1269, 1270 (2018).

[21] *Id.* at 1270, 1271 n.3.

[22] *See id.* at 1295; *Spotlight on Foreign Corrupt Practices Act*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml (last visited Aug. 11, 2019).

[23] 15 U.S.C. §§ 78dd-1(a), 2(a), 3(a) (2012).

[24] *Id.*

[25] Complaint at 9, United States v. ABB Vetco Gray, Inc., No. 04-CR-279 (S.D. Tex. June 22, 2004), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/07/06-22-04abbvetco-info.pdf.

[26] Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), https://www.sec.gov/news/pressrelease/2016-241.html.

The anti-bribery provisions apply to U.S. issuers, "domestic concern[s]," and any other persons who are not issuers or domestic concerns who, while in the United States, perform an act in furtherance of a prohibited payment.[27] Any officer, director, employee, or agent of parties falling under one of the three categories is also subject to the anti-bribery provisions.[28]

According to a report published by the Open Society Foundations, when Congress enacted the FCPA, it was well aware that "companies frequently use foreign subsidiaries to make corrupt payments to foreign officials."[29] It is for this reason that "Congress preserved an incentive for parent companies to monitor and secure compliance by their foreign subsidiaries."[30] The Committee on Interstate and Foreign Commerce noted that in the majority of bribery cases that the SEC investigates, "some responsible official or employee of the U.S. parent company had knowledge of the bribery and either explicitly or implicitly approved the practice. Under the bill as reported, such persons could be prosecuted."[31]

B. Parent-Subsidiary Liability

In *United States v. Bestfoods*, the Supreme Court clearly articulated that limited liability is a fundamental principle in corporate law by stating that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."[32] "The rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest."[33] For example, if a person buys $100 of a corporation's stock, she only risks $100—and no

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27 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012). An issuer is an entity that issues any class of securities registered in an exchange in the United States or an entity that is required to file reports with the SEC, pursuant to securities laws. *Issuer*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* 15 U.S.C. § 78c(a)(8) (2012). A domestic concern is any individual who is a citizen, U.S. national, or resident of the United States. A domestic concern also includes any corporation, partnership, association, unincorporated organization, or sole proprietorship "which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h)(1) (2012).

28 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

29 DAVID KENNEDY & DAN DANIELSON, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 42–43 (2011), https://repository.library.northeastern.edu/files/neu:332329/fulltext.pdf.

30 *Id.* at 43.

31 H.R. REP. NO. 95-640, at 8 (1977).

32 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929)).

33 Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89–90 (1985).

more.[34] Thus, "shareholders of a corporation are insulated from liability for the acts of the corporation."[35] Moreover, "[t]he managers and the other workers are not vicariously liable for the firm's deeds."[36] In short, corporations are distinct entities "separate and apart from their creditors, shareholders, directors, and other constituencies."[37] To survive in today's competitive markets, many U.S. companies are forced to seek opportunities abroad and expand their operations overseas. Perhaps because the principle of limited liability allows companies to reap enormous economic and tax benefits from their subsidiaries while also limiting their liability, firms are incentivized to launch vast enterprises abroad, pursue international business relationships, and enter markets they might not have otherwise.[38] In the FCPA context, cases in which a parent company is held liable for illegal bribes paid by its subsidiary mostly involve subsidiaries that are wholly owned by their parent companies.[39] This means that the mere existence of a parent-subsidiary relationship between two corporations is not enough to make the parent liable for the misconduct of its subsidiary.[40]

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34 *Id.* at 90.

35 Joshua M. Siegel, Comment, *Reconciling Shareholder Limited Liability with Vicarious Copyright Liability: Holding Parent Corporations Liable for the Copyright Infringement of Subsidiaries*, 41 U. RICH. L. REV. 535, 535 (2007).

36 Easterbrook & Fischel, *supra* note 33, at 90.

37 Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 104 (2014).

38 *See* Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1777 (2015) (pointing out that limited liability can be an obstacle to justice, since parent corporations receive economic and tax benefits from their foreign subsidiaries' activities while being able to "externalize the risks of their operations through their subsidiaries," leaving victims of corporate misconduct with no remedy).

39 *See, e.g.*, United Techs. Corp., Exchange Act Release No. 84,087, 2018 WL 4347768 ¶¶ 1, 5, 8 (Sept. 12, 2018) (concerning FCPA anti-bribery violations of Otis Elevator Company, a wholly-owned subsidiary of UTC); Bio-Rad Labs., Inc., Exchange Act Release No. 73,496, 110 SEC Docket 747 ¶¶ 1, 5, 6, 13, 15 (Nov. 3, 2014) (concerning FCPA anti-bribery violations of Bio-Rad Russia and Bio-Rad SNC, wholly-owned subsidiaries of Bio-Rad Laboratories, Inc.); Letter from Nicola J. Mrazek, Senior Litig. Counsel, U.S. Dep't of Justice Criminal Div., to Nathaniel B. Edmonds, Paul Hastings LLP (June 21, 2017), https://www.justice.gov/criminal-fraud/page/file/976976/download (stating that the DOJ was closing its investigation of Edmonds' client, CDM Smith Inc., regarding FCPA violations through its wholly-owned subsidiary in India, CDM India).

40 *See, e.g.*, Manchester Equip. Co. v. Am. Way & Moving Co., 60 F. Supp. 2d 3, 7 (E.D.N.Y. 1999) (holding parent liable on agency theory for acts of subsidiary only if subsidiary had actual or apparent authority to act on parent's behalf); Cellini v. Harcourt Brace & Co., 51 F. Supp. 2d 1028, 1034 (S.D. Cal. 1999) (ruling that subsidiary was not agent of parent corporation for purposes of liability under fair employment statute in absence of showing that parent "exercised any control over [subsidiary's] day-to-day employment decisions").

Nonetheless, "liability has never been absolutely limited;"[41] there are exceptions to the rule. For example, holding a parent company liable that exercises control over a subsidiary beyond the level of control a shareholder typically has does not violate the principle of limited liability. This Section expounds on the three ways in which a parent can be liable for the actions of its subsidiary under the FCPA anti-bribery provisions: direct liability for participation in an FCPA violation, a principal-agent relationship, or under an alter ego theory.[42]

1. Direct Liability

The most straightforward way a parent company can be charged with violating the FCPA anti-bribery provisions is by knowingly participating in the prohibited conduct—either directly, by conspiring, or by aiding and abetting.[43] For example, a parent company directly or implicitly providing a subsidiary with funds to facilitate improper payments to a foreign official would suffice to establish liability.[44] Moreover, liability can be imposed without proof of actual knowledge that the subsidiary will give the thing of value to a prohibited beneficiary because knowledge includes conscious avoidance.[45] As the Second Circuit noted, "[conscious avoidance] may be established where a defendant's involvement in the criminal offense may have been so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge."[46]

2. Principal-Agent Relationship

A principal-agent relationship is a second way to establish parent liability for a subsidiary's misconduct when the subsidiary is an agent.

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[41] Easterbrook & Fischel, *supra* note 33, at 89.

[42] It is important to note that it is not contested in the literature whether the DOJ and SEC can hold a parent company liable for directly participating in a scheme to violate the FCPA or for a subsidiary's misconduct when the subsidiary is merely the alter ego of its parent company. *See, e.g.*, Siegel, *supra* note 35, at 535, 539–41. For this reason, the focus of this Note is parent-subsidiary liability based on a principal-agent relationship.

[43] *See* Resource Guide, *supra* note 13, at 27, 34.

[44] *Id.* at 27 (stating that a parent can be directly liable for an FCPA violation "when it directed its subsidiary's misconduct").

[45] Under the FCPA, a person is "knowing" with regard to a circumstance or result if they have a "firm belief that such circumstance exists[,] that such result is substantially certain to occur . . . [or] is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." 15 U.S.C. § 78dd-1(f)(2) (2012); *see also* 15 U.S.C. §§ 78dd-2(h)(3), 78dd-3(f)(3) (2012).

[46] United States v. Kozeny, 667 F.3d 122, 134 (2d Cir. 2011) (alteration in original) (quoting United States v. Svoboda, 347 F.3d 471, 480 (2d Cir. 2003)).

A principal-agent relationship arises when a principal "manifests assent" to an agent that the agent will act on the principal's behalf and be subject to the principal's control, and the agent "manifests assent or otherwise consents so to act."[47] In other words, agency requires a consensual relationship in which one person, to a certain degree, acts as a representative of or on behalf of another person "with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent."[48]

For example, a subsidiary is the agent of its parent when it enters into a contract on the parent's behalf. In such a scenario, if a "foreign subsidiary is the agent of the parent corporation, the parent would be liable for all questionable payments made by the subsidiary in the exercise of its agency authority."[49] Indeed, "[t]he element of control often is deemed the essential characteristic of the principal-agent relationship. To bind a principal, 'an agent must have authority, whether apparent, actual, or implied.'"[50]

However, it is important to note that a parent company's subsidiary can serve as an agent "in the course of one or more specific transactions."[51] Thus, whether a parent company can be held liable for a subsidiary's violation of the FCPA anti-bribery provisions turns on the issue of control. While the law is not settled on how much control is required for a parent company to become a principal, existing case

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47 RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006); *see also id.* § 1.03 ("A person manifests assent or intention through written or spoken words or other conduct.").

48 *Id.* § 1.01 cmt. c.

49 Jennifer L. Miller, Note, *Accounting for Corporate Misconduct Abroad: The Foreign Corrupt Practices Act of 1977*, 12 CORNELL INT'L L.J. 293, 304 (1979) (emphasis omitted).

50 *In re* Parmalat Sec. Litig., 375 F. Supp. 2d 278, 290 (S.D.N.Y. 2005) (quoting Cromer Fin. Ltd. v. Berger, 245 F. Supp. 2d 552, 559 (S.D.N.Y. 2003)). There are three bases on which the common law of agency attributes the legal consequences of one person's actions to another person: actual authority, apparent authority, and respondeat superior. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. LAW INST. 2006). "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* § 2.03. For a definition of respondeat superior, see *infra* note 56. Under the Third Restatement of Agency, implied authority is an aspect of the scope of an agent's actual authority, and not a distinct type of authority. And while there are distinct bases for attributing the consequences of one person's actions to another, the type of authority on which a principal-agent relationship is based does not affect the analysis of parent-subsidiary liability. In the FCPA cases in which it is unclear whether an agency relationship exists between a parent and subsidiary, the subsidiary has actual authority; what is unclear is whether the parent company has sufficient control over the subsidiary company.

51 Phx. Can. Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988).

law is helpful in locating the point along the spectrum of control.[52] For example, the level of control under the alter ego theory is pervasive to the point where the subsidiary is essentially the same as the parent company.[53] However, that is not the case under a principal-agent theory,[54] as "[t]he principal's right of control in an agency relationship is a narrower and more sharply defined concept than domination or influence more generally."[55]

3. *Alter Ego Theory*

The third way a parent company can be directly liable for bribes paid by its subsidiary is if the parent company treated its subsidiary as its alter ego. The alter ego theory is different from respondeat superior[56] and is premised on the concept that, by piercing the corporate veil, the two companies do not have a separate legal existence. Parent companies are held liable through corporate veil-piercing in the parent-subsidiary context when the limited liability of the corporate form would be misused "to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf."[57]

Establishing that a parent and subsidiary are not separate legal entities requires two findings: "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice."[58] The first finding has also "been stated as requiring a showing that the parent controls the subsidiary

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52 See *infra* Section II.A for a discussion of case law on control.

53 Avery, *supra* note 17, at 148 ("Traditionally, a subsidiary is established as its parent's alter ego if the parent company has domination over the subsidiary with disregard for its separate identity . . . ."); *see also* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854 (1982) (explaining that domination and control of a corporation, as most frequently occurs in a parent-subsidiary relationship, can satisfy one of the requirements for alter ego liability: that the interests and ownership of a corporation and an individual are so similar and closely aligned that their separate personalities do not exist anymore).

54 *See Phx. Can. Oil Co.*, 842 F.2d at 1477 (stating that "total domination or general alter ego criteria need not be proven" under parent-subsidiary liability based on agency principles).

55 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. LAW INST. 2006).

56 *See id.* § 2.04 (defining respondeat superior as standing for the principle that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment"); *see also* John J. Kenney & Gerald E. Hawxhurst, *Preventing Corporate Criminal Liability*, *in* 2 BUSINESS CRIME: CRIMINAL LIABILITY OF THE BUSINESS COMMUNITY ¶ 6A.01 (Stanley S. Arkin et al. eds., 2019) (stating that the respondeat superior doctrine "stands for the proposition that a master is responsible for the wrongful acts of his servant and a principal for those of his agent").

57 United States v. Bestfoods, 524 U.S. 51, 62 (1998).

58 Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001) (alteration in original) (quoting AT&T Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996)).

'to such a degree as to render the latter the mere instrumentality of the former.'"[59] A parent company could be "directly involved in financing and macro-manag[ing] . . . its subsidiar[y]" without risking a charge that its subsidiary "is merely its alter ego."[60] Rather, the alter ego theory envisions pervasive control over the subsidiary, such as when a parent dictates nearly every aspect of the subsidiary's business—"from broad policy decisions to routine matters of day-to-day operation."[61] In the case *In re Silicone Gel Breast Implants Products Liability Litigation*,[62] the court applied a totality of the circumstances test, which included eleven factors, to determine whether a subsidiary can be found to be the alter ego of its parent company. Ultimately, the court found that the subsidiary was the alter ego of its parent company because, among other factors, they had directors in common; they used the same legal, auditing, and communications departments; they filed consolidated tax returns; and the parent company operated the subsidiary's finance company.[63] However, *Silicone Gel*'s holding is hardly representative of the various cases considering alter ego theory, as most courts apply the rule with "great caution and reluctance."[64] For this reason, although alter ego theory is one of the ways in which a prosecutor can hold a parent company liable, it is not the focus of this Note.

II
What Level of Control Is Needed to Establish a Principal-Agent Relationship?

As discussed in Section I.B.2, whether a principal-agent relationship exists turns on control. However, courts thus far have not adequately answered the question of how much control is required to establish a principal-agent relationship between a parent company and its subsidiary. Instead, they have only asserted that control is needed. Part II parses out how much control is needed to establish a principal-agent relationship. Section II.A examines existing case law and FCPA literature to answer the crux of the debate: What level and

[59] *Id.* (quoting Calvert v. Huckins, 875 F. Supp. 674, 678 (E.D. Cal. 1995)); *see also* Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991).

[60] *Unocal Corp.*, 248 F.3d at 927.

[61] *Id.* at 926 (quoting Rollins Burdock Hunter of S. Cal., Inc. v. Alexander & Alexander Servs., Inc., 253 Cal. Rptr. 338, 344 (Ct. App. 1988)).

[62] 887 F. Supp. 1447, 1452 (N.D. Ala. 1995).

[63] *Id.* at 1452–53.

[64] 1 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Corporations § 41.10 (Sept. 2019) ("[M]any courts require exceptional circumstances before disregarding the corporate form.").

type of control must a parent company assert over a subsidiary to establish a principal-agent relationship, and thus hold a parent liable for the misconduct of its subsidiary? This is a particularly challenging question to answer, since as one scholar has noted, "[t]he difference in precedent and extensive factor analysis among various jurisdictions make the determination of parent-subsidiary liability rather complex—and a lack of precedent within the specific FCPA context seems to leave both regulators and corporations with an incomplete understanding of the law."[65] Section II.B highlights an important distinction that is almost always overlooked by courts and prosecutors: whether a principal has control over an agent generally or specifically. In an attempt to address some of the issues discussed in Sections II.A and II.B, Section II.C proposes a novel formulation of the correct standard, based on the Third Restatement of Agency and case law that accurately reflects traditional agency principles. This standard serves as a test to determine both whether a principal-agent relationship exists and what level of control is needed to establish such a relationship.

A. The Confusion About What the Standard Is

A principal-agent relationship does not exist unless "the principal has the right throughout the duration of the relationship to control the agent's acts."[66] While courts have not established what level of control is sufficient, they have said what level of control is *in*sufficient. "A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other"[67]—even if the subsidiary is wholly owned by the parent corporation[68]—or because the parent company appoints its subsidiary's Board of Directors.[69] Thus, the exercise of control that stock ownership gives to the stockholders does not "create liability beyond the assets of the subsidiary."[70] That control includes electing directors, making bylaws,

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65 Avery, *supra* note 17, at 150.

66 Restatement (Third) of Agency § 1.01 cmt. c (Am. Law Inst. 2006).

67 Restatement (Second) of Agency § 14 M (Am. Law Inst. 1958).

68 *See* United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985); Am. Bell, Inc. v. Fed'n of Tel. Workers of Pa., 736 F.2d 879, 887 (3d Cir. 1984); Ohio Tank Car Co. v. Keith Ry. Equip. Co., 148 F.2d 4, 6 (7th Cir. 1945).

69 *See* Transamerica Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843, 849 (D.C. Cir. 2000).

70 United States v. Bestfoods, 524 U.S. 51, 61–62 (1998) (quoting Douglas & Shanks, *supra* note 32, at 196); *see also* Restatement (Second) of Agency app. § 14 M, at 68 (Am. Law Inst. 1958) ("[A parent company's ownership of a controlling stock interest] does not mean that every subsidiary is the agent of its parent; so to declare would be to destroy the privilege of limited lability obtained by satisfying the incorporation law which permits the subsidiary to be organized.").

and carrying out "all other acts incident to the legal status of stockholders."[71] "Nor will a duplication of some or all of the directors or executive officers be fatal."[72] Yet this still leaves us with the question, how much control must a parent have over a subsidiary for their relationship to become one of principal and agent?[73] To make matters worse, many courts have (incorrectly) interchangeably established a principal-agent relationship through a corporate piercing veil analysis, alter ego theory, or agency theory.[74] However, holding a parent company liable for a subsidiary's actions on an agency theory is different from doing so by attempting to pierce the corporate veil.[75] Yet as one scholar aptly pointed out, "whether [a] court labels a subsidiary an 'agent,' 'instrumentality,' 'alter ego,' or 'identity' of the parent seems to make no difference in [a] court's decision."[76]

While the theory a court uses to establish a principal-agent relationship may just be a means to a specific legal outcome, it impacts corporations. Companies need to understand these standards and theories of liability. Understanding the theoretical underpinnings of the FCPA and its regulatory enforcement enables companies to assess what risks they face in a given business transaction and whether they need to increase their compliance controls.[77] Thus, it is important to

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71 *Bestfoods*, 524 U.S. at 62 (quoting Douglas & Shanks, *supra* note 32, at 196).

72 *Id.* (quoting Douglas & Shanks, *supra* note 32, at 196).

73 *See Transamerica Leasing*, 200 F.3d at 849 ("Courts have long struggled, often with confusing results, to explain how much control is required before parent and subsidiary may be deemed principal and agent.").

74 *See e.g.*, N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 224 (2d Cir. 2014) (laying out a standard to pierce the corporate veil using elements of the alter ego theory); *In re* Parmalat Sec. Litig., 501 F. Supp. 2d 560, 587 n.149 (S.D.N.Y. 2007) ("It is possible to interpret the complaints [of the plaintiff] as alleging an *alter ego* theory, despite their express references to agency law. The difference is immaterial, however."); Bagel Bros. Maple, Inc. v. Ohio Farmers, Inc., 279 B.R. 55, 67 (W.D.N.Y. 2002) ("The test for determining whether a corporation is acting as an agent for a related corporation is the same as the test for determining whether to pierce the corporate veil.").

75 Janki Bai Sahu v. Union Carbide Corp., No. 04 Civ. 8825 (JFK), 2012 U.S. Dist. LEXIS 91066, at *46 (S.D.N.Y. June 26, 2012) (explaining that an agency theory claim against a parent requires the subsidiary to be acting in the name of the parent with proper authority). For an additional explanation of corporate veil-piercing and alter ego theory, see *supra* Section I.B.3.

76 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 7:16 (3d ed. 2018).

77 After all, the DOJ and SEC chose to publish the Resource Guide in part to explain their FCPA enforcement approach to businesses and individuals. RESOURCE GUIDE, *supra* note 13, at *Foreword*. This includes an overview of principles of corporate liability and anti-bribery violations. *Id.* at 27; *see also* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1235 (2007) (arguing that regulatory certainty and predictability promote effective deterrence and increase corporate compliance with the FCPA); Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV.

note that piercing the corporate veil and establishing a principal-agent relationship are two distinct theories used to hold a parent company liable for the acts of its subsidiary. Under an alter-ego or veil-piercing test, a court disregards the corporate form, and treats the parent and subsidiary companies as one and the same[78] in order to hold the parent company liable in its shareholder capacity. Under an agency theory, a court holds a parent company liable for the acts of the subsidiary agent because the subsidiary was acting on the parent's behalf.[79] Yet some courts and scholars[80] have conflated piercing the corporate veil and holding a parent liable under an agency theory. "The result has been a weakening and muddying of the term 'agent' and a failure by courts to state the real reasons for their decisions."[81]

In determining whether a subsidiary is an agent of a parent company to then impose liability to the parent company, courts consider several factors regarding activities that resulted in the claim at issue. These factors include whether the parent company 1) "established detailed operating policies and procedures"; 2) "exerted day-to-day control over the subsidiary"; 3) "negotiated and drafted contracts"; 4) and whether "[e]mployees of the parent company assumed a controlling role in carrying out obligations under contracts related to the claim."[82] Moreover, a subsidiary can be the agent of its parent company for a specific transaction or in general, although the relationship should relate to the underlying claims of misconduct.[83]

In contrast, the Third Restatement of Agency provides clearer insight into what constitutes a principal-agent relationship. Besides laying out the elements that define an agency relationship, the Restatement also points out that a principal's right to control the

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37, 43 (2013) (highlighting that compliance with the FCPA is difficult for many U.S. companies in part because of "missing judicial or administrative clarification").

78 *See* Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1237–38 (N.D. Cal. 2004) (describing how under veil-piercing or alter-ego tests, courts ignore "corporate formalities" and treat both corporations as a single entity).

79 *See* F. Hoffman-La Roche, Ltd. v. Superior Court, 30 Cal. Rptr. 3d 407, 418 (Ct. App. 2005) ("[T]he hallmark of agency is the exercise of control over the agent by the principal.").

80 *See, e.g.*, Avery, *supra* note 17, at 144–45 ("To pierce the corporate veil of a subsidiary using agency theory, the court must find that the parent acted beyond the normal and usual manner of a shareholder for the purposes of using the subsidiary as an agent or instrumentality.").

81 *Bowoto*, 312 F. Supp. 2d at 1239 (quoting RESTATEMENT (SECOND) OF AGENCY app. § 14 M, at 68 (AM. LAW INST. 1958)).

82 *See* Kenney & Hawxhurst, *supra* note 56, ¶ 6A.01(c).

83 *See* Phx. Can. Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988); *see also* Kenney & Hawxhurst, *supra* note 56, ¶ 6A.01(c) (stating that the relevant inquiry under an agency theory is "whether the parent company exerted control over specific activities directly relating to the underlying claims").

actions of the agent is a defining feature of a principal-agent relationship.[84] The right to control is closely related to the concept of establishing control over an agent's actions generally or specifically; a subsidiary can be an agent although the principal lacks "the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment."[85] For this reason, the focus should be on whether the principal has this right to control the agent—not whether the principal actually exerts that control. In other words, a principal that controls only some of an agent's activities or does not exercise their right of control entirely still maintains that right.

B. Control over an Agent Generally or Specifically?

As mentioned in Section I.B.2, it is important to note that a parent company's subsidiary can serve as an agent "in the course of one or more specific transactions."[86] This means that a subsidiary could function either as an agent of the parent company generally or solely for purposes of a particular decision or transaction.[87] Moreover, "[t]he parent corporation will be held liable for the activities of the subsidiary only if the parent dominates those activities."[88] The mere fact that an agent acts on behalf of another implies that there is a limit to the scope of the relationship. As the Third Restatement of Agency points out, "[t]he legal consequences of agency may attach only to a portion of the relationship between two persons, a fact that dictates care in using the term 'agency relationship.'"[89] Thus, whether a parent company can be held liable for a subsidiary's violation of the FCPA anti-bribery provisions turns on the issue of control.

Moreover, the distinction between a subsidiary being an agent overall versus being an agent for a specific transaction is important because both forms of an agency relationship can be a basis for parent liability. It is also necessary to acknowledge this distinction to better understand whether the SEC and DOJ are correctly applying agency theories to hold parent companies liable for the actions of their sub-

84 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. LAW INST. 2006) ("[A]n essential element of agency is the principal's right to control the agent's actions.").

85 *Id.* § 1.01 cmt. c.

86 *See Phx. Can. Oil Co.*, 842 F.2d at 1477.

87 *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. b (AM. LAW INST. 2006) ("It is also common usage to refer without distinction to parties who serve any intermediary function as 'agents.'"); *see also id.* § 1.01 cmt. c (discussing how a person can be an agent despite the principal's lack of full control or the independent actions of the agent).

88 *See In re* Tronox, Inc. Sec. Litig., 769 F. Supp. 2d 202, 209 (S.D.N.Y. 2011) (quoting Grasty v. Michail, No. Civ. A. 02C-05-89 CLS, 2004 WL 396388 (Del. Super. Ct. 2004)).

89 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. b (AM. LAW INST. 2006).

sidiaries. While the law is not settled on the exact amount of control required for a parent company to cross the line and become a principal, existing case law is helpful in locating the point along the spectrum of control.

C. A New Formulation of the Correct Standard

In explaining a principal's right of control in the corporate context, the Third Restatement of Agency points to *Transamerica Leasing, Inc. v. La Republica de Venezuela*[90] to clarify the circumstances under which a subsidiary is an agent of its parent. In that case, marine equipment lessors sued the Venezuelan government and one of its instrumentalities, a shipping company, alleging that the government was derivatively liable for the shipping company's breaches of contract and that the Venezuelan government was directly liable for causing the breaches.[91] Although this was not an FCPA case, the D.C. Circuit court applied traditional agency principles to assess whether the Venezuelan government had sufficient control over its instrumentality, the shipping company, for it to constitute an agent and overcome the presumption that a government instrumentality has a legally separate status from the Venezuelan government.[92] For this reason, *Transamerica* provides an excellent example of the principal-agent test federal courts should follow.

This Note proposes using the D.C. Circuit court's clear, concise formulation of the control analysis as a basis for a new standard because it does not conflate liability premised on alter ego versus a principal-agent relationship, and it correctly applies traditional agency principles per the Third Restatement of Agency. The D.C. Circuit court states that the parent company must have 1) expressed an interest for the subsidiary to act on behalf of the parent; 2) the subsidiary agreed to do so; 3) the parent has the right to exert control over the subsidiary regarding matters given to the subsidiary; and 4) the parent's control over the subsidiary is more direct than if it were merely a majority shareholder of the subsidiary's stock or if it had appointed individuals to the subsidiary's Board of Directors.[93]

This Note builds on the D.C. Circuit's control standard to develop a new formulation, refined by applying a set of specific factors to determine the requisite level of control that some Delaware

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[90] 200 F.3d 843 (D.C. Cir. 2000).

[91] *Id.* at 845–46.

[92] *Id.* at 847–50.

[93] *Id.* at 849.

courts[94] have applied in corporate law: "the extent of overlap of officers and directors, methods of financing, the division of responsibility for day-to-day management, and the process by which each corporation obtains its business."[95] In addition to the fundamental elements to establish a principal-agent relationship, these additional factors would provide guidance to both corporations and prosecutors in the FCPA context, where a range of case-specific evidence is considered when enforcing the anti-bribery provisions. Under this approach, no single factor need be determinative; rather, each factor should be weighed to assess parent-subsidiary liability predicated on a principal-agent relationship.

Some critics of applying the D.C. Circuit's standard may argue that its ambiguity regarding the level of control needed to establish a principal-agent relationship still leaves us with unclarity and uncertainty.[96] In particular, one primary weakness is that the D.C. Circuit's standard only analyzes when a parent is a principal for all of the acts of a subsidiary and does not provide an analysis for when a parent is a principal for specific transactions. Thus, it does not distinguish between the two ways in which a parent company can serve as a principal of a subsidiary. However, the second step in this Note's formulation proposes weighing the four Delaware corporate law factors, which could be applied to both situations. For example, if a parent company's foreign subsidiary ran an import and export business on behalf of its parent, a court could apply the requisite elements to establish a principal-agent relationship using the four Delaware court factors. Similarly, if a parent company's foreign subsidiary were merely responsible for importing and exporting rice specifically on behalf of its parent, one would still apply the requisite elements to assess whether an agency relationship exists. The distinction in this second hypothetical is that rather than apply the four factors to the subsidiary generally, courts could apply the four factors to the specific rice transactions. In other words, a court would look at 1) the extent

94 To refine the D.C. Circuit's standard, this Note turns to Delaware corporate case law because it has been the most important jurisdiction in U.S. corporate law since the early twentieth century, where more than one million businesses have made Delaware their legal home. Gov't Info. Ctr., *Why Businesses Choose Delaware*, DELAWARE.GOV, https://corplaw.delaware.gov/why-businesses-choose-delaware (last visited Aug. 29, 2019).

95 Applied Biosystems, Inc. v. Cruachem, Ltd., 772 F. Supp. 1458, 1463 (D. Del. 1991); *see also, e.g.*, E.I. du Pont de Nemours & Co. v. Agfa-Gavaert NV, 335 F. Supp. 3d 657, 670 (D. Del. 2018); Telcordia Techs., Inc. v. Alcatel S.A., No. 04-874 GMS, 2005 U.S. Dist. LEXIS 10194, at *8–9 (D. Del. May 27, 2005).

96 *See, e.g.*, COX & HAZEN, *supra* note 76 (arguing that while the agency theory does "broadly" point courts in the right direction, it ultimately "offers little analytical rigor to the process" of determining whether parent subsidiary liability exists).

of overlap of officers and directors responsible for importing and exporting the rice; 2) the methods of financing the rice shipments; 3) the division of responsibility for day-to-day management regarding the rice shipments; and 4) the process by which the subsidiary obtains its clients for importing and exporting rice.

Ultimately, combining the D.C. Circuit and Delaware courts' approaches to determine whether a principal-agent relationship exists serves as a crucial guide in what can often be a complicated area of law. Together, they provide a clear, concise formulation of both traditional agency principles and general principles of corporate liability, both of which apply to the FCPA. Because business structures can be complex, the agency relationship is very fact specific. Thus, courts and enforcement agencies should apply a uniform standard rather than a rule. These formulations are broad enough to take into consideration the amount of control that a parent company can have over its subsidiary to establish a principal-agent relationship under the agency theory. On one hand, a parent needs more control than merely voting control over its subsidiary. On the other, a parent need not control the internal affairs of the subsidiary or determine its day-to-day operations.[97] After all, a parent company can exert or have a right to control operations generally or for specific activity of a subsidiary and still establish a principal-agent relationship. As the Supreme Court noted, agents come in many shapes and sizes: "One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose."[98]

[97] That is closer to the master-servant relationship usually needed to establish criminal respondeat superior liability, which is a specific form of agency where there is more control. *See, e.g.*, Schecter v. Merchants Home Delivery, Inc., 892 A.2d 415, 431 (D.C. 2006) (acknowledging trial court's ruling that vicarious liability for a theft by hired deliverymen could only stand if deliverymen were employees or agents of company in a master-servant relationship); *see also* Bottos v. Beamer, 399 F. Supp. 999, 1003 (N.D. Ind. 1973) ("While the concept of vicarious liability may apply to intentional torts . . . it is limited to those situations in which a master-servant relationship exists and the tort was committed in the course of employment."); Restatement (Second) of Agency § 219 (Am. Law Inst. 1958) (explaining when a master is liable for the torts of his servants); *id.* § 220 (defining the term "servant"). *But see* Restatement (Third) of Agency 10 (Am. Law Inst. 2006) (explaining that the Third Restatement of Agency does not use the "master-servant" terminology because of its antiquated origins implying that household service is the archetype of an employment relationship); *id.* § 2.04.

[98] Daimler AG v. Bauman, 571 U.S. 117, 135 (2014) (quoting 2A C.J.S. *Agency* § 43 (2013)).

III
THE DOJ AND SEC'S INTERPRETATION OF AGENCY THEORIES FOR PARENT-SUBSIDIARY LIABILITY—AGGRESSIVE OVERREACH?

Part I reviewed the elements of the FCPA provisions and the ways in which a parent company can be held liable for the misconduct of its subsidiary under the anti-bribery provisions. Part II demonstrated the lack of clarity in the existing literature and case law regarding parent-subsidiary liability based on a principal-agent relationship, before proposing a new two-step standard based on the D.C. Circuit's formulation of agency principles in *Transamerica Leasing* and Delaware corporate case law. Part III first assesses the DOJ and SEC's stated policy regarding parent-subsidiary liability. It then provides an overview of scholars' and practitioners' critiques and concerns of the agencies' policy. Finally, Section III.C applies this Note's proposed standard to three cases: Ralph Lauren, Alcoa, and Legg Mason. This Note analyzes these three cases because they are frequently cited as key examples of the DOJ and SEC's overly aggressive enforcement policies.[99] As a result, they are good cases upon which to apply this Note's proposed standard and assess whether the government agencies are in fact incorrectly applying parent-subsidiary liability.

A. The DOJ and SEC Policy

In November 2012, the DOJ and SEC jointly issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("Resource Guide").[100] Nonbinding and advisory in nature, the document details and compiles information about the FCPA, principles of best practices, and enforcement considerations.[101] In it, the agencies highlight that a parent can be liable for its subsidiary's conduct under traditional agency principles.[102] Because the most important characteristic

99 *See, e.g.*, Koehler, *supra* note 16, at 441 (citing Alcoa as an example of an FCPA enforcement action in which government agencies do not allege any knowledge, participation, or acquiescence in the conduct at issue by the board of directors or executive officers); NICHOLAS R. BARNABY ET AL., JENNER & BLOCK LLP, BUSINESS GUIDE TO ANTI-CORRUPTION LAWS 2017: A GUIDE TO THE FCPA AND THE UK BRIBERY ACT 9 (2017), https://jenner.com/system/assets/assets/9974/original/BusinessGuideToAntiCorruptionLaws2017.pdf (citing Ralph Lauren and Alcoa as examples of the DOJ and SEC's aggressive positions with respect to a parent's liability for its subsidiary's actions); LEVINE ET AL., *supra* note 6, at 9 (citing the Legg Mason enforcement action as an example of the DOJ applying an expansive theory of agency).

100 RESOURCE GUIDE, *supra* note 13.

101 *Id.*

102 *Id.* at 27 ("If an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent. Moreover, under traditional principles of *respondeat superior*, a company is liable for the acts of its agents . . . .").

of agency is control, the agencies evaluate the parent's control by looking at a variety of factors, such as "the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of a specific transaction" to determine whether a subsidiary is an agent of the parent.[103] To support this point, the agencies point to *Pacific Can Co. v. Hewes*,[104] a dispute between a fruit brokerage and a packing company in which the Ninth Circuit assessed whether there was sufficient evidence of a principle-agent relationship between the packing company and the can manufacturer to submit the question to the jury. In determining that there was sufficient evidence, the court stated, "[w]here one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for the acts of its agent within the scope of the agent's authority."[105] The Resource Guide also cites *United States v. NYNEX Corp*.,[106] in which the court found the corporation criminally liable for its agent's misconduct, much like a parent corporation can be liable for the conduct of its subsidiary under an alter ego analysis.[107]

However, while the Resource Guide explains in general terms that the DOJ and SEC are applying agency theories to establish parent-subsidiary liability,[108] it provides very little clarity regarding how these theories apply in the FCPA context. The Resource Guide only provides one concrete example: the SEC's 2009 cease-and-desist order against United Industrial Corporation (UIC).[109] In that case, the SEC alleged that the president of the subsidiary, ACL, who authorized the illegal payments, was an agent of the parent company because he reported directly to the CEO of UIC. UIC also listed the subsidiary's president "as a member of UIC's 'senior management'" in its annual reports.[110] In addition, UIC's corporate legal department approved the retention of the foreign agent who served as the intermediary to commit the bribes, "despite a lack of documented due diligence and an agency agreement that violated corporate policy."[111] In

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103 *Id.*

104 95 F.2d 42 (9th Cir. 1938).

105 *Id.* at 46.

106 Resource Guide, *supra* note 13, at 27 n.178 (citing United States v. NYNEX Corp., 788 F. Supp. 16, 18 n.3 (D.D.C. 1992)).

107 *NYNEX Corp.*, 788 F. Supp. at 18 n.3.

108 *See* Resource Guide, *supra* note 13, at 27–28.

109 *See id.* at 112 n.181.

110 United Indus. Corp., Exchange Act Release No. 60005, Administrative Proceeding File No. 3-13495 ¶ 27 (May 29, 2009) (corrected order), https://www.sec.gov/litigation/admin/2009/34-60005.pdf.

111 Resource Guide, *supra* note 13, at 28.

addition, a corporate official of the parent company, UIC, approved a $100,000 advance payment to the foreign agent.[112]

For two reasons, this example does not help illustrate the point that a parent can be held liable for bribes committed by its subsidiary if a principal-agent relationship exists between the two. First, in the legal analysis section of the cease-and-desist order, the SEC does not actually state that UIC was liable because the subsidiary, or its president, was UIC's agent. Second, the enforcement agency's focus is on the actions of ACL's president, Thomas Wurzel. The SEC states that in its "Forms 10-K and annual reports, [UIC] routinely listed ACL's President as a member of UIC's 'senior management.'"[113] This suggests that in the SEC's analysis, the parent company was liable because Wurzel himself was UIC's direct agent, not because the subsidiary was UIC's agent and Wurzel was a subagent.[114] While the UIC example in the FCPA Resource Guide was meant to stand for the proposition that a company can face parent-subsidiary liability, it is not clear that this example is predicated on a principal-agent relationship theory of liability more specifically. Rather, it seems that the SEC was holding the parent company, UIC, liable because the parent company treated the President as a member of UIC's senior management, serving as a direct agent of the parent company. In sum, the single example that the DOJ and SEC provide in their Resource Guide as an example of parent liability based on an agency theory may not actually be about a principal-agent relationship between a parent company and its subsidiary.

Based on this analysis of the UIC case, a principal-agent relationship exists between a parent company and its subsidiary when the parent company exerts control over the subsidiary's executives under the SEC and DOJ's theory of parent liability. However, courts have yet to answer the question of whether a parent company could be liable not because of the misconduct of a subsidiary, but because an employee of the subsidiary was considered to be an agent of the parent company. Although the Second Circuit avoided providing an answer, the facts in *United States v. Hoskins*[115] raise the same question. In that case, the DOJ alleged that Hoskins, along with several other defendants participated in a scheme to bribe Indonesian officials

112 United Indus. Corp., Exchange Act Release No. 60005, *supra* note 110, ¶ 27.

113 *Id.*

114 *See* RESTATEMENT (THIRD) OF AGENCY § 1.04 (AM. LAW INST. 2006) ("A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationship . . . is one of agency . . . .").

115 902 F.3d 69 (2d Cir. 2018).

so that their company, Alstom S.A. (Alstom), could secure a contract from the Indonesian government.[116] More specifically, the government alleged that Alstom's subsidiary, Alstom Power, Inc. (Alstom U.S.) and various individuals associated with the French parent company, Alstom, retained consultants to bribe Indonesian officials to secure a $118 million contract for the parent company.[117] Hoskins never directly worked for Alstom U.S.; rather, he worked for Alstom and was employed by Alstom's U.K. subsidiary. But at the time of the misconduct, he was assigned to work for a French-based subsidiary called Alstom Resources Management.[118] The DOJ alleged that Hoskins was an agent of Alstom U.S. because he "repeatedly e-mailed and called . . . U.S.-based coconspirators" regarding the scheme.[119] Moreover, he was "one of the people responsible for approving the selection of, and authorizing payments to, [the consultants], knowing that a portion of the payments to [the consultants] was intended for Indonesian officials in exchange for their influence and assistance in awarding the [contract]."[120] However, similar to the UIC case, the facts in *Hoskins* suggest that even if he had been an employee of Alstom's U.S. or U.K. subsidiary, Hoskins was working for the parent company when he participated in the conspiracy to retain consultants to bribe Indonesian government officials to retain business on behalf of Alstom. Although the DOJ has thus far been unable to establish that Hoskins did in fact act as an agent of Alstom U.S. (which would have been liable as a principal), it remains an open question whether a parent company can be held liable for the FCPA violations of a subsidiary's employee who acted as the subsidiary's agent.

The Resource Guide states: "If an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent."[121] Therefore, a principal should be liable for an act committed through an agent if the principal would have been held liable if it had done the same act directly.[122] The Resource Guide further states that "under traditional principles of *respondeat superior*, a company is liable for the acts of its agents, including its employees, undertaken within the

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116 *Id.* at 72.

117 *Id.*

118 *Id.*

119 *Id.* (quoting Brief for Appellant at 7, United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018) (No. 16-1010), 2016 WL 4760908, at *7).

120 *Id.* (alterations in original) (internal citations omitted) (quoting Third Superseding Indictment ¶¶ 3, 8, United States v. Hoskins, 123 F. Supp. 3d 316 (D. Conn. 2015) (No. 3:12-CR-238)).

121 Resource Guide, *supra* note 13, at 27.

122 *E.g.*, Jahn v. Bacon (*In re* E. Tech. Co.), 528 B.R. 743, 751 (Bankr. E.D. Tenn. 2015); Blanks v. Fluor Corp., 450 S.W.3d 308, 378 (Mo. Ct. App. 2014).

scope of their employment and intended, at least in part, to benefit the company."[123] As a result, a parent company "is liable for bribery committed by [its] subsidiary's employee" when an agency relationship exists between a parent and its subsidiary.[124]

Even though the Resource Guide attempts to serve as a comprehensive resource that summarizes the FCPA's prohibitions and requirements as well as the agencies' interpretations, it does not provide sufficient clarity on certain issues. Much of the Resource Guide is not even drawn from case law, but rather "de facto agency jurisprudence, which is comprised of the Sentencing Guidelines, opinion procedure releases, and various resolution vehicles (such as declinations, NPAs, DPAs, and plea agreements)."[125] The SEC and DOJ have no incentive to elaborate further on the standard for parent-subsidiary liability or to provide additional examples—especially in determining what level of control is needed to assert a principal-agent relationship. Currently, parent companies are uncertain about what the standard is, which may be one of the reasons why companies are more likely to settle charges against them. When a corporation's board of directors becomes aware of a possible investigation—either through an internal report or a letter from the SEC or DOJ—it will typically hire outside counsel from a large law firm to conduct an internal investigation. This internal investigation can cost a corporation hundreds of millions of dollars in legal fees, e-discovery services, additional internal monitoring, and potentially increased accounting firm fees.[126] When the investigations costs are so high, many companies would rather accept the penalties and fines than risk the cost of going to court and potentially facing years of litigation.[127] Since 1977, 92% of defendants have settled with the SEC, while 73% of defendants have settled with the DOJ.[128] Moreover, uncertainty creates a climate of fear that the

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[123] Resource Guide, *supra* note 13, at 27.

[124] *Id.*

[125] Pollack & Reisinger, *supra* note 17, at 143.

[126] Avery, *supra* note 17, at 165–66; *see also* Andrew Weissmann & Alixandra Smith, U.S. Chamber Inst. for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 5 (2010), https://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpa.pdf (pointing out the immense costs businesses incur when confronted with an FCPA investigation); *Foreign Corrupt Practices Act Clearinghouse: Key Statistics from 1977 to Present*, Stan. L. Sch., http://fcpa.stanford.edu/statistics-keys.html (last visited Aug. 13, 2019) (stating that the average length of an FCPA-related investigation is thirty-eight months and that the average monthly cost is $2,243,428).

[127] *See* Avery, *supra* note 17, at 168 (explaining that towards the end of an investigation, corporations face the threat of SEC or DOJ fines and penalties and "must decide whether to add years of litigation" to the list of expenses corporations already face).

[128] *Foreign Corrupt Practices Act Clearinghouse: Key Statistics from 1977 to Present*, *supra* note 126.

enforcement agencies might find beneficial, in which defense attorneys are advising their clients to bolster their internal compliance controls, just in case.[129]

B. Critics' Analysis of the DOJ and SEC Policy

For the last several years, both practitioners and commentators have sounded the alarm about the DOJ and SEC applying an aggressive enforcement theory of parent company liability under the FCPA.[130] The general argument is that in cases involving payments made by subsidiaries, parent liability has typically been premised on the parent company's authorization, direction, or control of the alleged improper payments. More recently, however, some argue that "the DOJ and SEC have advanced a more aggressive enforcement approach, seeking to hold a parent responsible for the actions of [its] subsidiary without its knowledge of, or participation, in the alleged misconduct."[131] According to this view, there have been several cases in which the agencies have not found that any officer, director, or employee of a parent company knowingly engaged in a bribery scheme.[132] Instead, the enforcement agencies based their enforcement actions "on expansive 'agency' principles"[133] in which it appears that the government almost always views a subsidiary as being an agent of its parent.[134] Moreover, the enforcement agencies' view is that a corporation is responsible for the acts of its agents when they act within the scope of their employment and, at least in part, for the corporation's benefit.[135] "This essentially results in strict *respondeat superior* liability," warned one opponent of this approach.[136]

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129 *See, e.g.*, Harker et al., *supra* note 7, at 3–4 (warning parent companies that the SEC is willing "to bring FCPA charges against parent companies for improper behavior by subsidiaries and their third-parties based on little more than a failure to properly supervise").

130 *See, e.g.*, Adams & Keeling, *supra* note 14, at 29 ("Despite the language in the Resource Guide, the government has not uniformly applied the requirements for alleging an agency relationship."); *see also* LEVINE ET AL., *supra* note 6, at 9 (describing a non-prosecution agreement between the U.S. Department of Justice and Legg Mason, Inc. as reflecting "an expansive application of the agency theory of liability and little regard for the principle of corporate limited liability"); Urofsky, *supra* note 19, at 1 (arguing that the facts of the Ralph Lauren case point to the entrenchment of an "ominous prosecution theory").

131 *See* Williams & Smith, *supra* note 7.

132 *See* WEISSMANN & SMITH, *supra* note 126, at 22 (claiming that the SEC regularly charges parent companies for FCPA anti-bribery violations that a subsidiary committed without the parent's knowledge).

133 *Id.*

134 Urofsky, *supra* note 19, at 3.

135 RESOURCE GUIDE, *supra* note 13, at 27.

136 Urofsky, *supra* note 19, at 3.

According to some practitioners and scholars, the DOJ and SEC must additionally allege the parent company authorized, directed, or controlled the bribes in order to assert parent-subsidiary liability. Gregory M. Williams and Richard W. Smith elaborate on this view, arguing that the Resource Guide is incorrect. According to them, under traditional agency principles, a parent company is only liable for the acts of its subsidiary under the alter ego theory "or when the subsidiary acts as the agent of the parent *for a specific purpose*."[137] Another commentator has gone so far as to claim that the Resource Guide "is an advocacy piece and not a well-balanced portrayal of the FCPA, as it is replete with selective information, half-truths, and information that is demonstratively false."[138]

C. The DOJ and SEC's Parent-Subsidiary Liability Theories in Practice

Having determined what level of control is needed to establish a principal-agent relationship, it seems clear that the DOJ and SEC's enforcement policies conform with general principles of corporate liability. The Resource Guide does not contradict general principles of corporate liability. Under the various theories used to establish parent-subsidiary liability, knowledge and intent is imputed to the parent company. This does not ignore the principle of limited liability either: When a controlling shareholder (a parent company) goes beyond the traditional level of control a shareholder exercises and starts exercising the level of power a board member exercises, it is acting as a parent of the subsidiary and is thus liable. The principle of limited liability only applies to companies whose shareholders are not exercising more control than their role allows. This Section applies this Note's proposed standard to three cases that are often cited as examples of the DOJ and SEC's overly aggressive enforcement policy, to determine whether strict liability was actually applied.

1. Ralph Lauren Corporation

In 2013, both the DOJ and SEC reached non-prosecution agreements with Ralph Lauren Corporation (Ralph Lauren) for violations of the FCPA anti-bribery provisions. For several years, Ralph

137 Williams & Smith, *supra* note 7; *see also* British Telecomms. PLC v. IAC/InteractiveCorp., 356 F. Supp. 3d 405, 409 (D. Del. 2019) ("Finding liability under the agency test requires the parent-subsidiary relationship to be directly related to the cause of action.").

138 Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, BLOOMBERG BNA: WHITE COLLAR CRIME REPORT (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189072.

Lauren's subsidiary in Argentina had allegedly paid a third party more than $500,000 to bribe Argentine customs officials in order to expedite merchandise through customs without proper import licenses or inspection.[139] Neither government agency alleged that Ralph Lauren demonstrated any authorization, direction, or control of its subsidiary's conduct. Yet this would not be necessary if the subsidiary, PRL S.R.L., had been an agent of its parent company, Ralph Lauren. Ultimately the agencies chose not to charge Ralph Lauren for violating the FCPA anti-bribery provisions because the company voluntarily disclosed the misconduct at issue and cooperated with the agencies during the investigation.[140]

While the facts of both non-prosecution agreements are sparse, applying this Note's two-step analysis to the facts of this case indicates PRL S.R.L. was indeed an agent. The first step requires looking at the four elements the D.C. Circuit court established in *Transamerica Leasing*. Here, the subsidiary marketed and sold Ralph Lauren merchandise from Argentina as well as merchandise imported from outside the country.[141] This implies that Ralph Lauren wanted the subsidiary to act on its behalf by selling Ralph Lauren's products and that PRL S.R.L. did so. While it is unclear whether the parent company had the right to control the subsidiary regarding matters delegated to the subsidiary, Ralph Lauren did hire the general manager of PRL S.R.L.[142] This suggests that Ralph Lauren exercised its control more directly than by merely voting a majority of the stock in its subsidiary or by making appointments to PRL S.R.L's Board of Directors. The non-prosecution agreements lack sufficient facts to move to the second step of the proposed standard. Nevertheless, determining whether a principal-agent exists "defies resolution by 'mechanical formula[e]'" because the inquiry is fact-specific,[143] so even weighing two or three of the four factors would help determine whether a principal-agent relationship exists between a parent and its subsidiary. In sum, had the government agencies failed to reach an agreement with Ralph Lauren, they could have chosen to hold the

139 Letter from U.S. Dep't of Justice Criminal Div. to Ralph Lauren Corp. (Apr. 22, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/23/Ralph-Lauren.-NPA-Executed.pdf.

140 *See id.*; *see also* Ralph Lauren Corp., SEC Non-Prosecution Agreement, Statement of Facts ¶ 12 (Apr. 18, 2013), https://www.sec.gov/news/press/2013/2013-65-npa.pdf.

141 Ralph Lauren Corp., SEC Non-Prosecution Agreement, *supra* note 140, Statement of Facts ¶ 2.

142 *Id.* Statement of Facts ¶ 3.

143 Transamerica Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843, 849 (D.C. Cir. 2000) (alteration in original).

company liable by demonstrating that PRL S.R.L. was acting as an agent of its parent company.

2. Alcoa

The Alcoa case also resulted in a settlement with the SEC and DOJ. As discussed in the Introduction, Alcoa Inc. was charged with violating the FCPA when "its subsidiaries repeatedly paid bribes to government officials in Bahrain to maintain a key source of business."[144] Because the SEC cease-and-desist order stated that there were "no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme,"[145] some lawyers cited this case as an example of the aggressive enforcement theory of parent company liability the agencies have been applying.[146]

Alcoa is a U.S. company that was a majority owner of Alcoa World Alumina and Chemicals (AWAC), which operated through several enterprise companies, including two subsidiaries, Alcoa of Australia Limited (AofA) and Alcoa World Alumina LLC (AWA).[147] At issue in this case was the misconduct of the two subsidiaries. Applying the D.C. Circuit's principal-agent test to establish liability, I examine the first two factors: the parent company's intent for the subsidiary to act on the parent's behalf and the subsidiary's consent.[148] Although desire for the subsidiary to act on the parent's behalf is not explicitly stated in the cease-and-desist order, it can be implied. AofA was the AWAC enterprise that owned and operated AWAC's bauxite mining and alumina refining assets in Australia. As for AWA, which was also an AWAC enterprise company, it assumed primary responsibility for all of Alcoa's alumina customers abroad (including Aluminium Bahrain B.S.C.) starting in 2000.[149] Based on these facts, it is reasonable to assume that AWAC wanted both subsidiaries to act on its behalf and that the subsidiaries consented to do so.

The third factor in the D.C. Circuit analysis is that the parent has the right to exercise control over the subsidiary regarding the "matters entrusted to the subsidiary."[150] The control the parent exercises, however, must be more than just as a majority stockowner.[151] The SEC asserted that Alcoa exercised control over the two subsidiaries based

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[144] U.S. Sec. & Exch. Comm'n, *supra* note 3.

[145] *Id.*

[146] *See, e.g.*, Harker et al., *supra* note 7; Williams & Smith, *supra* note 7.

[147] Alcoa Inc., Exchange Act Release No. 71261, 107 SEC Docket 20, ¶¶ 6–8 (Jan. 9, 2014), https://www.sec.gov/litigation/admin/2014/34-71261.pdf.

[148] *See Transamerica Leasing*, 200 F.3d at 849.

[149] Alcoa Inc., 107 SEC Docket at 20, ¶ 8.

[150] *Transamerica Leasing*, 200 F.3d at 849.

[151] *See id.*

on two facts: "Alcoa appointed the majority of seats on the AWAC Strategic Council, and the head of Global Primary Products served as its chair."[152] While some courts have pointed out that transferring personnel between a parent company and a subsidiary is insufficient to establish a principal-agent relationship, the SEC took other factors into consideration as well. Alcoa also "set the business and financial goals for AWAC and coordinated the legal, audit, and compliance functions of AWAC; and the AWAC subsidiaries' employees managing the Alba alumina business reported functionally to the global head of the Alumina Segment."[153] These are all essentially the same factors Delaware courts have looked at to determine the requisite level of control needed to establish a principal-agent relationship: the overlap of personnel, methods of financing, the division of day-to-day management, and the process by which each company obtains its business.[154] Applying a totality of circumstances approach, these factors indicate a principal-agent relationship between Alcoa and its subsidiaries. Moreover, "Alcoa was aware that Consultant A was an agent and distributor" of AofA's sales of alumina to Aluminium Bahrain B.S.C.[155] In fact, senior managers in Alcoa's Alumina Segment in the United States reviewed and approved the terms contracts related to Aluminium Bahrain and AofA.[156] Given that AWA and AofA were both Alcoa's agents during the relevant time and were acting within the scope of their authority when participating in the bribery scheme, it would have been unusual if Alcoa had *not* been charged with violating the FCPA because of the misconduct of its subsidiaries.

3. *Tyco International Limited*

In 2012, Tyco International Ltd. (Tyco) agreed to pay more than \$26 million to resolve charges of violating the FCPA. While the SEC charged Tyco with violating the anti-bribery provisions,[157] the DOJ declined to prosecute Tyco for crimes related to violations of the books and records provisions.[158] Specifically, the SEC charged Tyco of

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152 Alcoa Inc., 107 SEC Docket at 20, ¶ 12.

153 *Id.*

154 *See supra* Section II.C (discussing the factors some Delaware courts have used to assess whether a principal-agent relationship exists).

155 Alcoa Inc., 107 SEC Docket at 20, ¶ 12.

156 *Id.*

157 *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Tyco for Illicit Payments to Foreign Officials (Sept. 24, 2012), https://www.sec.gov/news/press-release/2012-2012-196htm.

158 *See* Press Release, U.S. Dep't of Justice, Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act (Sept. 24, 2012), https://www.justice.gov/opa/pr/subsidiary-tyco-international-ltd-pleads-guilty-sentenced-conspiracy-violate-foreign-corrupt.

violating the FCPA anti-bribery provisions once, through the acts of its then-subsidiary, TE M/A-COM, Inc. (M/A-COM). The SEC's complaint alleges that M/A-COM "retained a New York City-based sales agent who made illicit payments in connection with a September 2006 sale of microwave equipment to an instrumentality of the Turkish government."[159] The agent, who was contractually designated as M/A-COM's sales agent for Turkey, sold the equipment to the entity controlled by Turkey at approximately a twelve to forty percent mark-up over the M/A-COM invoice price and also received a commission on one of the sales.[160] The sales agent then transferred a portion of his commission and part of his mark-up earnings to a Turkish government official to obtain orders.[161] As a result, M/A-COM earned more than $70,000 in gross profits.[162] The SEC alleged that M/A-COM was an agent of Tyco based in part on the fact that officers served in dual roles at both companies.[163] At the time of the illicit transaction, four senior Tyco officers were also officers of M/A-COM, "including one who was M/A-COM's president."[164] In addition, "one of those Tyco officers served as one of five members of M/A-COM's board of directors."[165]

As can be observed by assessing whether there was a principal-agent relationship in the previous two examples, establishing the first two factors in the D.C. Circuit court standard is straightforward. Typically, a parent company wants the subsidiary to act on its behalf, and the subsidiary has consented to do so—especially regarding subsidiary companies abroad. They usually perform services that are sufficiently important to the parent company that if the subsidiary did not perform them, the parent company's own officials would perform similar services. The third and fourth D.C. Circuit factors, whether the parent company has the right to exercise control over the subsidiary and whether the parent exercises more than mere shareholder control, are more difficult to determine. Here, Tyco exerted control over M/A-COM because some officers served dual roles for the parent company and its subsidiary.[166] Nevertheless, it does not appear that Tyco

[159] Complaint ¶ 23, SEC v. Tyco Int'l Ltd., 12-cv-01583 (D.D.C. Sept. 24, 2012), https://www.sec.gov/litigation/complaints/2012/comp-pr2012-196.pdf.

[160] Letter from U.S. Dep't of Justice Criminal Div. to Tyco Int'l Ltd., Statement of Facts ¶ 57 (Sept. 20, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/09/27/2012-09-20-tyco-intl-npa-sof.pdf.

[161] *Id.*

[162] *Id.* ¶ 58.

[163] Complaint, *supra* note 159, ¶ 25.

[164] *Id.*

[165] *Id.*

[166] *See id.*

exerted more control than the typical amount of control stock owners exert. As mentioned in Section II.A, control related to stock ownership includes the election of directors.[167] Even a duplication of directors or officers will not be sufficient to establish parent-subsidiary liability under traditional agency principles.[168]

Under the Delaware courts' analysis, Tyco does not exert sufficient control over M/A-COM to establish a principal-agent relationship. The Delaware courts look at three additional factors besides the extent of overlap of officers and directors—which, in this case, was only four high-level officers—and the agencies should apply a totality of the circumstances approach to indicate an agency relationship. The Tyco case also appears to be inconsistent with the example of a principal-agent relationship the agencies provided in the Resource Guide. While M/A-COM and Tyco only had four overlapping directors, in the Resource Guide example, UIC exerted much more control over its subsidiary.[169] Although there could be valid explanations for the discrepancy, it is worth noting that while the SEC charged Tyco with violating the books and records, internal controls, and anti-bribery provisions of the FCPA, the DOJ only mentioned violations of the books and records provisions. Consequently, the DOJ never attempted to establish a principal-agent relationship between Tyco and M/A-COM to assert parent-subsidiary liability. The DOJ may have made this decision because it did not think Tyco exerted sufficient control over M/A-COM. In contrast, in the Ralph Lauren case, the two enforcement agencies were consistent in charging the parent company with violations of the anti-bribery provisions. Similarly, the plea agreement with the DOJ and the SEC cease-and-desist order were consistent regarding Alcoa, which was charged with one count of violating the anti-bribery provisions.

While the Tyco case is not necessarily an example of the SEC failing to apply traditional agency principles, it does appear that the principles were not applied consistently. Although Delaware courts have observed that no single factor is necessary, no single factor should be determinative either. Here, the SEC did not weigh or even mention some of the other factors that should be taken into consideration. If anything, this reinforces the point that the current framework of parent-subsidiary liability under an agency theory is insufficiently clear. No one seems to know what level of control is needed to establish a principal-agent relationship—not even the SEC itself.

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167 *See supra* note 71 and accompanying text.

168 *See supra* note 72 and accompanying text.

169 For a more detailed discussion, see *supra* Section III.A.

Conclusion

Under traditional agency principles, parents can be held liable for the misconduct of their subsidiaries. Critics of the agencies' enforcement approach are wrong to claim that the DOJ and SEC are applying strict liability to parent companies. However, although the agencies are correctly applying agency theories to establish parent-subsidiary liability, they are not doing so consistently. Practitioners and scholars criticizing the agencies' enforcement approach are right to be concerned about the lack of clarity in the existing framework to establish parent-subsidiary liability under the FCPA anti-bribery provisions. The Ralph Lauren, Alcoa, and Tyco cases demonstrate that this lack of clarity results in inconsistent outcomes and regulatory uncertainty. In Tyco, the company agreed to pay more than $26 million to resolve the charges with the two agencies.[170] If the standard regarding the level of control needed to establish a principal-agent relationship had been clear, Tyco might have been more incentivized to contest the charges and go to trial.

Lack of clarity has also perpetuated a vicious cycle in which corporations are incentivized to settle their cases through NPAs and deferred prosecution agreements (DPAs). This has then created a lack of FCPA precedent. Without FCPA case law, companies have been forced to rely on NPAs and DPAs for guidance. As has been noted elsewhere, these alternative forms of resolution now serve as de facto jurisprudence,[171] raising concerns about the separation of powers: Government agencies are now creating precedent rather than federal courts.[172] Troublingly, "without binding judicial precedent, the DOJ is under no obligation to treat the same conduct by different corporations with any consistency, increasing the challenges of corporate compliance and risk reduction."[173]

Consequently, courts should uniformly apply a standard like the one this Note proposes, which uses both the D.C. Circuit's formulation, and also incorporates the Delaware courts' analysis of the requisite level of control needed to establish a principal-agent relationship. This formulation is especially useful because both tests are based on the Restatement of Agency.[174] Applying this standard would address

170 Press Release, U.S. Dep't of Justice, *supra* note 158.

171 *See* Pollack & Reisinger, *supra* note 17, at 131.

172 *See* Woody, *supra* note 14, at 1756 (stating that the downside to relying on DOJ and SEC agreements for legal standards is that "the settlement agreements have been created by prosecutors without judicial oversight").

173 Pollack & Reisinger, *supra* note 17, at 127.

174 Like all restatements, the Restatement of Agency was written by experts in this area of law and was meant to provide "clear formulations of common law and its statutory

some of the frequently cited problems with the existing FCPA regime: the need for clearer pleadings and the application of uniform standards in the enforcement of parent-subsidiary liability.

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elements and reflect the law as it presently stands." *How the Institute Works*, Am. Law Inst., https://www.ali.org/about-ali/how-institute-works (last visited Aug. 18, 2019).