



From FATCA to FIFA

The Extraterritoriality of U.S. Money Laundering Laws

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Extraterritoriality

- What is extraterritoriality?
 - Through extraterritoriality the laws of a nation follow a person even beyond that nation's borders.
 - In the U.S. there is a strong presumption that U.S. laws are meant to apply only within the territorial jurisdiction of the United States. When Congress expresses an affirmative intent that its legislation should be applied outside the territorial borders of the U.S., it is exercising *extraterritorial* legislation.
- Foreign Corrupt Practices Act (FCPA)
 - The FCPA is an example of extraterritorial legislation. The FCPA is an anti-corruption statute that is far-reaching in scope and applies to companies with relevant securities in the U.S.; this includes both U.S. and foreign persons and entities.

Four Extraterritoriality Theories

Continuing with the example of the FCPA...

- First, the FCPA contains alternative jurisdiction provisions that allow a U.S. national or business to be charged for certain crimes they commit *outside* the U.S.
 - This jurisdiction is based in the perpetrator's nationality rather than where the crime was committed.
- Second, the FCPA applies to non-US persons who make use of the U.S. in the furtherance of corrupt payments.
 - This provision has been interpreted to include even minor pass-through acts, such as email traffic through U.S. domains and wire transfers sent using a US banking system. This broad interpretation grants the U.S. extensive jurisdiction over foreign persons and businesses.

Four Extraterritoriality Theories

- Third, the legal theories of agency and vicarious liability are ardently applied.
 - A domestic person or entity can be found liable for corrupt acts undertaken by its employees within the scope of their employment which are intended to benefit the domestic person or entity.
- Fourth, even if an individual or entity does not undertake any act in furtherance of a corrupt payment within the U.S., they may still be found liable for aiding and abetting an FCPA violation.
 - The U.S. will be able to obtain jurisdiction over a foreign individual or entity who conspires to violate the FCPA as long as there is jurisdiction over another party participating in the FCPA or conspiracy violation in question.

What is FATCA?

- **The Foreign Account Tax Compliance Act** is another example of extraterritorial legislation.
- FATCA prevents U.S. citizens and residents from evading federal income tax on U.S.-sourced income generated from investments in or through non-U.S. entities, offshore funds, and other foreign financial institutions.
- FATCA creates a new reporting regime that imposes a 30% withholding tax on any withholdable payments made to foreign financial institutions, or FFIs, and non financial foreign entities, or NFFEs, unless such entities meet certain requirements.

What is an FFI?

- **An FFI** is any entity that:
 - accepts deposits in the ordinary course of a banking or similar business;
 - holds financial assets for the accounts of others as a substantial portion of its business;
 - is engaged, or holds itself out as being engaged, in the business of investing, reinvesting or trading in securities, insurance or annuity contracts, options, derivatives, commodities, partnership interests, NPCs; or
 - is an insurance company that issues or is obligated to make payments with respect to a financial account.
 - **Some examples** include banks, trustees, broker dealers, insurance companies, and trust companies.

What is a Withholdable Payment?

- **Withholdable payments** include payments of fixed or determinable annual or periodical income, and gross proceeds from the sale or disposition of a type that can produce interest or dividends from U.S. sources.
- If the payee fails to meet FATCA requirements, withholdable payments are subject to the 30% FATCA withholding tax.

How can the FATCA withholding be avoided?

- In order to avoid the 30% FATCA withholding:
 - FFIs must enter into an information reporting agreement with the U.S. International Revenue Service (“IRS”). This agreement would require non-U.S. banks to report their accounts to the IRS.
 - NFFEs must supply a certification that they do not have substantial U.S. owners.

FIFA

- In May 2015, the U.S. Justice Department arrested FIFA officials in Switzerland extraditing them to the U.S. The U.S. Justice Department then announced that it had charged top FIFA officials for various crimes of corruption, including racketeering and bribery.
 - FIFA officials are facing corruption charges involving more than \$150 million in bribes.
- The U.S. justified its jurisdiction over FIFA, which is based in Switzerland, because the banks that transferred the allegedly corrupt money kept their servers in New York City, New York.
 - The U.S. also claims that FIFA officials often held meetings in the U.S. to discuss their ongoing bribe schemes.

FATCA to FIFA

- The U.S.'s prosecution of FIFA is an extension of what the U.S. is doing with FATCA.
 - The U.S.'s prosecution of FIFA demonstrates that the U.S. will intervene if its banks are in any way involved in corruption. Similarly, FATCA establishes that if you want to benefit from U.S. banks, then you must be prepared to abide by U.S. law.
- As FBI Director James Comey explained when speaking about the FIFA prosecution, **“If you touch our shores with your corrupt enterprise, whether that’s through meetings or using our world-class financial system, you will be held accountable.”**

Thank you!

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