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Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a "Foreign Official" in the Foreign Corrupt Practices Act

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CONTROLLING THE PROSECUTION OF BRIBERY: APPLYING CORPORATE LAW PRINCIPLES TO DEFINE A "FOREIGN OFFICIAL" IN THE FOREIGN CORRUPT PRACTICES ACT

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Abstract: This Comment focuses on the debate surrounding the definition of an "instrumentality" within the Foreign Corrupt Practice Act's (FCPA) "foreign official" provision. The FCPA prohibits bribery of "foreign officials" but provides little guidance as to the types of entities included within the meaning of an "instrumentality." The Department of Justice construes this term broadly and therefore can aggressively prosecute alleged corruption. This Comment argues that courts should provide guidance on the definition of a "foreign official" within the meaning of the FCPA by applying principles of control drawn from corporate law. Such guidance would accomplish three important tasks. First, it would help corporations comply with the FCPA. Second, it would align with the approach used by foreign jurisdictions designated in treaty obligations. Finally, it could help achieve Congress's original objectives in enacting the legislation: namely, to prevent corruption of foreign public officials as well as the negative consequences for foreign policy.

INTRODUCTION

In the wake of the Watergate scandal, federal investigations uncovered illicit practices in both government and private business, including unreported campaign contributions and "questionable" and "illegal"[1] payments to domestic and foreign political officials.[2] The Securities Exchange Commission (SEC) began investigating these payments and discovered that approximately 400 U.S. corporations had made over $300 million in bribes to foreign public officials in order to secure business.[3] In 1977, Congress responded by enacting the Foreign

1. *See* STAFF OF S. COMM. ON BANKING, HOUS. AND URBAN AFFAIRS, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES A-1 (Comm. Print 1976), *reprinted in* SEC. REG. & L. REP. No. 353 (May 19, 1976) [hereinafter REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES].

2. *See id.*; *see also* John Castellano, *Current Issues in Cases Under the Foreign Corrupt Practices Act*, 2011 EMERGING ISSUES 5669 (May 25, 2011); Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 499 (2011).

3. H.R. REP. NO. 95-640, at 4–6 (1977); *see also* REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, *supra* note 1, at A–C; Thomas McSorley, *Article: Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 750 (2011); Theodore C.

Corrupt Practices Act (FCPA)[4] to criminalize bribery and improve the U.S. corporate image abroad.[5] Congress noted the "severe foreign policy problems" these bribes created for the U.S., and intended for the FCPA to prevent U.S. businesses from engaging in bribery, as this would have negative implications for the image of the United States abroad.[6] Congress sought to restore public confidence in American corporate practice.[7] The primary evil that Congress sought to address with the FCPA was improper payments to foreign government officials, which "invariably tend[] to embarrass friendly governments, lower the esteem for the United States among citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations."[8]

The FCPA had a slow start.[9] During the first quarter century of the FCPA's existence, the SEC and Department of Justice (DOJ), jointly

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Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFF. 719, 719 (1976).

4. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006)).

5. *See* McSorley, *supra* note 3, at 750 (discussing the factors contributing to the creation of the FCPA); Westbrook, *supra* note 2, at 499; Castellano, *supra* note 2.

6. *See Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 95th Cong. 5 (1977) (statement of Rep. Bob Eckhardt, Chairman, Subcomm. on Consumer Prot. & Fin., H. Comm. on Interstate & Foreign Commerce) (stating that "[b]ribery of foreign officials by U.S. corporations . . . creates severe foreign policy problems"); H.R. REP. NO. 95-640, 4–5 (1977); S. REP. NO. 95-114, at 3 (1977) (noting "severe adverse effects" of bribery); REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, *supra* note 1, at 61; Declaration of Professor Michael J. Koehler in Support of Defendants' Motion To Dismiss Counts One Through Ten of the Indictment at 140, United States v. Carson, No. SACR 09–00077–JVS (C.D. Cal. filed Feb. 21, 2011), ECF No. 305 [hereinafter Koehler Declaration]; *see also* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF COMMERCE, FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS 2 (June 2001), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf [hereinafter FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS].

7. *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 95th Cong. 4–5 (1977) (statement of Rep. Bob Eckhardt, Chairman, Subcomm. on Consumer Prot. & Fin., H. Comm. on Interstate & Foreign Commerce); H.R. REP. NO. 95-640, at 4 (noting that bribery "erodes public confidence in the integrity of the free market system"); S. REP. NO. 95-114, at 124.

8. H.R. REP. NO. 95-640, at 5.

9. *See* S. REP NO. 95-114, at 11–12 (explaining the enforcement duties of the DOJ and SEC); FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS, *supra* note 6, at 2 (explaining the respective roles of the DOJ and SEC); Robert W. Tarun & Peter P. Tomczak, *Introductory Essay: A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 159 (2010).

responsible for enforcing the FCPA,[10] initiated only two or three cases per year.[11] Fines tended to remain below $1,000,000.[12] However, after an initial twenty years of relative dormancy, enforcement surged.[13] Over the past ten years, the DOJ and SEC have greatly increased the number of enforcement actions and the severity of fines assessed.[14] In 2010, for example, the DOJ and the SEC initiated a record of forty-eight and twenty-six cases respectively.[15] This trend shows no sign of abating, and the DOJ recently confirmed its intent to "vigorously enforce" the FCPA.[16] In November 2009, Assistant Attorney General Lanny Breuer remarked that the "past year was probably the most dynamic single year in the more than 30 years since the FCPA was enacted" and promised to continue "the upward trend in FCPA enforcement."[17]

While DOJ officials commend the surge in investigations and prosecutions, the reaction in the corporate world has been less enthusiastic. Of particular concern to directors and officers of corporations doing business abroad is the rise of prosecution of individuals.[18] According to Mark Mendelsohn, Deputy Chief of the

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10. FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS, *supra* note 6, at 2.

11. 4 ARKIN, BUSINESS CRIME § 18 (Matthew Bender 2011); Westbrook, *supra* note 2, at 497; Roger M. Witten et al., *The Increased Prosecution of Individuals Under the FCPA: Trends and Implications*, 2 BLOOMBERG L. REP.: RISK AND COMPLIANCE, no. 12, 2009, at 10.

12. Westbrook, *supra* note 2, at 495.

13. *See* 4 ARKIN, *supra* note 11, at § 18; Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 90 (2010); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) (noting "FCPA enforcement was largely non-existent for most of its history"); Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, http://online.wsj.com/article/SB124329477230952689.html; *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, SHEARMAN & STERLING LLP, i–xi (Oct. 1, 2009), http://www.shearman.com/files/upload/fcpa_digest.pdf (listing FCPA enforcement actions chronologically).

14. Westbrook, *supra* note 2, at 495–96, 522 (noting "recent years have seen an 'extraordinary upswing' in the number of FCPA actions brought by the DOJ and SEC").

15. *See* 4 ARKIN, *supra* note 11, at § 18; *2011 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP, 2 (Jan. 3, 2012), http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf.

16. Eric H. Holder, Jr., Att'y Gen., Remarks at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), *available at* http://www.state.gov/j/inl/rls/rm/131641.htm.

17. Lanny A. Breuer, Assistant Att'y Gen., Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

18. *See* GIBSON, DUNN & CRUTCHER LLP, *supra* note 15, at 2–4 (discussing FCPA enforcement actions against individual defendants in 2011).

Fraud Division at the DOJ, the rise in individual prosecutions is "not an accident."[19] Rather, the trend reflects the Department's policy of deterring bribery by holding individuals personally accountable.[20] The sanctions resulting from these enforcement actions have also risen dramatically. In 1994, the largest FCPA-related sanction was $24.8 million.[21] In 2008, a settlement for $800 million by Seimens Aktiengesellschaft ("Seimens AG") and its subsidiaries dwarfed the previous record.[22] The increase in prosecutions and sanctions reflects a trend of increasingly aggressive DOJ enforcement policy.[23] The FCPA's vague language has facilitated the Government's increasingly vigorous approach by permitting a broad interpretation of the statute's provisions.[24]

This Comment surveys the debate surrounding the clarity of the term "instrumentality" within the FCPA's definition of "foreign official" and recommends a resolution. The FCPA prohibits bribery of "foreign officials," defined as "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof,"[25] but provides little guidance as to the types of entities included within the meaning of an "instrumentality."[26] The DOJ construes this term broadly, which permits it to aggressively prosecute alleged corruption.[27] Corporations

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19. *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 CORP. CRIME REP. 36(1) (Sept. 16, 2008), http://www.corporatecrimereporter.com/mendelsohn091608.htm.

20. *See id.*; Lanny A. Breuer, Assistant Att'y Gen., Remarks at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf ("[T]he prospect of significant prison sentences . . . should make clear to every corporate executive . . . that we will seek to hold you personally accountable for FCPA violations.").

21. *See* United States v. Lockheed Corp., No. CR.A. 194CR226MHS, 1995 WL 17064259, at *7 (N.D. Ga. Jan. 9, 1995); Bixby, *supra* note 13, at 128.

22. *See* Plea Agreement at 10–11, United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. filed Feb. 11, 2009), ECF No. 12; SEC v. Halliburton Co., No. 4:09-CV-399, at 5 (S.D. Tex. 2009); *see also* Tarun & Tomczak, *supra* note 9, at 161; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations – Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million, Litigation Release No. 20897A, Accounting and Auditing Enforcement Release No. 2935A (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm.

23. *See* Bixby, *supra* note 13, at 90–91; *2010 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP, 4 (Jan. 3, 2011), http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx.

24. Westbrook, *supra* note 2, at 503.

25. 15 U.S.C. § 78dd-2(h)(2)(A) (2006) (emphasis added).

26. *See infra* notes 39–41 and accompanying text.

27. *See, e.g.*, Response of the United States to Defendant's Motion to Dismiss Indictment at 4,

have not been motivated to challenge the Government's interpretation in court, and have tended to opt for settlement rather than proceed to trial.[28] In 2011 alone, six settlements, plea agreements, or deferred prosecutions involved disputes over the definition of "instrumentality."[29] While corporations may have preferred to resolve these cases without a possibly lengthy trial and the ensuing publicity, each case diverted from trial has deprived the courts of a chance to clarify crucial definitions.[30] On the other hand, individuals prosecuted for bribery under the FCPA typically proceed to trial in an attempt to avoid high fines coupled with jail sentences.[31] For this reason, the individuals who have litigated FCPA cases have played a crucial role in developing the sparse jurisprudence.

The OECD Working Group on Bribery in International Business Transactions ("Working Group"), which monitors the implementation and enforcement of the OECD Anti-Bribery Convention, has also commented on the lack of explicit language in the definition of a "foreign official."[32] In its most recent evaluation, the Working Group noted that some courts had addressed the definition, and it noted more "positive legal developments."[33] The Working Group noted that District Court opinions are not binding on higher courts and thus the interpretation they provide remains subject to further dispute.[34] Even the

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United States v. O'Shea, No. H-09-629 (S.D. Tex. filed Mar. 28, 2011), ECF No. 50 (arguing that Congress intended for the FCPA to have a broad interpretation because of the use of the word "any" in the foreign official provision).

28. *See, e.g.*, Westbrook, *supra* note 2, at 497; Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?* 63 BUS. LAW. 1243, 1248 (2008); Stephen G. Huggard & Haley Morrison, *Some FCPA Concepts are Coming into Focus: Implications for the UK Bribery Act*, MARTINDALE-HUBBEL, July 5, 2011, *available at* http://www.edwardswildman.com/files/upload/comlitjune11_usfocusbriberyact.html.

29. *See infra* Part III.C.

30. *See FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act,* SHEARMAN & STERLING LLP, 18 (Jan. 2012), http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b9-9d99e001dd5f/Presentation/PublicationAttachment/6ec0766a-25aa-41ec-8731-041a672267a6/FCPA-Digest-Trends-and-Patterns-Jan2012.pdf.

31. *See* Bixby, *supra* note 13, at 111–12.

32. OECD DIRECTORATE FOR FIN. & ENTER. AFFAIRS, UNITED STATES: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 26 (2010), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf [hereinafter 2010 OECD REPORT PHASE 3].

33. *See id.* at 27. Because of the timing of the report, the Working Group mentioned only *United States v. Nam Quoc Nguyen*, 2:08-CR-522-TJS (E.D. Pa., Sept. 4, 2008), which did not produce a written opinion.

34. 2010 OECD REPORT PHASE 3, *supra* note 32, at 27.

more recent court opinions that provide written opinions[35] (which were not available at the time the Working Group prepared its report) provide little clarity, as they merely confirm that "[s]tate-owned business enterprises may, *in appropriate circumstances*, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials."[36] This language does little to check the DOJ's broad interpretation of "foreign official," permitting it to continue its pattern of aggressive enforcement without providing useful guidance to businesses.[37] For this reason, the OECD's Working Group has urged more "positive legal developments concerning the application of the definition of 'foreign official' in the FCPA to . . . employees of state-owned or controlled enterprises."[38]

Several individuals have already challenged the DOJ's interpretation of the "foreign official" definition.[39] However, a troublesome lack of clarity remains. In the meantime, many corporations, fearing sanctions because of what they perceive as excessive vagueness in the law, have been forced to adopt the hyper-conservative strategy of labeling any company with a greater than one percent government ownership as "high risk."[40] This tactic significantly limits the types of businesses U.S. corporations may work with, reducing their ability to compete with corporations from other countries that are not similarly restrained.[41]

This Comment argues that courts should either clarify the definition of a "foreign official" or supply guidelines that will clarify standards for prosecuting FCPA violations. International treaties and anti-corruption laws in foreign countries could assist in formulating guidelines to clarify the definition of a foreign official.[42] If courts interpret the meaning of a

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35. *See, e.g.*, Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment, United States v. Carson, No. SACR 09–00077–JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011).

36. UNITED STATES, U.S. RESPONSE TO OECD PHASE 1 QUESTIONNAIRE (Oct. 30, 1998), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/response1.pdf [hereinafter U.S. RESPONSE TO OECD PHASE 1 QUESTIONNAIRE] (emphasis added).

37. *See* Cohen, *supra* note 28, at 1250.

38. 2010 OECD REPORT PHASE 3, *supra* note 32, at 27.

39. *See* Witten et al., *supra* note 11, at 10 (noting "unlike companies, individuals are more likely not to settle and to go to trial").

40. *See, e.g.*, Ryan Morgan, *'Majority' Report*, THE FCPA BLOG (Mar. 15, 2011, 7:18 AM), http://www.fcpablog.com/blog/2011/3/15/majority-report.html.

41. *See* McSorley, *supra* note 3, at 750; Jacqueline C. Wolff & Nirav S. Shah, *Is Anyone* Not *a Foreign Official Under the FCPA?*, 18 BUS. CRIMES BULL. (Law Journal Newsletters), Feb. 2011, at 6, *available at* http://www.manatt.com/uploadedFiles/News_and_Events/Articles_By_Us/Foreign%20Bribery(3).pdf.

42. *See* Convention on Combating Bribery of Foreign Public Officials in International Business

"foreign official," they could refine the definition using principles of corporate law to evaluate a business entity's connection to the government by the level of control exerted on it by the government. In doing so, courts would help corporations comply with the FCPA by using legal principles familiar to them. Ideally, this path would result in increased clarity and better compliance.

Part I of this Comment introduces the basic provisions of the FCPA, including relevant amendments. Part II describes the legislative history of the FCPA. Part III examines the case law dealing with the definition of a "foreign official." Part IV discusses approaches to defining corporate responsibility from international anti-bribery legislation. Finally, Part V argues that courts should apply principles of control drawn from U.S. corporate law when defining a "foreign official" for purposes of the FCPA. This approach should remain consistent with those used by foreign jurisdictions to comply with treaty obligations.

I. THE FCPA WAS DESIGNED TO INCREASE ACCOUNTABILITY AND PREVENT CORRUPTION IN INTERNATIONAL BUSINESS

The FCPA contains two types of provisions: (1) accounting and internal control provisions; and (2) anti-bribery provisions.[43] The former require companies with securities listed on U.S. stock exchanges to maintain records that "accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[44] These provisions also require the companies to maintain a system of internal controls that provides reasonable assurances that transactions are recorded and executed with the general or specific authorization of the management.[45] The following sections describe the anti-bribery provisions in greater detail.

A. The Anti-Bribery Provisions of the FCPA Outline Prohibited Corrupt Acts

Any company with securities listed on U.S. stock exchanges is subject to the FCPA.[46] The FCPA's anti-bribery provisions provide in relevant part:

Transactions, art. 1, Nov. 21, 1997, S. TREATY DOC. NO. 105-43 (1998) [hereinafter OECD Convention].

43. 15 U.S.C. § 78dd-1 (2006).

44. *Id.* § 78m(b)(2)(A).

45. *Id.* § 78m(b)(2)(B).

46. *Id.* § 78dd-1(a).

> (a) Prohibition
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> It shall be unlawful for any issuer which has a class of securities registered [with the SEC], or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—
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> (1) any foreign official for purposes of—
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> (A)
>
> (i) influencing any act or decision of such foreign official in his official capacity,
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> (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or
>
> (iii) securing any improper advantage; or
>
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[47]

The FCPA applies to United States companies and their personnel, foreign companies with shares listed on a U.S. stock exchange, and United States citizens or any person while in the United States territory.[48] The FCPA prohibits anyone to whom it applies from paying, offering, promising, or authorizing payment or anything of value to a foreign official to obtain or retain business.[49] The anti-bribery provisions can be divided into three elements: (1) "anything of value" given for the purposes of (2) "obtaining or retaining business" to a (3) "foreign official."[50]

The FCPA does not define the first element, "anything of value," and does not provide a *de minimus* exception.[51] FCPA enforcement actions have shown that a variety of things may fit the definition.[52] For example,

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47. *Id.* § 78dd-1(a); *see also* § 78c(a)(8) (defining an "issuer" as "any person who issues or proposes to issue any security").

48. *Id.* § 78dd-1(a); *see also* Koehler, *supra* note 13, at 389.

49. 15 U.S.C. § 78dd-1(a)(1).

50. *See* Koehler, *supra* note 13, at 389–90.

51. *Id.* at 390.

52. *Id.*

one enforcement action penalized an American company for providing Nigerian foreign officials with vehicles filled with cash and left in hotel parking lots,[53] while in another instance a company's less tangible payment of "executive training programs at U.S. universities" for Chinese officials was considered among the items of value.[54]

The second element of the FCPA anti-bribery provisions is the use of the item of value for obtaining or retaining business.[55] A Fifth Circuit decision interpreted this element broadly, holding that the legislative history of the FCPA shows Congress intended to prohibit a range of payments beyond simply acquiring or retaining contracts.[56] In *United States v. Kay*,[57] the defendants, members of a Houston-based corporation that exported grain, were accused of making payments to Haitian government officials.[58] The issue was whether these payments, allegedly made for the purpose of reducing the corporation's customs duties and taxes, was sufficient to constitute an offense under the FCPA.[59] The court determined that such payments *can* provide an unfair advantage to the payer, thus functioning to "obtain or retain business."[60] The court emphasized that such payments do not automatically violate the FCPA, only those "intended to produce an effect" that would "assist in obtaining or retaining business."[61] The court held that Congress had intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business.[62] Since *Kay*, several other enforcement actions have involved

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53. *See* Information at 17–18, United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. filed Feb. 6, 2009), ECF No. 1.

54. Complaint at 16, SEC v. UTStarcom, Inc., Case No. CV 09-6094 (N.D. Cal. filed Dec. 31, 2009). UTStarcom, the subject of this enforcement action, had also provided foreign government officials or their families with work visas to work at UTStarcom facilities without requesting they actually work, paid for trips to popular destinations in the United States to visit company facilities, despite the fact that no facilities existed in these areas, and spent approximately seven million dollars worth of gifts in conjunction with the executive training courses. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges California Telecom Company with Bribery and Other FCPA Violations, Litigation Release No. 21357, Accounting and Auditing Enforcement Release No. 3093 (Dec. 31, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21357.htm; Koehler, *supra* note 13, at 390–91.

55. 15 U.S.C. §§ 78dd-l(a)(B), 78dd-2(a)(1)(B), 78dd-3(a)(1)(B).

56. United States v. Kay, 359 F.3d 738 (5th Cir. 2004)*; see also* Koehler, *supra* note 13, at 393.

57. 359 F.3d 738.

58. *Id.* at 740.

59. *Id.*

60. *Id.* at 754–55.

61. *Id.* at 756.

62. *Id.*

allegedly improper payments that assisted the payor in doing business in a foreign country.[63] These include payments for customs duties, taxes, licenses, permits, and certifications.[64]

The third element involves the person to whom the payment or gift is given. The FCPA defines "foreign official" as:

> [A]ny officer or employee of a foreign government or any department, agency, or *instrumentality* thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[65]

The FCPA does not define "instrumentality." Scholars have noted the lack of a clear definition and the susceptibility of instrumentality to multiple interpretations lead to significant confusion among corporations and litigants in FCPA actions.[66]

The anti-bribery provisions were created with one limited exception.[67] Commonly referred to as the "grease payments" exception,[68] this provision permits the use of "facilitating or expediting payment . . . to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."[69] Routine governmental action is defined as "only an action which is ordinarily and commonly performed by a foreign official [and] does not include any decision . . . to award new business or continue business with a

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63. Koehler, *supra* note 13, at 394 n.35; *see, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Eli Lilly and Company with FCPA Violations, Release 2012-273 (Dec. 20, 2012), *available at* http://www.sec.gov/news/press/2012/2012-273.htm (involving allegations of improper payments by subsidiaries to foreign government officials to win business in Russia, Brazil, China, and Poland); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Johnson & Johnson with Foreign Bribery, Release 2011-87 (Apr. 7, 2011), *available at* http://www.sec.gov/news/press/2011/2011-87.htm (involving allegations of bribing public doctors in several European countries and paying kickbacks to Iraq to obtain business).

64. Koehler, *supra* note 13, at 394.

65. 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis added).

66. *See* Cohen, *supra* note 28, at 1248.

67. *See* United States v. Kay, 359 F.3d 738, 751 (5th Cir. 2004) (noting "routine governmental action" refers to "very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries"); Timothy O'Toole & Andrew T. Wise, *You Mean You're Really Going to Try an FCPA Case? A Checklist of Defenses for Practitioners Handling Foreign Corrupt Practices Act Cases*, THE CHAMPION, Sept. 2011, at n.6, *available at* http://nacdl.org/Champion.aspx?id=21931&terms=a+checklist+of+fcpa+defenses (noting that counsel advising companies on FCPA compliance advise against relying on this exception).

68. *See, e.g.*, Westbrook, *supra* note 2, at 505–06 (explaining the types of action permitted by the grease payments exception); McSorley, *supra* note 3, at 764.

69. 15 U.S.C. § 78dd-1(b).

particular party."[70] Despite their somewhat unsavory-sounding name, "grease payments," because of their routine nature, are not viewed as bribery and are therefore lawful under the FCPA.[71]

Congress has amended the FCPA twice.[72] In 1988, Congress added two affirmative defenses and refined the knowledge requirement[73] for an FCPA violation.[74] The first defense to enforcement is that "the payment . . . was lawful under the written laws and regulations of the foreign official's . . . country."[75] This defense is limited because no country has a law expressly permitting bribery.[76] The second defense is for "promotional expenses," and permits a payment to a foreign official if it was a "reasonable and bona fide expenditure, such as travel and lodging expenses" and was directly related to the "promotion, demonstration, or explanation of products or services."[77] The crucial element of this defense is the reasonableness of the expenditure.[78]

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70. *See id.* §§ 78dd-1(f)(3)(A)−(B).

71. *See id.* § 78dd-1(b).

72. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 15 U.S.C. § 78dd-1); The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78dd-1); *see also* Westbrook, *supra* note 2, at 502. For House and Senate Reports relevant to the FCPA's 1988 and 1998 Amendments, see *Foreign Corrupt Practices Act (FCPA), Legislative History*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/history/ (last visited Feb. 14, 2013).

73. *See* Pub. L. No. 100-418, 102 Stat. 1121 (codified at 19 U.S.C. § 1901) (stating that "knowledge is established by if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes the circumstance does not exist"); *see also* United States v. Bourke, No.

09-4704-cr (2d Cir. Dec. 14, 2011) (defendant liable where he consciously avoided knowing an intermediary was paying bribes); United States v. Kozeny, 664 F. Supp. 2d 369, 374–78 (S.D.N.Y. 2009) (holding "knowledge of the object of the conspiracy," sufficient to satisfy the knowledge requirement); United States v. Self, No. SA CR 08-110-AG (C.D. Cal. 2008) (defendant liable when he was "aware of the high probability that the payments" were improper, but "deliberately avoided learning the true facts").

74. The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78dd-1); *see also* Koehler Declaration, *supra* note 6, at 127–41.

75. 15 U.S.C. § 78dd-1(c)(1).

76. *See* United States v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008) (rejecting the defendant's contention that under local law he was relieved of criminal liability because he voluntarily reported the bribe); ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIME PRACTITIONERS 16 (2d ed. 2012).

77. 15 U.S.C. § 78dd-1(c)(2).

78. *See* O'Toole & Wise, *supra* note 67 (noting "[t]he more the trip looks like a routine business trip . . . the more viable the defense becomes"); Press Release, U.S. Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html (stating that defendants were liable for taking Chinese government officials on sightseeing trips to Disneyland,

Congress amended the FCPA again in 1998[79] to ensure that it complied with the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").[80] The United States' interest in the OECD Convention arose from concerns that the passage of the FCPA had put U.S. businesses at a competitive disadvantage with foreign companies unconstrained by comparable anti-bribery laws.[81] The purpose of the OECD Convention was to "level the playing field for business worldwide,"[82] and it required signatories to create or modify anti-corruption legislation to comply with its requirements.[83] The 1998 modifications to the FCPA extended the statute's jurisdiction to conduct occurring outside the United States.[84] It also broadened the scope of liability by including in the definition of "foreign official" foreign nationals working for U.S. companies and officers of any public international organization.[85] Aside from the 1988 and 1998 Amendments, the structure of the FCPA has remained unchanged.

II. THE FCPA'S LEGISLATIVE HISTORY REVEALS THAT CONGRESS DISAGREED OVER THE BEST METHOD TO PROHIBIT CORRUPTION OF FOREIGN OFFICIALS

The legislative history has been read to provide support for both the DOJ and SEC's broad construction of the term "instrumentality," as well as the considerably narrower interpretation proposed by the corporations subject to FCPA enforcement actions. The DOJ and SEC have argued

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Universal Studios, and various cities).

79. Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1416–17 (codified as 15 U.S.C. §§ 78dd(1)-(3), 78ff).

80. *See* OECD Convention, *supra* note 42, at art. 1; Koehler Declaration, *supra* note 6, at ¶¶ 26, 390–436 (discussing the portions of the FCPA's legislative history relevant to the adoption of the 1998 amendments).

81. *See* Wolff & Shah, *supra* note 41, at 6; McSorley, *supra* note 3, at 750.

82. H.R. REP. No. 105-802, at 12.

83. OECD Convention, *supra* note 42, at 7.

84. *See, e.g.*, Defendants' Notice of Motion and Motion to Dismiss Counts One Through Ten of the Indictment; Memorandum of Points and Authorities in Support Thereof, United States v. Carson, No. SACR 09–00077–JVS (C.D. Cal. filed Feb. 21, 2011), ECF No. 304 [hereinafter Carson Defendants' Motion to Dismiss].

85. *See* The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78dd-1); Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1416–17 (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff).

that Congress intended "instrumentalities" as a catchall term for entities not covered by "agencies" or "departments."[86] Not surprisingly, corporations subject to FCPA enforcement actions argue for a much more narrow construction.[87]

This section summarizes the FCPA's legislative history by introducing the various congressional hearings, resolutions, and proposed bills that ultimately led to its enactment.[88] Congress became concerned about the results of investigations made by the Watergate Special Prosecutions Office of "illegal, and therefore undisclosed, corporate campaign contributions in the 1972 elections."[89] These contributions, as well as several instances involving "questionable" and "illegal"[90] payments made by United States companies to foreign government officials or political parties,[91] prompted the United States Senate and House of Representatives to hold a series of hearings concerning instances of corrupt payments.[92]

Between May 16, 1975, and September 12, 1975, the Senate Subcommittee on Multinational Corporations met on several different occasions to discuss prominent instances of corruption.[93] During the first of these hearings, Senator Frank Church, the Chairman of the Subcommittee, explained that the hearings were concerned with the foreign policy consequences of illegal political payments made by United States companies.[94] A series of hearings held in the House and Senate in 1975 led to proposals for legislation to deter corporations from making corrupt payments.[95]

In May 1976, the SEC published a report on Questionable and Illegal Corporate Payments which gave new momentum to the discussion on

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86. *See* Cohen, *supra* note 28, at 1250, 1273.

87. *See id.*

88. For a significantly more extensive explanation of the legislative history, see Koehler Declaration, *supra* note 6, at 10–143.

89. *See* REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, *supra* note 1, at 2–3.

90. *See id.* at 1.

91. *See id.* at 5.

92. *See, e.g.*, H.R. REP. NO. 95-640 at 6–7 (indicating the various bills considered over the course of several hearings).

93. *See* George H. Mazzarantani, *Foreign Corrupt Practices Act*, 26 AM. CRIM. L. REV. 855, 855–56 (1988); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 930–31 n.1 (2012).

94. *See* Koehler, *supra* note 93, at 933.

95. *See id.*

specifically criminalizing illegal payments.[96] The report discussed foreign and domestic payments with a focus on whether these payments should have been disclosed to investors.[97] Following the publication of the report, there was a hearing before the Senate Committee on Banking, Housing, and Urban Affairs titled "Corrupt Payments By U.S. Business Enterprises" to discuss Senate Bills 3133, 3379, and 3418.[98] President Ford supported these efforts by establishing a Task Force on Questionable Corporate Payments Abroad,[99] issuing remarks introducing new initiatives of the task force, and urging enactment of proposed legislation to require the disclosure of payments to foreign officials.[100] Despite several additional bills circulating through the House and Senate, nothing was enacted. The final hearings of President Ford's term, held in September of 1976, discussed four bills. However, due to "end of session pressures," no bill passed before Congress adjourned in October 1976.[101]

Once Congress reconvened, several bills began circulating that eventually led to the FCPA. On January 18, 1977, Senator Proxmire introduced Senate Bill 305.[102] This bill prohibited bribery of any official of a "foreign government or instrumentality thereof."[103] It did not define either of these terms. Senate Bill 305 was ultimately merged with another bill, House Bill 3815,[104] to become the FCPA. House Bill 3815 defined a foreign official as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality."[105] The report accompanying House Bill 3815 explains that the prohibited transactions are those that are "corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official, foreign government or an instrumentality of the foreign government . . . [the

96. REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, *supra* note 1.

97. *Id.* at 55.

98. S. REP. NO. 94-1031, at 1 (1976).

99. *See* H.R. DOC. NO. 94-572, at 1 (1976) (Foreign Payments Disclosure: Message from the President of the United States Urging Enactment of Proposed Legislation to Require the Disclosure of Payments to Foreign Officials).

100. H.R. DOC. NO. 94-572.

101. H.R. REP. NO. 95-640, at 7.

102. S. 305, 95th Cong. (1977).

103. *Id.* at 161.

104. H.R. 3815, 95th Cong. (1977).

105. H.R. REP. NO. 95-640, at 4 (1977).

payment] must be intended to induce the recipient to misuse his official position."[106] In early December of 1977, the Speaker of the House and the Secretary of the Senate signed the amended Senate Bill 305.[107] President Carter signed Senate Bill 305 on December 19, 1977.[108] Senate Bill 305 did not define an "instrumentality."

III. COURTS HAVE CONSIDERED THE "FOREIGN OFFICIAL" PROVISION, BUT CASE LAW REMAINS IN ITS INFANCY

Courts have had few opportunities to address the ambiguities in the FCPA, and the DOJ's broad interpretation of "foreign official" has largely avoided judicial scrutiny for over a quarter century.[109] This has resulted from the tendency of companies prosecuted for violating the FCPA to resort to extrajudicial settlements, such as non-prosecution and plea agreements, rather than contesting the charges.[110] To this point, the only judicial responses have been scattered district court opinions denying defendants' motions to dismiss.[111] In each of these actions, the defendants have made essentially the same claim: the FCPA does not apply to the conduct charged because, as a matter of law, the officers and employees of a state-owned enterprise (SOE) are not "foreign officials" as the term "instrumentality" does not encompass SOEs.[112] The courts' responses have been generally unvaried, stating that the determination of whether "instrumentality" encompasses an entity requires a fact-intensive analysis that is inappropriate for a motion to dismiss.[113] The initial court decisions provided no discussion of the merits.[114] More recent orders, however, have produced frameworks for analyzing whether an entity could be considered an instrumentality

106. *Id.* at 7–8.

107. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to dd-2 (2006)).

108. *Id.*

109. *See* Cohen, *supra* note 28, at 1245–46.

110. *See supra* notes 28–30 and accompanying text.

111. *See*, *e.g.*, United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment, United States v. Carson, No. 09-cr-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011).

112. *See, e.g.*, Carson Defendants' Motion to Dismiss, *supra* note 84, at 27.

113. *See, e.g.*, In Chambers Criminal Minutes at 9, United States v. Lindsey, No. CR10-01031-AHM (C.D. Cal. Apr. 20, 2011) (denying defendant Lindsey's motion to dismiss); Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 5, *Carson*, 2011 WL 5101701.

114. *See* Order at 1, United States v. Nguyen, No. 08-522 (E.D. Pa. Dec. 2, 2009).

within the meaning of the FCPA's "foreign official."[115] Even with this progression towards clarity, these district court opinions generate no binding precedent.

A. Although Early FCPA Decisions Indicated Who Could Be a "Foreign Official," the Courts Failed to Create a Workable Framework

An SOE is a legal entity created by the government to partake in commercial activities on the government's behalf.[116] An SOE may be either partially- or fully-owned by the state.[117] A significant proportion of FCPA defendants are prosecuted for conduct involving SOEs, therefore resolving the question will impact many FCPA defendants.[118]

The first cases[119] to address whether an SOE could be an "instrumentality" within the FCPA's definition of a "foreign official" did little to resolve the ambiguities.[120] In *United States v. Nguyen*,[121] the defendants filed a motion to dismiss on the grounds that the payments made to SOEs in Vietnam did not violate the FCPA, because these types of entities did not qualify as "instrumentalities" of the government.[122] The court rejected their motion in a one-sentence order.[123] In a

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115. *See* Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment, *Carson*, 2011 WL 5101701; *see also* United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

116. *See, e.g.*, Definition of "State-Owned Enterprise (SOE)," INVESTOPEDIA, http://www.investopedia.com/terms/s/soe.asp#axzz22sSPLRwH (last visited Jan. 30, 2013).

117. *Id.* For example, most businesses listed on the Chinese Stock Exchange are SOEs and have strong links to the government. *See* Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13 (2008); STOYAN TENEV ET AL., CORPORATE GOVERNANCE AND ENTERPRISE REFORM IN CHINA: BUILDING THE INSTITUTIONS OF MODERN MARKETS 83–84 (2002), *available at* http://www1.ifc.org/wps/wcm/connect/93111800485831c58971e9fc046daa89/Corporate+Governance+in+China.pdf?MOD=AJPERES.

118. *See* Koehler Declaration, *supra* note 6, at 411–13 (discussing that over two-thirds of the FCPA prosecutions in 2009 related to SOEs).

119. *See* Michael Volkov, *Failing to Clarify: The Courts Try to Define "Foreign Official" in FCPA Cases*, FCPA COMPLIANCE & ETHICS BLOG (May 23, 2011, 1:01 AM), http://tfoxlaw.wordpress.com/2011/05/23/failing-to-clarify-the-courts-try-to-define-foreign-official-in-fcpa-cases/.

120. *See, e.g.*, Carson Defendants' Motion to Dismiss, *supra* note 84, at 10; United States v. Nguyen, No. 08-522 (E.D. Pa. Dec. 2, 2009); United States v. Esquenazi, No. 09-21010-CR-MARTINEZ-BROWN (S.D. Fla. Nov. 19, 2010).

121. No. 08-522 (E.D. Pa. Dec. 2, 2009).

122. Gov't's Response in Opposition to Defendant's Motions to Dismiss, for a Bill of Particulars, and to Amend Schedule of Pretrial Submissions at 6, *Nguyen* (No. 08-522), ECF No. 109.

123. Order at 1, *Nguyen* (No. 08-522).

subsequent case, *United States v. Esquenazi*,[124] the defendant's motion to dismiss garnered only a slightly more substantial analysis from the court.[125] *Esquenazi* concerned a bribery scheme involving directors in Telecommunications D'Haiti (Haiti Téléco), Haiti's ninety-seven percent state-owned telecommunications company.[126] Rejecting the defendant's "foreign official" challenge, the court stated, "The plain language of [the FCPA] and the plain meaning of [instrumentality] show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government."[127] The court provided jury instructions with a list of non-exclusive factors to assess whether Haiti Téléco was an instrumentality of the Haitian government.[128]

B. Recent Cases on the "Foreign Official" Definition Have Provided a More Substantive Framework

The California District Court in *United States v. Aguilar*[129] addressed more substantively whether an SOE might qualify as an instrumentality within the meaning of the FCPA.[130] In this case, the government charged the Lindsey Manufacturing Company, along with its president and chief financial officer, with paying bribes to two high-ranking employees of Comisión Federal de Electricidad (CFE), an electric utility company owned by the Mexican government.[131] The defendants filed a motion to dismiss, arguing that an SOE can never be an "instrumentality" of a foreign government because this would be contrary to the language and legislative intent of the statute.[132] The ordinary meaning of the term

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124. No. 09-21010-CR-MARTINEZ-BROWN (S.D. Fla. Nov. 19, 2010).

125. Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 1, *Esquenazi* (No. 09-21010-CR-MARTINEZ-BROWN).

126. Indictment at 6, *Esquenazi* (No. 09-21010-CR-MARTINEZ-BROWN); *see also Stunning Haiti Teleco Development*, FCPA PROFESSOR (Aug. 29, 2011), http://www.fcpaprofessor.com/stunning-haiti-teleco-development (last visited Feb. 16, 2013).

127. *See* Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 3, *Esquenazi* (No. 09-21010-CR-MARTINEZ-BROWN).

128. *See* Volkov, *supra* note 119.

129. 783 F. Supp. 2d 1108 (C.D. Cal. 2011), *dismissed on other grounds*, 831 F. Supp. 2d 1180 (C.D. Cal. 2011).

130. *Id.* at 4–16.

131. *Id.* at 15.

132. Defendants' Notice of Motion and Motion to Dismiss the First Superseding Indictment; Memorandum of Points and Authorities at 3, *Aguilar*, 783 F. Supp. 2d 1108 (No. CR10-01031-AHM) [hereinafter Aguilar Defendant's Motion to Dismiss].

"instrumentality" and the other provisions of the FCPA, according to defendants, clearly does not encompass state-owned business enterprises.[133] Moreover, defendants argued, the legislative intent of the FCPA was to prevent the harmful consequences of bribes to *government* officials.[134] Congress's purpose was not to micro-manage U.S. business with every foreign company in which a government may have a monetary interest.[135] The statute, therefore, singles out officials in *government* positions and does not encompass non-governmental employees of even majority state-owned companies.[136]

The argument failed in April 2011, when Judge Matz denied the defendants' motion to dismiss,[137] noting that the FCPA's statutory language is clear.[138] The court held that "a state-owned corporation having the attributes of CFE may be an 'instrumentality' of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation, as [the individuals who allegedly received bribes], may therefore be 'foreign officials' within the meaning of the FCPA."[139] Judge Matz articulated a non-exclusive list of characteristics shared by government agencies and departments that qualify as "instrumentalities":

- The entity provides a service to the citizens . . . of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties . . . .
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.[140]

133. *See id.* at 12.

134. *See id.*

135. *See id.* at 18–19.

136. *See id.* at 12.

137. *Aguilar*, 783 F. Supp. 2d at 1110.

138. *Id.* at 1113.

139. *Id.* at 1110.

140. *Id.* at 1115.

Judge Matz reasoned that an "instrumentality" need not share "all of its characteristics with both a department and an agency," lest the term be "robbed of independent meaning."[141] He then applied the listed factors to CFE, and noted that CFE performs a function that the Mexican Constitution acknowledges is solely a government function,[142] "was created by statute as a 'decentralized *public* entity,'" and has a "governing Board . . . comprised of various high-ranking governmental officials."[143] Judge Matz also found very convincing the fact that it describes itself on its website as a governmental agency.[144]

A subsequent case involving CFE adopted Judge Matz's analysis in *Aguilar.* In *United States v. O'Shea*,[145] the government charged a former general manager at a large robotics corporation, John Joseph O'Shea, with an 18-count indictment alleging he paid bribes to CFE in exchange for contracts for his company.[146] O'Shea moved to dismiss using essentially the same argument as in *Aguilar*, that an SOE can never be an instrumentality of the state.[147] Judge Lynn Hughes, in the Southern District of Texas, denied the motion.[148] Judge Hughes did not issue a written ruling but took judicial notice of several facts about CFE: under Mexican law, electricity is a public service; CFE has a monopoly over it; the Mexican Ministry of Energy, Mines, and State-Owned Industry sets requirements for CFE; and the President of Mexico appoints the general director of CFE.[149] The factors Judge Hughes noted generally matched the rubric laid out by Judge Matz, which indicates some consistency in the analytical framework courts have used to characterize a "foreign official."[150]

In another case involving a challenge to the "foreign official"

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141. *Id.* at 1114.

142. *Id.* at 1115–16; *see also* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Art. 27, Diario Oficial de la Federactión [DO], 5 de Enero de,1917 (Mex.).

143. *Aguilar*, 783 F. Supp. 2d at 1115 (emphasis in original).

144. *Id.*

145. No. H-09-629 (S.D. Tex. Feb. 9, 2012).

146. Indictment at 7–8, *O'Shea* (No. H-09-629).

147. Defendant O'Shea's Opposed Motion to Dismiss Counts One Through Seventeen of the Indictment at 2, *O'Shea* (No. 09-629).

148. Management Order at 1, *O'Shea*, (No. 09-629), ECF No. 107.

149. *See* William McGrath, *Judge Denies Motion to Dismiss Based on Definition of Foreign Official in O'Shea FCPA Case*, FED. LAW SEC. BLOG (Jan. 6, 2012), http://www.fedseclaw.com/2012/01/articles/foreign-corrupt-practices-act-1/judge-denies-motion-to-dismiss-based-on-definition-of-foreign-official-in-oshea-fcpa-case/#axzz2KW9Wj2Ka.

150. *Compare id.*, *with* United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal 2011).

provision, *United States v. Carson*,[151] Judge James Selna of the Central District of California, like Judges Matz and Hughes, emphasized the importance of the factual inquiry: "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact."[152] In this case, Stuart Carson, the Former Chief Executive Officer of Control Components, Inc. (CCI), was indicted along with five other defendants.[153] The defendants moved to dismiss the first ten counts of the indictment with the familiar argument that an SOE cannot be an "instrumentality" as a matter of law.[154] The court denied the motion to dismiss, stating that adopting the defendants' construction would lead to an "impermissible narrowing of a statute intended to mount a broad attack on government corruption."[155]

Judge Selna employed a different framework from those used in *Aguilar* and *O'Shea*.[156] The non-exclusive list of characteristics of government agencies that meet the description of an instrumentality include:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g.,

151. No. SACR 09–00077–JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011).

152. Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 3, *Carson*, 2011 WL 5101701.

153. Indictment at 2–11, *Carson* (No. SACR 09–00077–JVS).

154. Carson Defendants' Motion to Dismiss, *supra* note 84, at 11.

155. Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 5, *Carson*, 2011 WL 501701. (The trial was scheduled for June 5, 2012, but before it occurred the defendants reached plea agreements.) For selected documents from the *Carson* docket, see *FCPA and Related Enforcement Actions, United States v. Stuart Carson, et al.*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/carsons.html (last visited Feb. 14, 2013).

156. *Compare* Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 5, *Carson*, 2011 WL 501701, *with* United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

subsidies, special tax treatment, and loans).[157]

The court emphasized that no single factor is dispositive.[158] The list purports mainly to indicate what types of evidence are relevant when determining whether state-owned companies constitute an "instrumentality" under the FCPA.[159]

These cases reveal an evolution in court guidance on the issue of what kind of entity may be classified as an "instrumentality" of government. All the cases emphasize that the analysis will depend on questions of fact, not law.[160] Defendants, restricted to legal arguments by the format of a motion to dismiss, consistently advanced the same theory: that, under the FCPA, an SOE can never be an "instrumentality" as a matter of law.[161] Yet each judge, in addressing the definition of an instrumentality, specifically rejected the defendants' contention.[162] None of the decisions suggested what level of state ownership would make an SOE an "instrumentality" under the FCPA. Businesses attempting to develop compliance programs may become frustrated by the fact that courts have declined to produce a bright-line rule regarding what makes an entity an "instrumentality."[163]

C. The Department of Justice Defines "Instrumentality" Broadly and States That It Can Include State-Owned or State-Controlled Entities

The Department asserts that it provides sufficient guidance with

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157. Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 3–4, *Carson*, 2011 WL 501701.

158. *Id.* at 5. The court also rejected the defendants' void-for-vagueness challenge, stating that the Government's "substantial evidentiary burden to establish that a business entity constitutes a government instrumentality . . . does not encourage arbitrary or discriminatory enforcement." *Id.* at 11. The court rejected the defendants' argument for applying the rule of lenity. *Id.* at 10.

159. *Id.*

160. *See id.* at 6; *Aguilar*, 783 F. Supp. 2d at 1115.

161. *See* Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 6, *Carson*, 2011 WL 501701; *Aguilar*, 783 F. Supp. 2d at 1115; Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 3, United States v. Esquenazi, No. 09-21010-CR-MARTINEZ-BROWN (S.D. Fla. Nov. 19, 2010); Order at 1, United States v. Nguyen, No. 08-522 (E.D. Pa. Dec. 2, 2009).

162. *See* Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 6, *Carson*, 2011 WL 501701; *Aguilar*, 783 F. Supp. 2d at 1115; Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 3, *Esquenazi* (No. 09-21010-CR-MARTINEZ-BROWN); Order at 1, *Nguyen* (No. 08-522).

163. Westbrook, *supra* note 2, at 574; Cohen, *supra* note 28, at 1272.

respect to FCPA enforcement to notify companies how to comply.[164] At a recent Senate hearing, Acting Deputy Assistant Attorney General Greg Andres confirmed the DOJ's position that the Department provides sufficient guidance with respect to FCPA enforcement.[165] Mr. Andres listed several sources of information, including the DOJ's *Lay Person's Guide to the FCPA*[166] and the FCPA Opinion Procedure.[167] The *Lay Person's Guide to the FCPA* conspicuously fails to define "instrumentality."[168] In November 2012, the DOJ and the SEC published a guidance document on the FCPA, in which they specifically addressed the definition of an "instrumentality."[169] The report asserts that whether a particular entity constitutes an "instrumentality" requires a "fact-specific analysis of an entity's ownership, control, status, and function."[170] Furthermore, the report explains that in some circumstances an entity may qualify as an instrumentality absent fifty percent or greater foreign government ownership.[171] Finally, the report refers to the list of factors to consider that several courts had provided.[172]

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164. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 7 (2010) (statement of Greg Andres, Deputy Assistant Att'y Gen.); *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 62 (2011) (statement of Greg Andres, Deputy Assistant Att'y Gen.); CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV. OF U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20 (2012), *available at* http://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf.

165. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 7 (2010) (statement of Greg Andres, Deputy Assistant Att'y Gen.); *Foreign Corrupt Practices Act: Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 7, 62 (2011) (statement of Greg Andres, Deputy Assistant Att'y Gen.).

166. *See* FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS, *supra* note 6, at 3.

167. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 7 (2010) (statement of Greg Andres, Deputy Assistant Att'y Gen.); *see also* 15 U.S.C. §§ 78dd-1(e), 2(f) (2006). This procedure allows companies to request determination by the Attorney General as to whether its proposed conduct would violate FCPA. 15 U.S.C. §§ 78dd-1(e), 2(f).

168. *See* Huggard & Morrison, *supra* note 28, at 1.

169. *See* A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 6, at 20.

170. *Id.*

171. *Id.* at 21.

172. *Id.* at 20 (The factors listed are: "the foreign state's extent of ownership of the entity; the foreign state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials); the foreign state's characterization of the entity and its employees; the circumstances surrounding the entity's creation; the purpose of the entity's activities; the entity's obligations and privileges under the foreign state's law; the exclusive or controlling power vested in the entity to administer its designated functions; the level of financial

In *Carson*, the DOJ supported its position with principles of statutory construction, arguing that the statute is unambiguous because "instrumentality" is a commonly used legal term[173] and has an accepted legal definition that would incorporate an instrumentality.[174] This position has succeeded in several cases, with courts agreeing that the term is clear.[175] The DOJ also argued in *Carson* that interpreting the statute in context is necessary to ensure that all the provisions of the statute have meaning.[176] According to a principle of statutory interpretation, courts should not interpret a statute in such a way that portions of the statute have no effect.[177] For example, the DOJ argues that the provision defining "routine governmental action" as "providing phone service, power and water supply" would be rendered meaningless if the definition of "instrumentality" necessarily excluded SOEs.[178] SOEs typically are included in the governmental entities that provide these services.[179]

In *Carson*, the defendant contended that the DOJ opinions have no binding application to parties other than those requesting the opinion and "will not affect the requesting issuer's . . . obligations to any other agency," such as the SEC.[180] Furthermore, of the five opinions that have dealt with the definition of "foreign official," only one analyzes the facts

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support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans); the entity's provision of services to the jurisdiction's residents; whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and the general perception that the entity is performing official or governmental functions.")

173. The United States Code, for example, uses the word "instrumentality" in 1478 separate provisions.

174. *See* Gov't's Opposition to Defendants' Amended Motion to Dismiss Counts One through Ten of the Indictment; Memorandum of Points and Authorities at 16, United States v. Carson, No. SACR 09–00077–JVS (C.D. Cal. filed April 18, 2011), ECF No. 332 [hereinafter Gov't's Opposition to Carson Defendants' Motion to Dismiss] (citing BLACK'S LAW DICTIONARY (9th ed. 2009) (defining instrumentality as "[a] thing used to achieve an end or purpose")).

175. *See, e.g.*, Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 3, United States v. Esquenazi, No. 09-21010-CR-MARTINEZ-BROWN (S.D. Fla. Nov. 19, 2010); Transcript of Pretrial Motions Hearing at 108, United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011) ("I think that the language itself, and the very definition of instrumentality that you proposed in your briefs, makes it unnecessary to even engage in a legislative history or statutory analysis . . . .")

176. *See* Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 20.

177. *See id.* (citing Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1978) ("explaining that '[in] construing a statute we are obliged to give effect, if possible, to every word Congress used'")).

178. *See* 15 U.S.C. § 78dd-1(f)(3)(A)(iv) (2006).

179. *See* Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 21–22.

180. 28 C.F.R. § 80.11.

provided by the company requesting the opinion.[181] One scholar has argued that DOJ opinions are therefore not functionally equivalent to the binding precedent produced by judicial review.[182] The defendant in *Carson* also argued that, following the principle *noscitur a sociis* (a word draws meaning from the terms around it), "instrumentality" should be considered in context of the two terms preceding it in the statute, "department" and "agency."[183] Following this principle, then an "instrumentality" cannot be an entity in which the government has merely a monetary investment, because such a construction would give the word a different meaning than the others that precede it.[184]

The FCPA's definition of "routine governmental action" in the grease payments exception further supports defendants' position.[185] The FCPA defines "routine governmental action" to include power and water supply.[186] The exception applies only to *governmental* action, which could suggest that SOEs are not included in "instrumentalities" because they are not exclusively government-owned.[187] This last argument is weakened by the fact that some of these functions are typically carried out by commercial (e.g. not necessarily governmental) entities, lending support to the conclusion that an instrumentality does not have to be purely governmental.[188]

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181. *See* Press Release, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 12-01 (Sept. 18, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf; Press Release, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 10-03 (Sept. 1, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf; Press Release, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 94-01 (May 13, 1994), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.pdf; Press Release, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 86-01 (Jul. 18, 1986), *available at* http://www.justice.gov/criminal/fraud/fcpa/review/1986/r8601.pdf; Press Release, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 82-02 (Feb. 18, 1982, *available at* http://www.justice.gov/criminal/fraud/fcpa/review/1982/r8202.pdf; Press Release, U.S. Dep't of Justice, FCPA Opinion Procedure Release, No. 80-01 (Oct. 29, 1980), *available at* http://www.justice.gov/criminal/fraud/fcpa/review/1980/r8001.pdf.

182. Cohen, *supra* note 28, at 1251.

183. *See* Carson Defendants' Motion to Dismiss, *supra* note 84, at 12.

184. *Id.* ("[T]he government's proposed reading of 'instrumentality' as encompassing any entity in which a government has a monetary investment makes that term fundamentally different from the first three since a business enterprise . . . cannot fairly be said to be carrying out governmental (rather than commercial) functions . . . .").

185. *See* 15 U.S.C. § 78dd-2(b) (2006); *see also supra* notes 67–70 and accompanying text.

186. 15 U.S.C. § 78dd-2(h)(4)(A)(iv).

187. Carson Defendants' Motion to Dismiss, *supra* note 84, at 18.

188. *See* Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 22 (arguing that the "routine governmental action" exception demonstrates that there are functions, like delivery of power, that can be both governmental and commercial).

Anti-corruption legislation in foreign jurisdictions, while also not binding, sheds some light on how corporate concepts of control have been used to identify an SOE to which bribery statutes apply.

IV. THE OECD CONVENTION AND THE UK ANTI-BRIBERY ACT TAKE DIFFERENT APPROACHES TO DEFINING A FOREIGN OFFICIAL THAN DOES THE FCPA

The heightened international focus on combating corruption has caused various countries to introduce several anti-corruption statutes.[189] This section examines two prominent examples of international anti-corruption legislation: the OECD Convention[190] and the UK Bribery Act of 2010.[191] The former can be used as a tool for interpreting the FCPA because it binds the United States to conform its anti-bribery legislation to the requirements outlined in the OECD Convention.[192] The United States advocated for the creation of the OECD Convention to "level the playing field" for United States businesses that faced a comparative disadvantage competing against businesses not subject to anti-bribery legislation.[193] Congress amended the FCPA in 1998 to implement and ensure conformance with the OECD Convention.[194] Each of the thirty-nine signatories[195] to the OECD Convention has an anti-corruption framework because of the OECD's requirement that countries create or amend existing anti-corruption laws in order to comply with the OECD Convention.[196]

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189. *See, e.g.*, Lucinda A. Low & Owen J. Bonheimer, *Enforcement of the U.S. Foreign Corrupt Practices Act: Extraterritorial Reach and the Effects of International Standards* 12 (presented to the Int'l Bar Ass'n Annual Conference Anti-Corruption Working Grp. in Chi., Ill. on Sept. 19, 2006).

190. OECD Convention, *supra* note 42.

191. Bribery Act, 2010, c. 23 (U.K.).

192. OECD Convention, *supra* note 42, at art. I ("Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.").

193. *See* S. REP. NO. 105-277, at 2 (1998).

194. *See* OECD Convention, *supra* note 42; S. REP. NO. 105-277, at 3 (1998).

195. *See* OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF 20 NOVEMBER 2012 (Nov. 2012), *available at* http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf.

196. *See, e.g.*, OECD Convention, *supra* note 42, at art. 4.4 (directing each signatory country to "take remedial steps"). Additionally, many countries that have not ratified the OECD Convention have either signed other treaties or introduced their own anti-corruption legislation. *See* Low &

The UK Bribery Act is included as a comparison to the FCPA. The UK Bribery Act is more expansive than both the FCPA and the OECD Convention, protecting all forms of bribery (governmental *and* commercial).[197] Although the UK Bribery Act does not influence the FCPA,[198] it demonstrates how another country has approached preventing bribery of various entities.

A. The OECD Convention Defines "Foreign Official" by Focusing on Function and Conduct

First, the OECD Convention uses familiar legal principles of "control" to define a *public* enterprise.[199] Second, it only prohibits payments to entities that are *majority* owned by the government.[200] Initially, thirty-three countries signed the OECD Convention on December 17, 1998.[201] The United States urged the development of the

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Bonheimer , *supra* note 189, at 13–21 (discussing international anti-corruption conventions); *Snapshot of the China Country Profile*, BUS. ANTI-CORRUPTION PORTAL (Dec. 2012), http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/china/snapshot/ (discussing the anti-corruption legislation China has enacted).

197. *See U.S. FCPA vs. UK Bribery Act*, TRANSPARENCY INT'L (last visited Feb. 14 2013), http://www.transparency-usa.org/documents/FCPAvsBriberyAct.pdf (providing a chart comparing the FCPA with the UK Anti-Bribery Act); *see also* Ron Reid, *A Comparison Between the UK Bribery Act and the FCPA*, SHOOSMITHS (May 9, 2012), http://www.shoosmiths.co.uk/client-resources/legal-updates/A-comparison-between-UK-Bribery-Act-and-the-FCPA-1543.aspx ("The UK Bribery Act is wider in scope than the US Foreign & Corrupt Practices Act (FCPA) in a number of respects."); *FCPA and UK Bribery Act 2010 Offenses Comparison Chart*, CHADBOURNE PARKE LLP (June 2011), http://www.ukbriberyact2010.com/Assets/Resources/FCPA_BriberyActComparison_WEB.pdf.; A Client Alert From Paul Hastings by Michelle Duncan et al., A Comparison of the U.S. Foreign Corrupt Practices Act and the UK Bribery Act (Oct. 2010), *available at* http://www.paulhastings.com/assets/publications/1750.pdf.

198. The UK Bribery Act is a law enacted only in the UK. No convention requires that the U.S. reproduce the Bribery Act. The only connection between the FCPA and the UK Bribery Act is the fact that both were enacted because the two countries are signatories to the OECD and thus obliged to enact anti-bribery legislation in conformation with the OECD Convention. *See* OECD Convention, *supra* note 42, at art. 4.4 (directing each signatory country to enact anti-bribery legislation). The U.S. already conforms to the OECD, and thus it is not required to go beyond what the OECD requires. S. REP. NO. 105-277, at 3 (1998) (amending the FCPA to conform to the OECD Convention).

199. ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIME PRACTITIONERS 57 (2d ed. 2012).

200. *See* Organization for Economic Cooperation and Development Negotiating Conference, *Commentaries on the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* 14 (adopted Nov. 21, 1997), *available at* http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf.

201. OECD Convention, *supra* note 42, at art. I; *see also supra* note 195 and accompanying text.

OECD Convention in the hope that the Convention would reduce the competitive disadvantage U.S. businesses faced compared to their foreign counterparts not subject to anti-bribery laws.[202]

The definition of a "foreign *public* official" in the OECD Convention focuses on the individual's function and conduct.[203] The OECD Convention defines a "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country . . . any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation [sic]."[204] The term most closely analogous to the FCPA's instrumentality is a "public enterprise."[205] The OECD Convention defines a "public enterprise" as:

> [A]ny enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.[206]

An official of a "public enterprise" is deemed to perform a public function *unless* "the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise."[207] An SOE, therefore, is either a public or a private enterprise under the OECD's definition, depending on its function.[208] A public-enterprise SOE might be largely owned or substantially subsidized by the government. By contrast, a private-enterprise SOE benefits from some government investment, but competes on an equal footing in the marketplace with other private companies not subsidized by the government. Unlike the FCPA, the OECD Convention explicitly includes SOEs in its "foreign public official" provision.[209] Crucially, the definition also focuses on the level

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202. *See* S. REP. NO. 105-277, at 1 (1998).

203. *See* Cohen, *supra* note 28, at 1260.

204. OECD Convention, *supra* note 42, at art. 1 ¶ 4(a); *see also* 15 U.S.C. §§ 78dd-1(f)(1)(A).

205. 2010 OECD REPORT PHASE 3, *supra* note 32, at 32.

206. Organization for Economic Cooperation and Development Negotiating Conference, *supra* note 200, at 15.

207. *Id.*

208. *See* TARUN, *supra* note 199, at 57.

209. *See id.*

of control the government holds over an enterprise to determine whether it is a "public enterprise."[210]

The fact that Congress did not include this term has sparked debate: did Congress believe "public enterprises" were already encompassed by "instrumentalities," or did Congress not intend to prohibit bribes made to SOEs?[211] The legislative history of the 1998 Amendments supports both propositions.[212] Anna Harkin, Acting Assistant Attorney General of the DOJ, sent the Speaker of the House (Newt Gingrich) and the President of the Senate (Al Gore) a draft bill with the proposed amendments to the FCPA on May 4, 1998.[213] These "Transmittal Letters" explained that the proposed legislation, among other things, purported to expand "the FCPA definition of public official to include officials of [public international] organizations."[214] On July 30, 1998, Senator Alfonse D'Amato introduced these suggestions in S. 2375, an Act titled "The International Anti-Bribery and Fair Competition Act of 1998."[215] S. 2375 passed the Senate on July 31, 1998.[216] In the House, the bill was introduced as H.R. 4353 on July 30, 1998, and was passed October 9, 1998.[217] President Clinton ultimately signed S. 2375 on November 10, 1998.[218] Neither the House nor the Senate bills expressly incorporated "public enterprises" into the definition of "foreign official."[219]

In *Carson,* defendants support their argument that the post-1998 FCPA does not cover SOEs by pointing to the fact that Congress borrowed some components of the OECD to augment the FCPA but did not make a wholesale revision.[220] Professor Koehler, who compiled the portions of the legislative history relevant to the "foreign official"

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210. *Id*.

211. *See* Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 29–31; Carson Defendants' Motion to Dismiss, *supra* note 84, at 29.

212. *See* Cohen, *supra* note 28, at 1255–56.

213. *See* Transmittal Letters, Letter from Anne Harkin, Acting Assistant Att'y Gen. of the Dep't of Justice, to Newt Gingrich, Speaker of the House (May 4, 1998) (on file with author).

214. *See id.*

215. The International Anti-Bribery and Fair Competition Act of 1998, S. 2375, 105th Cong. (1998) (as passed on July 31, 1998).

216. *Id.*

217. The International Anti-Bribery and Fair Competition Act of 1998, H.R. 4353, 105th Cong. (1998) (as passed on Oct. 9, 1998).

218. The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended in scattered sections of 15 U.S.C. § 78dd-1).

219. *See* Carson Defendants' Motion to Dismiss, *supra* note 84, at 29.

220. *See id.* at 27–29.

definition,[221] explains that members of Congress were informed that the 1998 Amendments would not make the FCPA and the OECD Convention identical.[222] If this is the case, Defendants contend that the portions of the OECD Convention that differ from the FCPA were only adopted if Congress explicitly added them.[223] Conversely, the government in *Carson* has claimed that Congress's decision to not adopt provisions of the OECD Convention that differed slightly from the FCPA may show that Congress believed these provisions were already included.[224] Unlike the legislative history of the 1998 Amendments and the language of the FCPA itself, the OECD Convention's definition of "public official" contains some concrete ways to measure government control.[225]

B. The U.K. Anti-Bribery Act Provides a More Robust Prohibition on Foreign Bribery than the OECD Convention

The United Kingdom Anti-Bribery Act of 2010[226] (U.K. Bribery Act) has been referred to as "the FCPA on steroids"[227] because it has a broad jurisdictional reach, prohibits bribes made to both private and public individuals, and identifies "failure to prevent bribery"[228] as a distinct offense.[229] The U.K. Bribery Act creates four separate offenses: 1) bribing,[230] 2) being bribed,[231] 3) bribing a foreign public official,[232] and

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221. Koehler Declaration, *supra* note 6, at ¶ 395.

222. *Id.*

223. Carson Defendants' Motion to Dismiss, *supra* note 84, at 28–29.

224. *See* Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 29–30. ("[O]nly one unrelated amendment to the FCPA was necessary in Congress's view to bring the statute into compliance with the OECD Convention. Otherwise, Congress considered the FCPA's definition of 'foreign official' to be inclusive of the definition in the OECD Convention.").

225. OECD Convention, *supra* note 42, at art. 1 ¶ 4(a).

226. Bribery Act, 2010, c. 23 (U.K.).

227. *See, e.g.*, Nathan Koppel, *Introducing the New "FCPA on Steroids,"* WALL ST. J. L. BLOG (Dec. 28, 2010, 2:12 PM), http://blogs.wsj.com/law/2010/12/28/introducing-the-new-fcpa-on-steroids/.

228. *See* Bribery Act, 2010, c. 23, § 7 (U.K.); *see also* LATHAM & WATKINS LLP, LITIGATION DEPARTMENT, UK BRIBERY ACT 2010—AN EXTENDED TIMETABLE FOR GUIDANCE AND COMMENCEMENT (July 22, 2010) (analyzing the U.K. Anti-Bribery Act's jurisdiction).

229. *See* Bribery Act, 2010, c. 23, § 7 (U.K.); Marcus Sohlberg, *The United Kingdom Bribery Act 2010–Anti-Corruption Legislation with a Significant Jurisdictional Reach*, THE L. LIBR. CONGRESS (Mar. 2011), http://www.loc.gov/law/help/uk-bribery-act.php.

230. Bribery Act, 2010 c. 23, § 1 (U.K.).

231. *Id.* §§ 2, 3(2).

232. *Id.* § 6.

4) failing as a commercial organization to prevent bribery.[233] The section most similar to the FCPA's "foreign official"[234] provision defines a "foreign public official" as including:

> An individual who—(a) holds a legislative, administrative or judicial position of any kind . . . (b) exercises a public function— (i) for or on behalf of a country or territory outside the United Kingdom . . . or (ii) for any public agency or public enterprise of that country or territory . . . or (c) is an official or agent of a public international organization [sic].[235]

Subsection (b) on individuals who exercise a public function for any public agency or public enterprise is analogous to the FCPA's "instrumentality" language and concept.[236]

On March 30, 2011, the U.K. Ministry of Justice clarified how the U.K. Bribery Act will operate.[237] The policy behind the foreign public official offense is "the need to prohibit the influencing of decision making in the context of publicly funded business opportunities."[238] However, the expressed policy offers little clarification as to what types of SOEs could be covered because it fails to define "public function."[239] The U.K. Bribery Act's "foreign official" provision closely mirrors the FCPA definition.[240] However, this dilemma may not have been a major concern for the U.K. Bribery Act's drafters because the U.K. legislation, unlike the FCPA, also explicitly criminalizes commercial bribery.[241] Case law emanating from the year-old U.K. Bribery Act remains in its infancy, and thus has not yet produced any clarifications that might assist U.S. courts.[242]

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233. *Id.* § 7; *see also* F. Joseph Warin, et al., *The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 8 (2010).

234. *See* Warin et al., *supra* note 233, at 8 (describing the foreign public official offense as "directly analogous" to the FCPA).

235. Bribery Act, 2010, c. 23, § 6(5) (U.K.).

236. *See id.*; TARUN, *supra* note 199, at 430.

237. *See* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (SECTION 9 OF THE BRIBERY ACT 2010) 2 (2011).

238. *Id.* at 11.

239. *Id.*; *see also* Bribery Act, 2010, c. 23, § 6(5)(b)(i) (U.K.).

240. *See* Warin et al., *supra* note 233, at 18.

241. Warin et al., *supra* note 233, at 18–19.

242. *See The U.K. Bribery Act: One Year Later, Enforcement and Its Implications for Companies*, ALIXPARTNERS LLP, 2 (2012) (noting "[t]o date, not a single successful prosecution has been brought against a company by the U.K.'s Serious Fraud Office (SFO), which is responsible for enforcing the law"); Sohlberg, *supra* note 229.

V. U.S. COURTS SHOULD APPLY THE CORPORATE CONCEPT OF CONTROL TO THE FCPA IN ORDER TO PROVIDE NEEDED CLARITY TO U.S. BUSINESSES

Theories of statutory construction, the legislative history relevant to the definition of a "foreign official," and recent court opinions have all failed to clearly identify the types of entities included within "instrumentality." The defendants in FCPA cases argue that neither the principles of statutory interpretation nor the legislative history fully clarifies whether an "instrumentality" includes an SOE.[243] Because of the ambiguity in the text and legislative history, courts use an evolving list of factors relating to the functions performed by the SOE and its connections to the government.[244] These multifactor tests, however, overcomplicate the issue. Both sides of the debate have agreed that the statute intends to prevent the detrimental effects of bribery on foreign governments.[245] Therefore, determining the connection the entity has to the government would inform the extent to which bribery of officials within that entity would affect the government.

This Comment proposes using the concept of "control" derived from U.S. corporate law to determine whether an SOE is within the definition of an instrumentality. The test for "control" is used within corporate law to determine whether certain shareholders exert sufficient influence that they have additional fiduciary duties to the organization and non-

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243. Both sides of the debate have argued that the legislative history supports their interpretation. Order Denying Defendants' Motion to Dismiss Counts 1 Through 10 of the Indictment at 3, United States v. Carson, No. SACR 09–00077–JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011). The defendants typically support their narrow reading of the "foreign official" provision with four principal observations drawn from the legislative history. First, the legislative history contains no explicit reference to the inclusion of an SOE in the definition. Second, Congress enacted the FCPA to prevent the "severe foreign policy problems" stemming from bribes to high-ranking *government* officials. Third, Congress declined the opportunity explicitly include SOEs in the definition when it amended the FCPA to conform to the OECD Convention. Fourth, Congress considered including SOEs in earlier versions of the FCPA, but ultimately omitted them from the version that was enacted. Defendants in FCPA enforcement actions have claimed that Congress's decision to discard the versions that specifically referenced SOEs evinces an intention to not include SOEs within the definition of a "foreign official." *See* Carson Defendants' Motion to Dismiss, *supra* note 84, at 21–29. The government contends that a prominent weakness in this argument is that the bill ultimately enacted did not specifically reject the components of the enumerated list that other bills contained. Here, Congress adopted a general term that could theoretically include SOEs but, in doing so, did not mention eliminating SOEs from the definition. *See* Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 37–38.

244. *See, e.g.*, *supra* notes 136–158 and accompanying text.

245. *See* Carson Defendants' Motion to Dismiss, *supra* note 84, at 22; Gov't's Opposition to Carson Defendants' Motion to Dismiss, *supra* note 174, at 1.

controlling shareholders.[246] To determine whether a shareholder owes these duties, U.S. courts have developed numerous methods for ascertaining actual control.[247] Adopting these tests in the context of the FCPA would be beneficial because corporations subject to the FCPA are already familiar with this concept. A significant body of case law already exists to clarify the various situations in advance. The use of this test would help eliminate the inevitable complications that arise as courts develop a new framework for assessing the connections between SOEs and governments.

A. The Principles of "Control" in U.S. Corporate Law Consist of a Defined Body of Law that Measures Corporate Responsibility

U.S. corporate law has long used principles of "control" to assess fiduciary duties,[248] ownership, or liability for wrongdoing.[249] U.S. corporate law does not provide a bright-line rule for determining the level of control held over a corporation, but the guidelines courts use are ones that businesses are accustomed to applying.[250] The most dominant source of U.S. Corporate law is Delaware, where over half of the corporations listed for trading on the New York Stock Exchange are incorporated.[251] Delaware law measures control in two different ways: (1) percent of ownership[252] and (2) actual control.[253] When a shareholder

246. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110 (Del. 1994); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53 (Del. 1987).

247. *See* STEPHEN M. BAINBRIDGE, CORPORATE LAW 72 (2d ed. 2009) (noting that voting rights, majority—or effective majority—ownership, and participation in management activities all signify "control" in the corporate sense).

248. For example, courts have used principles of "control" to determine fiduciary duties owed by controlling shareholders. *Lynch*, 638 A.2d at 1114.

249. *See, e.g.*, Belvedere Condominium Unit Owners' Assoc. v. R.E. Roark Cos., 617 N.E.2d 1075, 1086 (Ohio 2008) (discussing the doctrine of piercing the corporate veil and noting that control of the corporation is so complete as to amount to total domination of finances, policy, and business practices such that the controlled corporation has no separate mind, will, or existence); *see also* BAINBRIDGE, *supra* note 247, at 72–75, 90.

250. *See* BAINBRIDGE, *supra* note 247, at 267 ("Any bright-line rule inevitably will be set arbitrarily and therefore prove simultaneously over-and under-inclusive.").

251. *See id.* (noting Delaware is "far and away the dominant source of state corporation law").

252. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987). *But see* Odyssey Partners, L.P. v. Fleming Cos., 735 A.2d 386, 407–08 (Del. 1999) (holding that an owner of 50.1% of the stock did not dominate or control the board.)

253. *Ivanhoe Partners*, 535 A.2d at 1344 ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.") (citing Unocal Corp. v. Mesa Petroleum Co. 493 A.2d 946, 958 (Del. 1985)); *see also In re* Tri-Star Pictures, Inc. Litig., 634 A.2d. 319, 328 (Del. 1993).

or group of shareholders has the ability to control the corporate decision-making, despite owning less than fifty percent of the outstanding voting shares, the shareholder is deemed to have (actual) control.[254] For example, in *Kahn v. Lynch Communication Systems Inc*., the court determined that Alcatel was a controlling shareholder even though it owned only 43.3% of the outstanding stock.[255] The court noted a "shareholder who owns less than fifty percent of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation."[256] However, in relation to Alcatel, the court determined it exercised control by designating five of its eleven directors and coercing Lynch to permit it to purchase a sufficient quantity of stock to become the controlling shareholder, at much lower than the negotiated price.[257]

Under Delaware law, the significance of deeming a shareholder controlling is that it owes fiduciary duties to the corporation and to non-controlling shareholders.[258] Courts evaluate transactions involving controlling shareholders for "entire fairness," [259] which is a process-oriented standard examining whether the transaction involved "fair dealing" and a "fair price."[260] This commonly used test for determining the level of control exerted over the corporation should be transferred to standardize the approach in determining whether an SOE is an instrumentality.

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254. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1114 (Del. 1994) (noting that "[f]or a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct") (citing Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989)).

255. *Lynch*, 638 A.2d at 1114.

256. *Id.* (citing *Citron*, 569 A.2d at 70).

257. *See Lynch*, 638 A.2d at 1112, 1120 ("[T]he coercion was extant and directed to a specific price offer which was, in effect, presented in the form of a 'take it or leave it' ultimatum by a controlling shareholder with the capability of following through on its threat of a hostile takeover.").

258. *Lynch*, 638 A.2d at 1113–14; Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1061 n.83 (Del. 2004).

259. *See Lynch*, 638 A.2d at 1115–17.

260. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) ("The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.").

B. Courts Should Adopt the "Control" Test to Standardize the Approach to Determining if an SOE Is an "Instrumentality"

Applying the principles of corporate law to determine control would be advantageous to courts and businesses because of the familiarity of the applicable tests. Even if the courts decline to adopt a bright-line rule for determining control based on percentage of ownership, corporate law has developed numerous methods for ascertaining actual control.[261] This approach to assessing control of an organization, besides being familiar to both corporations and courts, is also consistent with the method the OECD uses to define "public enterprise."[262] This continuity would further clarify an area of law whose imprecise and divergent legal standards have produced the current confused state of the law—a confusion that might have an adverse effect on U.S. businesses.

A judicial opinion would likely be the most efficient route to further clarity for businesses. Alternatives to guidance from the courts would be the DOJ's adoption of prosecutorial guidelines or amendment of the FCPA. Unlike the DOJ advisory opinions, a court's opinion would provide precedential value. Even at the district court level, while not binding, opinions are still persuasive to other courts. The DOJ posits that the statute is clear; therefore, it seems unlikely to take the initiative to add further guidance.[263]A legislative amendment would likely take years to draft, debate and pass.

Lacking a clear rubric for determining what falls within the definition of a "foreign official," well-intentioned businesses are hesitant to engage in business abroad when they do not know how to structure their FCPA compliance programs.[264] Clear guidelines will provide a framework for businesses developing their compliance programs and allow those that wish to adhere to the FCPA to do so. The current enforcement practices, while lucrative for the DOJ and SEC, seem to have strayed from the primary rationale behind the enactment of the FCPA.[265] This Comment

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261. *See* BAINBRIDGE, *supra* note 247, at 72 (noting that voting rights, majority (or effective majority) ownership, and participation in management activities all signify "control" in the corporate sense).

262. *See supra* notes 199–224 and accompanying text (explaining the definition of a "public enterprise" focuses on the level of control the government holds over an enterprise.).

263. *See* Huggard & Morrison, *supra* note 28.

264. *See* Carson Defendants' Motion to Dismiss, *supra* note 84; *see also* MICHAEL V. SEITZINGER, CRS REPORT TO CONGRESS: FOREIGN CORRUPT PRACTICES ACT (Mar. 3, 1999), *available at* http://www.fas.org/irp/crs/Crsfcpa.htm.

265. *See* Bixby, *supra* note 13, at 92–94; *supra* notes 1–8 and accompanying text, summarizing sources explaining that Congress's rationale was to prevent U.S. businesses from engaging in

argues that the most effective way to give sufficient notice to businesses and still permit prosecution of bribery of SOEs would be for courts to apply corporate law principles of control to determine what types of bribery are prohibited under the FCPA.

The DOJ has previously acknowledged that the degree of control a foreign government exercises over an enterprise informs the DOJ's determination of whether the entity is an "instrumentality" under the FCPA.[266] Applying corporate law principles for determining whether a shareholder is a "controlling shareholder" would be useful in gauging the level of control the government has over an SOE, thus explaining whether it conforms to the definition of an "instrumentality." This area of law is particularly well-developed (as compared to the FCPA), and further, this is an area that corporations can be expected to understand. Applying these principles to the FCPA, the courts would consider the level of control a government has over an SOE to reflect how closely the two are linked. This, in turn, would help courts determine whether bribing an official within that entity would result in the deleterious consequences that the FCPA was enacted to prevent.

CONCLUSION

The increase in FCPA enforcement actions and the severity of sanctions has forced companies to reconsider their approach to business abroad.[267] Businesses have resorted to cautious behavior to minimize their risk of prosecution for violating the FCPA.[268] Prosecution can result in expensive litigation, reputational harm, or high settlement fees.

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bribery, as this led to serious foreign policy problems and damaged the image of the United States abroad.

266. U.S. RESPONSE TO OECD PHASE 1 QUESTIONNAIRE, *supra* note 36.

267. *See* Witten et al., *supra* note 11, at 3.

268. NEW YORK CITY BAR ASSOCIATION: COMMITTEE ON INTERNATIONAL BUSINESS TRANSACTIONS, THE FCPA AND ITS IMPACT ON BUSINESS TRANSACTIONS – SHOULD ANYTHING BE DONE TO MINIMIZE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATTING OFFSHORE CORRUPTION? 7, 11 (Dec. 2011) (noting that the FCPA's unclear scope and broad interpretation of the provisions advocated by the DOJ and SEC "may render corporations and individual officers overly cautious, avoiding not only objectionable conduct but also acts that should be permitted and even encouraged"); Dickstein Shapiro LLP Alert by David M. Nadler et al., DOJ and SEC Issue Foreign Corrupt Practice Guidance (Nov. 16, 2012), *available at* http://www.dicksteinshapiro.com/resources/alerts/detail.aspx?publication=2233 ("[T]he long-awaited FCPA guidance is a comprehensive and useful restatement of the government's positions with respect to the statute, but fails to provide the type of 'bright line' rules regarding FCPA compliance that many practitioners and commentators had hoped for . . . . Companies doing business in foreign countries must continue to exercise caution, and to obtain expert professional advice, to minimize their risk of liability under the FCPA.").

At the same time, the conservative approach adopted by American businesses has put them at a disadvantage compared to other corporations not constrained by the FCPA.

The courts should resolve these issues by refining the definition of "instrumentality" using principles of corporate law regarding "control." This direction remains the most viable option given the limited direction from the courts thus far in defining "instrumentality." The FCPA, though not new, does not have a well-established line of precedent that answers the question. Strict reliance on the legislative history to understand the meaning of "instrumentality" has been inconclusive.[269] Reasonable arguments support both sides of the debate as to whether the "foreign official" provision incorporates SOEs.[270] An amendment to the FCPA that clearly defines "foreign official" would be ideal, but is unlikely to occur any time soon.

Applying corporate law principles of control would help determine the extent to which the person or entity was a part of the foreign country's government. If the courts provided such guidance, businesses could determine whether an SOE falls under the definition of an "instrumentality" based on how much control the government retains. This would provide a clear means of identifying the SOEs whose employees could influence the government and therefore impact the public interest if bribed. This approach would achieve Congress's objectives in enacting the FCPA to prevent corruption of foreign public officials and the negative consequences for foreign policy.[271] Until such guidance is formulated, businesses developing their compliance programs must resort to overly cautious behavior or risk prosecution for violating the FCPA.

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269. United States v. Aguilar, 783 F. Supp. 2d 1108, 1120 (C.D. Cal. 2011).

270. *See* United States v. O'Shea, No. H-09-629 (S.D. Tex. Mar. 28, 2011); *Aguilar*, 783 F. Supp. 2d 1108.

271. *See supra* notes 4–8 and accompanying text.