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Foreign Official Define Thyself: How to Define Foreign Officials and Instrumentalities in the Face of Aggressive Enforcement of the Foreign Corrupt Practices Act

Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; M.P.H., 2004, The George Washington University; B.A. 2002, The George Washington University. The author is grateful to Professor Don Berthiaume for inspiring him to write this Comment; Jake Weixler and Steve Schulman of Akin Gump Strauss Hauer & Feld LLP for their expert advice and encouragement; D.J. Baker for his invaluable guidance in the writing process; and his Catholic University Law Review colleagues for their tremendous work preparing this piece for publication. Finally, he would like to thank his parents, the good doctors Harisiadis, for everything; without them, the author would be nothing.

FOREIGN OFFICIAL, DEFINE THYSELF: HOW TO DEFINE FOREIGN OFFICIALS AND INSTRUMENTALITIES IN THE FACE OF AGGRESSIVE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

Alexander L. Harisiadis⁺

Since 2007, American companies engaged in commerce overseas have grappled with an increasingly stringent regulatory environment.¹ The U.S. government utilizes the Foreign Corrupt Practices Act (FCPA)² to pursue aggressively both domestic and foreign companies with a presence in the United States that allegedly bribe foreign officials to gain a business advantage.³ Since the statute's enactment, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have exercised almost unbridled discretion in applying the statute, due to a paucity of case law or authoritative opinions interpreting the Act.⁴ Furthermore, the ambiguity in the

⁺J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; M.P.H., 2004, The George Washington University; B.A. 2002, The George Washington University. The author is grateful to Professor Don Berthiaume for inspiring him to write this Comment; Jake Weixler and Steve Schulman of Akin Gump Strauss Hauer & Feld LLP for their expert advice and encouragement; D.J. Baker for his invaluable guidance in the writing process; and his *Catholic University Law Review* colleagues for their tremendous work preparing this piece for publication. Finally, he would like to thank his parents, the good doctors Harisiadis, for everything; without them, the author would be nothing.

1. See, e.g., Shearman & Sterling LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, at v (Philip Urofsky 2012), available at <http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b9-9d99e001dd5f/Presentation/PublicationAttachment/590a9fc7-2617-41fc-9aef-04727f927e07/FCPA-Digest-Jan2012.pdf> (providing an aggregate chart of FCPA corporate enforcement actions from 2002–2011 that demonstrates a marked increase in enforcement actions beginning in 2007).

2. 15 U.S.C. §§ 78dd-1 to -3 (2006).

3. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) [hereinafter *House Judiciary Comm. Hearing*] (statement of Rep. Robert C. Scott, Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.); Joe Cassin, *Has More FCPA Enforcement Brought Less Deterrence?*, THE FCPA BLOG (Feb. 8, 2012, 4:28 AM), <http://www.fcpablog.com/blog/2012/2/8/has-more-fcpa-enforcement-brought-less-deterrence.html>.

4. See *House Judiciary Comm. Hearing*, *supra* note 3, at 2 (statement of Rep. F. James Sensenbrenner, Jr., Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (discussing how an absence of case law on the FCPA inflates prosecutorial discretion); see also ANDREW WEISSMANN & ALIXANDRA SMITH, UNITED STATES CHAMBER INSTITUTE FOR LEGAL REFORM, *RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 2–3* (2010) (stating that the FCPA's primary interpretive function is still performed by the DOJ

FCPA has created compliance challenges for companies and individuals engaged in business overseas.⁵

Much of the controversy over the FCPA centers on the terms “foreign official” and “instrumentality.” The Act proscribes the giving of a bribe or questionable payment to “any foreign official” for a quid pro quo.⁶ Further, in the definitions section, the Act states that the term foreign official entails all the officers or employees of any foreign government instrumentality.⁷

In particular, the business community is troubled by the lack of definitions of the terms “foreign official” and “instrumentality” in the FCPA.⁸ The FCPA creates liability for improper payments made to a foreign official, or to an official or employee of a foreign government instrumentality.⁹ However, who is properly a foreign official and what constitutes an instrumentality remains undefined, and consequently, the enforcement agencies have used this ambiguity to their advantage.¹⁰ For example, a consulting fee payment to a non-government official, as defined under that country’s law, may be considered payment to a foreign official under the FCPA.¹¹ Further, payments to the minority owner of an entity that is wholly owned by a foreign government may also create FCPA liability.¹² Further, the employee of a U.S. company partially owned by a foreign government may be considered a foreign official under the FCPA.¹³

The DOJ and SEC’s recent enforcement actions take advantage of the lack of interpretive opinions on the FCPA.¹⁴ The DOJ has adopted an expansive definition of foreign official to include employees of government-owned enterprises;¹⁵ this stonewalls attempts to clarify the meanings of foreign

and the SEC, which allows these agencies to read the Act aggressively); Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TUL. L. REV. 99, 108 (2011) (discussing how the SEC and the DOJ have unbridled discretion under the FCPA).

5. See *House Judiciary Comm. Hearing*, *supra* note 3, at 2 (statement of Rep. F. James Sensenbrenner, Jr., Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (noting how the business community complains that the FCPA’s vagueness makes it difficult for them to know if they are complying with the statute).

6. See, e.g., 15 U.S.C. § 78dd-1(a) (2006).

7. See 15 U.S.C. § 78dd-1(f)(1)(A).

8. *House Judiciary Comm. Hearing*, *supra* note 3, at 3.

9. 15 U.S.C. §§ 78dd-1(a)(1), -2(a)(1), -3(a)(1) (2006).

10. See *House Judiciary Comm. Hearing*, *supra* note 3, at 3.

11. See *infra* Part I.C.1.ii.

12. See *infra* Part I.C.1.iii.

13. T. Markus Funk & M. Bridget Minder, *The FCPA in 2011 and Beyond: Is Targeted FCPA Reform Really the “Wrong Thing at the Wrong Time”?*, BLOOMBERG LAW REPORTS: CORPORATE AND M&A LAW, at 13 (Dec. 29, 2011), available at http://www.perkinscoie.com/files/upload/LIT_12_01funkminderfcpayear-in-review.pdf.

14. See *supra* note 4 and accompanying text (explaining that the DOJ and the SEC are given significant discretion in interpreting the FCPA).

15. Koehler, *supra* note 4, at 108–16 (listing the foreign officials involved in recent FCPA enforcement actions, many of whom are officials of state-owned enterprises).

official and instrumentality.¹⁶ Such an interpretation is contrary to the FCPA's legislative intent of preventing the bribery of *foreign officials*.¹⁷ Furthermore, courts are deprived of binding case law interpreting the FCPA because most prosecutions under the Act end in settlements, deferred prosecution agreements (DPAs), or non-prosecution agreements (NPAs).¹⁸ The absence of definitions of these terms either in the statute or in case law offers little guidance¹⁹ on how to comply with the FCPA²⁰ to companies that conduct business abroad. Consequently, these companies become subject to the statute's harsh penalties²¹ without a practical tool with which to conduct due diligence.²²

The new regulatory environment, combined with the statute's lack of clarity, crystallizes the need to increase the FCPA's transparency. The judiciary views many of the DOJ's FCPA prosecutions skeptically and has dismissed a number of cases brought under the statute.²³ On Capitol Hill, the business community and the defense bar have pressed Congress to bring greater clarity to the FCPA through amendments.²⁴ However, amending the FCPA to achieve clarity is not

16. See generally *Examining Enforcement of the FCPA: Hearing before the Subcomm. on Crime and Drugs of the S. Comm. of the Judiciary*, 111th Cong. 28 (2010).

17. See *infra* Part II.B.

18. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909–10 (2010) (claiming that the frequent use of NPAs and DPAs has led to a decrease in both judicial scrutiny and substantive case law).

19. In November 2012, the SEC and the DOJ jointly released the long-awaited guidance document on the FCPA. The document, entitled *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, covers all major areas of concern related to the Act, including the foreign official and instrumentalities controversy. See CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE & ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

20. See *House Judiciary Comm. Hearing*, *supra* note 3, at 28 (statement of the Hon. Michael Mukasey, Former Att'y Gen., Partner, Debevoise & Plimpton, LLP) (noting how inconsistent interpretations of instrumentality and foreign official makes it difficult for companies to comply with the FCPA).

21. See *infra* Part I.B.2.ii.

22. See *infra* notes 214–16 and accompanying text; see also *House Judiciary Comm. Hearing*, *supra* note 3, at 19, 23 (statement of the Hon. Michael Mukasey, Former Att'y Gen., Partner, Debevoise & Plimpton, LLP) (noting that the companies with compliance programs are still held liable for employees' actions despite their due diligence).

23. See Andy Spalding, *Lord Acton and the FCPA*, THE FCPA BLOG (Feb. 27, 2012, 8:08 AM), <http://www.fcpablog.com/blog/2012/2/27/lord-acton-and-the-fcpa.html> (explaining that the judiciary checks the executive authority by “exposing bad [FCPA] prosecutions”); see also Koehler, *supra* note 4, at 120–21 (rejecting the government's argument that all tax reductions which directly or indirectly obtain or retain business constitute an FCPA violation); C.M. Matthews, *Government Drops High-Profile FCPA Sting Case*, CORRUPTION CURRENTS (Feb. 21, 2012, 10:05 AM), <http://blogs.wsj.com/corruption-currents/2012/02/21/government-drops-high-profile-fcpa-sting-case/> (highlighting the DOJ's decision to drop the prosecutions from its first-ever FCPA sting operation).

24. See *House Judiciary Comm. Hearing*, *supra* note 3, at 18–36 (statement of the Hon. Michael Mukasey, Former Att'y Gen., Partner, Debevoise & Plimpton, LLP) (proposing six

met with universal support. For example, anti-corruption advocates cite the recent Walmart Mexico bribery scandal²⁵ as a prime reason against reforming the Act,²⁶ claiming that this scandal has “torched” FCPA reform.²⁷ The conflicting views have resulted in a two-front battle waging in the courts²⁸ and on Capitol Hill²⁹ over the FCPA. At the forefront of this battle is the question of whether to clarify the definitions of foreign official and instrumentality.³⁰

This Comment explores the need for clearer definitions of the terms “foreign official” and “instrumentality.” Part I traces the development of the FCPA and examines attempts by the DOJ, the SEC, and the courts to define foreign official and its related term, instrumentality. In Part II, this Comment analyzes how the current definitions of foreign official and instrumentality are inadequate for the stringent enforcement of the FCPA. In conclusion, this Comment offers a two-part solution for analyzing whether a certain entity is an instrumentality under the FCPA and if the employee of the instrumentality is truly a foreign official.

amendments to the FCPA on behalf of the U.S. Chamber Institute for Legal Reform); Matthews, *supra* note 23 (noting how the U.S. Chamber of Commerce paid for a campaign lobbying to amend the FCPA).

25. David Barstow, *Vast Mexico Bribery Case Hushed up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1.

26. Stefanie Ostfeld, a policy adviser for Global Witness, an international civil society organization, stated, “I think it’s unbelievable that lawmakers would even contemplate weakening the FCPA when these allegations shine a spotlight on how bribery is still a major problem.” Samuel Rubinfeld, *Wal-Mart Bribery Allegations Stir up FCPA Debate Anew*, CORRUPTION CURRENTS (Apr. 24, 2012, 5:01 PM), <http://blogs.wsj.com/corruption-currents/2012/04/24/wal-mart-bribery-allegations-stir-up-fcpa-debate-anew/>.

27. Richard L. Cassin, *How Wal-Mart Torched FCPA Reform*, THE FCPA BLOG (Jun. 20, 2012, 3:51 AM), <http://www.fcpablog.com/blog/2012/6/20/how-wal-mart-torched-fcpa-reform.html> (discussing how the Walmart scandal raised questions about whether a weakened FCPA would be beneficial). *But see* Richard L. Cassin, *Revive Jacobson’s Good-Faith Compliance Plan*, THE FCPA BLOG (Aug. 27, 2012, 4:28 AM), <http://www.fcpablog.com/blog/2012/8/27/revive-jacobsons-good-faith-compliance-plan.html> (explaining that with the shock from Wal-Mart Mexico wearing off, the FCPA reform debate should be revived).

28. *See, e.g.*, *United States v. Aguilar*, 831 F. Supp. 2d 1180, 1186–97 (C.D. Cal. 2011) (discussing a jury instruction on the FCPA’s knowledge requirement); *United States v. Carson*, No. SACR 09–00077–JVS, 2011 WL 5101701, at *1, *11 (C.D. Cal. May 18, 2011) (denying the defendant’s motion to dismiss and holding that a broad definition of the FCPA terms is not prohibitive); *see also* Defendant O’Shea’s Opposed Motion to Dismiss Counts One Through Seventeen of the Indictment at 1–2, 4–8, *United States v. O’Shea*, No. 09-cr-00629 (S.D. Tex. Mar. 7, 2011) (arguing that state-owned entities are not “foreign officials” or “instrumentalities” under the FCPA).

29. *See supra* note 24 and accompanying text.

30. *See House Judiciary Comm. Hearing, supra* note 3, at 18–36 (statement of the Hon. Michael Mukasey, Former Att’y Gen., Partner, Debevoise & Plimpton, LLP) (proposing ways to clarify the meaning of foreign official and instrumentality); Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW 1243, 1270–71 (2008) (providing the DOJ and the SEC with four suggestions to provide businesses guidance on the FCPA).

I. THE FOREIGN CORRUPT PRACTICES ACT AND ITS UNBRIDLED EXPANSION

A. *The Foreign Corrupt Practices Act of 1977: Origins, Anti-bribery Provisions, and Penalties*

In 1977, Congress enacted the FCPA as an amendment to the Securities Exchange Act of 1934.³¹ This legislative action created the United States' primary tool for combating foreign bribery by U.S. corporations and citizens.³²

1. *The Waves of Watergate*

The FCPA's origins trace back to the exposure of corruption in the Nixon administration,³³ uncovered in the wake of the Watergate break-in.³⁴ The

31. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494, 1494 (1977) (codified as amended in scattered sections of 15 U.S.C. (2006)). Recognizing the necessity of a well-regulated securities market, Congress enacted the Securities Exchange Act of 1934 pursuant to its authority to regulate interstate commerce. *See, e.g.*, *United States v. Kunzman*, 125 F.3d 1363, 1365 (10th Cir. 1997) (holding that Congress did not exceed its authority under the Commerce Clause when it enacted the Securities Exchange Act of 1934); *Sloan v. Sec. & Exch. Comm'n*, 27 F.2d 11, 12 (2d Cir. 1975) (declaring that it is "frivolous" to question Congress's constitutional authority to pass the Exchange Act or any future rules or regulations promulgated from the statute).

32. 15 U.S.C. §§ 78dd-1 to -3, 78(m) (2006); *see Lay Person's Guide, Foreign Corrupt Practices Act, Antibribery Provisions*, U.S. DEP'T OF JUST., <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Dec. 24, 2012) ("Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system."). Congress's intent in shaping this anti-bribery tool was to ensure that the FCPA influenced American firms' business methods. *Id.*

33. *See* Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 442-43 (2010) (noting that aside from the break-in at the Watergate complex, the Nixon administration engaged in several other illegal activities). John Dean, the White House Counsel during the Nixon Administration, compiled an extensive list of illegal activities surreptitiously committed by the Nixon White House. John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 646-48 (2000). Other illegal activities included a planned burglary of the Brookings Institute, endeavoring to wiretap journalists and White House staff to anticipate potential news leaks, and the possible sale of ambassadorships. *Id.*

34. *See* Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFF. 719, 719 (1976) ("Indeed the seeds of the present furor were sown in Watergate."). According to former White House Special Counsel Ted Sorensen, it was Watergate that led to "pitiless exposure for all suspect practices connected with [the] government." *Id.* At the time, this intense scrutiny had the unintended effect of influencing bribery in the black market. *Id.* Some foreign officials reduced their rates due to a fear of exposure, and others commanded higher rates as they learned what influence their positions carried. *Id.*

Although the eruption of the Watergate scandal exposed one foreign dimension of the Nixon administration's "suspect practices," another foreign dimension may have led to the Watergate burglary in the first place. Purportedly, among one of the reasons for the break-in was that it was intended to uncover what the Democrats knew about the Nixon campaign's receipt of contributions from the junta in power in Greece from 1968 to 1974. Robert Parry, *Watergate Prosecutors Weighed Case Against Nixon Fund-Raiser*, ASSOCIATED PRESS, May 24, 1986, <http://www.apnewsarchive.com/1986/Watergate-Prosecutors-Weighed-Case-Against-Nixon-Fund>

Nixon administration created a number of overseas ‘slush funds’ to channel illegal contributions to Nixon’s re-election bid and other political campaigns, as well as to provide for international bribery.³⁵ As a result, numerous U.S. corporations were criminally prosecuted and accused of paying into these slush funds.³⁶ Several years after Nixon’s resignation, the SEC conducted a voluntary disclosure program that allowed U.S. corporations to self-report securities law violations and avoid SEC enforcement actions.³⁷ More than five hundred U.S. companies disclosed “questionable payments” made to foreign government officials.³⁸ Congress, concerned about damage to the reputation of American businesses resulting from corrupt business practices, passed the FCPA in 1977.³⁹

2. *The Anti-Bribery and Accounting Provisions of the FCPA*

The FCPA contains two major provisions—the anti-bribery provisions⁴⁰ and the accounting provisions.⁴¹ Essentially, the anti-bribery provisions prohibit payments (or promises to pay) by a company or an individual to an official or an employee of a foreign government or an instrumentality in order to compel that official to influence government action or otherwise secure an improper

-Raiser/id-9022f82c23ef7572d9a89b8ec3a792dd. One such contribution of \$15,000 was funneled to the Nixon campaign by a Greek-American, Thomas A. Pappas, who also sat on Nixon’s re-election committee. *Id.* Although Congress did not intend to prevent such foreign bribery in the FCPA, it may be more than a mere coincidence that the FCPA arose out of such events.

35. H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?*, 26 N.C. J. INT’L L. & COM. REG. 239, 241 n.15 (2001); Thomas, *supra* note 33, at 442–43.

36. *See* Brown, *supra* note 35, at 241 n.15 (stating that twenty-two companies were prosecuted).

37. *Id.* at 243; Thomas, *supra* note 33, at 443.

38. Tor Krever, *Curbing Corruption: The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 87 (2007); Thomas, *supra* note 33, at 443. A 1976 SEC report lists well-known corporations that voluntarily disclosed improper foreign payments. STAFF OF SEC. & EXCH. COMM’N, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL PAYMENTS AND PRACTICES SUBMITTED TO S. COMM. ON BANKING, HOUS. AND URBAN AFFAIRS, Exs. A & B (Comm. Print 1976) [hereinafter SEC PAYMENTS REP.]. For example, Baxter Labs, Carnation, Exxon, Johnson & Johnson and Pfizer all disclosed improper payments to foreign officials. *Id.* at Exs. A-2, -4, -5, -7. Also during this same period of disclosures, several major corporations settled SEC actions filed against them for improper foreign payments. *Id.* at Ex. B. Included among them were Ashland Oil Incorporated, Gulf Oil Corporation, and Northrop Corporation. *Id.* at B-3 to B-4, -7, -16 to -18. Recently, Johnson & Johnson agreed to pay a criminal fine of \$21.4 million for FCPA violations by its subsidiaries in Greece, Poland, and Romania. *Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations*, U.S. DEP’T OF JUST. (Apr. 8, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-446.html>.

39. S. REP. NO. 105-277, at 1 (1998).

40. 15 U.S.C. §§ 78dd-1, dd-2, dd-3 (2006).

41. 15 U.S.C. § 78m(b) (2006).

advantage for the briber.⁴² The accounting provisions⁴³ act to prevent corporations from falsifying their books and records in order to hide improper payments.⁴⁴ The SEC is the primary enforcer of the books and records provisions,⁴⁵ unless a knowing violation occurs.⁴⁶ In cases where there is a knowing violation, the DOJ has jurisdiction.⁴⁷

42. See, e.g., § 15 U.S.C. 78dd-2(a) (“It shall be unlawful for any domestic concern . . . 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 . . . to . . . any foreign official for purposes of . . . (i) influencing any act or decision of such foreign official in his official capacity, (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.”).

43. 15 U.S.C. § 78(m)(b)(2), (4)–(5).

44. See H.R. CONF. REP. NO. 95-831, at 10 (1977) (explaining that Congress intended the statute’s accounting provisions to ensure issuers “make and keep books, records, and accounts which accurately and fairly reflect the transaction and dispositions [sic] of the assets of the issuer.”). Congress hoped to “prevent off-the-books slush funds and payments of bribes” that were so troublesome in the post-Watergate era. *Id.*

45. See Raymond J. Dowd, *Civil Rico Misread: The Judicial Repeal of the 1990 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT’L L.J. 946, 950 (1991). The accounting provisions have a number of severe penalties. See 15 U.S.C. § 78u(d)(3)(B)(i)–(iii). Civil penalties assessed can be up to \$100,000 for a “natural person” and up to \$500,000 for “any other person.” 15 U.S.C. § 78u(d)(3)(B)(iii)(I). A “natural person” means a human being. BLACK’S LAW DICTIONARY 1257 (9th ed. 2009). “Any other person” refers to artificial persons such as corporations. See BARRON’S LAW DICTIONARY 331 (4th ed. 1996) (explaining that the term “natural person” does not include corporate entities and the term “person” by itself may or may not include corporations).

A court may also order disgorgement of profits for violations of the accounting provisions. See, e.g., SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996) (per curiam) (ordering disgorgement); SEC v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1312 (S.D. Fla. 2007) (“A federal district court’s authority to order disgorgement in a SEC enforcement action is well established.”); SEC v. Intelligis Int’l, Inc., No. 02-CV-674, 2003 WL 23356426, at *21 (D. Utah Dec. 11, 2003) (ordering the disgorgement of profits for a violation of section 78m among other sections of the Securities Exchange Act). Disgorgement is defined as “[t]he act of giving up something . . . on demand or by legal compulsion.” BLACK’S LAW DICTIONARY 536 (9th ed. 2009).

46. See 15 U.S.C. § 78m(b)(4)–(5) (stating that criminal liability is imposed where a “person . . . knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account . . .”). The mens rea element requires the intent to falsify books and records. See, e.g., United States v. Jensen, 532 F. Supp. 2d 1187, 1195 (N.D. Cal. 2008) (holding that a section 78m(b)(5) violation requires the government to prove that the defendant knew that the act of falsifying the books and records itself was wrongful, not that the act was a violation of the Exchange Act); see also S. REP. NO. 95-114, at 9 (1977) (explaining knowing conduct must be “rooted in a conscious undertaking to falsify records or mislead auditors” and that this mens rea leaves no refuge for the willfully blind).

47. See H.R. REP. NO. 95-640, at 9 (1977) (explaining that criminal violations of the FCPA are to be handled by the DOJ). If the SEC has collected sufficient evidence for a criminal prosecution, it will refer the matter to the DOJ. S. REP. NO. 95-114, at 11–12.

i. The Anti-Bribery Provisions of the FCPA—Home of Foreign Officials and Instrumentalities

The three main sections of the anti-bribery provisions apply to issuers of securities,⁴⁸ domestic concerns,⁴⁹ and foreign nationals.⁵⁰ “Issuers” are defined as companies that either have a class of securities registered with the SEC or are required to file reports with that agency.⁵¹ “Domestic concerns” are citizens of the United States and U.S. companies that either have their principal place of business within the United States or are organized under the laws of the United States.⁵² “Issuers” and “domestic concerns” are prohibited from having certain third parties make corrupt payments on their behalf.⁵³ The anti-bribery provisions’ third section mirrors the preceding two sections and completes the broad sweep of the statute.⁵⁴ Specifically, this section prohibits

48. 15 U.S.C. § 78dd-1(a) (2006).

49. 15 U.S.C. § 78dd-2(a) (2006).

50. 15 U.S.C. § 78dd-3(a) (2006).

51. See 15 U.S.C. § 78dd-1(a) (stating that section 78dd-1 applies to “any issuer which has a class of securities registered pursuant to section 78l . . . or which is required to file reports under section 78o(d) . . .”). A security on a national securities exchange must be registered with the SEC. 15 U.S.C. § 78l(a) (2006). The code requires an issuer to file reports if it has securities registered with the SEC. 15 U.S.C. § 78o(d) (2006).

52. 15 U.S.C. § 78dd-2(h)(1)(A)–(B). Specifically, the section applies to “any individual who is a citizen, national, or resident of the United States” and “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship” whose principal place of business is in the United States or a U.S. territory. *Id.*

53. 15 U.S.C. §§ 78dd-1(a), -2(a). These sections specifically prohibit the “officer[s], director[s], employee[s], or agent[s]” and “any stockholder[s] . . . acting on behalf” of any issuers and domestic concerns. *Id.*

54. 15 U.S.C. § 78dd-3(a). This section applies the Act’s prohibitions to “any person other than an issuer . . . or a domestic concern . . . while in the territory of the United States.” *Id.* This section was part of the FCPA’s 1998 Amendments that incorporated the requirements of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). S. REP. NO. 105-277, at 2–3 (1998). The OECD Convention required the treaty’s parties to bar foreign bribery by “any person.” *Id.* at 2. Prior to the 1998 Amendments, the FCPA covered only domestic parties involved in foreign bribery. *Id.* at 2–3. The text of the OECD Convention explained that all parties agreed to

take such measures . . . 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.

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, art. 1, ¶ 1, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 (1998) [hereinafter OECD CONVENTION] (emphasis added). In order to conform the FCPA with the treaty’s language, Congress expanded the statute’s jurisdiction to include foreign nationals furthering acts of foreign bribery within U.S. territory. S. REP. NO. 105-277, at 2–3.

corrupt payments and promises to pay made by foreign nationals and companies while within U.S. territory.⁵⁵ The FCPA's expanded scope leaves no party out of the statute's reach.⁵⁶ In addition to direct payments, the anti-bribery provisions each proscribe payments made to third parties "while knowing" that some or all of the payments will go to a foreign official.⁵⁷

The DOJ and the SEC share the enforcement responsibilities of the anti-bribery provisions.⁵⁸ The DOJ is responsible for the statute's criminal enforcement as well as civil enforcement of the provisions related to domestic concerns and foreign parties.⁵⁹ The SEC is responsible for civil enforcement of the provision affecting issuers, and it must refer all criminal FCPA matters involving issuers to the DOJ.

ii. Penalties Under the FCPA

Although the FCPA has a dedicated set of penalties,⁶⁰ actual penalties for an FCPA violation can extend beyond the statute's requirements.⁶¹ The intimidating nature of potential FCPA penalties led Siemens, a large European engineering company, to settle parallel FCPA enforcement proceedings with the DOJ and the SEC for \$800 million in 2008.⁶²

Criminal violations of the anti-bribery provisions carry a fine up to \$2 million and a possible five-year prison term.⁶³ Willful violations by individuals may be punished with fines up to \$5 million and jail time up to

55. 15 U.S.C. § 78dd-3(a). The definitions of this section expand the statute's jurisdictional reach to "any natural person other than a national of the United States" or any business entity "organized under the law of a foreign nation . . ." 15 U.S.C. § 78dd-3(f)(1) (emphasis added).

56. S. REP. NO. 105-277, at 2-3. The FCPA reflects the language of the OECD Convention. Paragraph 1, Article I of the Convention sets out the "any person" language, while paragraph 1, Article 4 urges signing parties to exercise jurisdiction over persons committing bribes within their territory. OECD CONVENTION, *supra* note 54, at art. 1, ¶ 1 and art. 4 ¶ 1. These two paragraphs form the basis of 15 U.S.C. § 78dd-3. H.R. REP. 105-802, at 21 (1998).

57. See 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), -3(a)(3) (2006) (setting forth the ban on payments by issuers, domestic concerns, and foreign citizens within the United States to third parties while knowing that all or part of that payment will ultimately go to a foreign official).

58. *Lay Person's Guide*, *supra* note 31, at 2.

59. H.R. REP. NO. 95-640, at 9 (1977) (outlining the DOJ's responsibility for criminal prosecution of FCPA violations); *Lay Person's Guide*, *supra* note 32, at 2. Because the acts covered by section 78dd-3 are the same as those in sections 78dd-1 and dd-2, by extension, the DOJ's prosecutorial authority also covers those foreign nationals alleged to have criminally violated section 78dd-3. See S. REP. NO. 105-277, at 4 (discussing how 15 U.S.C. 78dd-3 eliminates the preferential treatment that foreign nationals used to enjoy under the statute).

60. 15 U.S.C. §§ 78dd-2(g), -3(e), 78ff(c) (2006).

61. See Gary Eisenberg, *Foreign Corrupt Practices Act*, 37 AM. CRIM. L. REV. 595, 610-12 (2000) (describing how FCPA penalties are set at a baseline but can change based on aggravating factors).

62. Leslie Wayne, *Hits, and Misses In a War on Bribery*, N.Y. TIMES, Mar. 11, 2012, at 6.

63. See 15 U.S.C. §§ 78dd-2(g)(1)(A), (2)(A); 15 U.S.C. §§ 78dd-3(e)(1)(A), (2)(A); 15 U.S.C. §§ 78ff(c)(1)(A), (2)(A) (setting out criminal penalties for various provisions of the FCPA).

twenty years, while an entity may be punished with fines up to \$25 million.⁶⁴ Civil violations of the anti-bribery provisions carry fines up to \$100,000 for entities and up to \$10,000 for individual violators.⁶⁵

The penalties in the statute's language, however, are only part of the full picture. The DOJ's real punitive firepower is derived from 18 U.S.C. § 3571(d), which covers fines based on monetary gain or loss.⁶⁶ If a defendant derives a monetary gain from an FCPA violation, or a third party loses money due to the defendant's FCPA violation, section 3571 authorizes a penalty of twice the gross gain or twice the gross loss.⁶⁷ This means that a defendant who made a significant profit through foreign bribery could face a penalty that greatly exceeds the FCPA's statutory limits.⁶⁸

B. New Lexicon: Subsequent Amendments and Just Who Is a "Foreign Official?"

Much concern over the FCPA centers on the lack of clarity in the definition of foreign official.⁶⁹ The FCPA broadly defines a foreign official as officials of a foreign government and its related entities, government agents, and officials of public international organizations, such as the United Nations.⁷⁰

64. 15 U.S.C. § 78ff(a).

65. See 15 U.S.C. §§ 78dd-2(g)(1)(B), (2)(B) (providing the civil penalties for DOJ FCPA enforcement actions against domestic concerns); §§ 78dd-3(e)(1)(B), 2(B) (setting out civil penalties in FCPA enforcement actions against foreign individuals); 15 U.S.C. §§ 78ff(c)(1)(B), 2(B) (setting out civil penalties available in SEC FCPA enforcement actions against issuers and their agents).

66. 18 U.S.C. § 3571(d) (2006).

67. *Id.* Siemens A.G., the German engineering conglomerate, is the most notorious example of the steep penalties under section 3571, paying more than \$440 million in criminal penalties under section 3571's pecuniary gain provisions. See Press Release, SEC, SEC Charges Siemens A.G. for Engaging in Worldwide Bribery (Dec. 15, 2008), available at www.sec.gov/news/press/2008/2008-294.htm.

68. 18 U.S.C. § 3571(d); see, e.g., *United States v. Pfaff*, 619 F.3d 172, 174–75 (2d Cir. 2010) (per curiam) (noting that section 3571(d) permits a court to assess an alternative fine that may exceed the statutory maximum only if a jury finds that there was a pecuniary gain or loss); *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 682 (S.D. Tex. 2009) (noting that section 3571(d) allows a departure from a statutory maximum fine when the offense causes a pecuniary loss or gain); *United States v. Ferranti*, 928 F. Supp. 206, 219 (E.D.N.Y. 1996) (noting that departure from the statutory maximum is permissible when an offense results in a monetary loss or gain).

69. See *House Judiciary Committee Hearing*, *supra* note 3, at 3 (“One of the problems is the contention that the Justice Department and the SEC are interpreting the definition of ‘foreign official’ too broadly, especially when it comes to payments to companies that are state owned or state controlled.”); see also *id.* at 20 (testimony of the Hon. Michael B. Mukasey, former U.S. Att’y Gen., Partner, Debevoise & Plimpton LLP) (“The FCPA prohibits corrupt payments or offers of payment to foreign officials, but it does not provide adequate guidance as to who is a foreign official. The term is defined to include any officer or employee of a foreign government or any instrumentality thereof, but the FCPA doesn’t define what an instrumentality is.”).

70. See 15 U.S.C. §§ 78dd-1(f), -2(h), -3(f) (2006). In the 1998 Amendments to the FCPA, Congress expanded the definition of foreign official to comport with OECD Convention

However, despite an increase in enforcement, this definition still remains unclear, confusing practitioners and businesses conducting business abroad.⁷¹

The FCPA's legislative history suggests that the definition of a foreign official originally did not include *all* government employees, unlike present-day DOJ and SEC interpretations.⁷² The House of Representatives' original intent—to which the Senate acceded—was that the foreign official definition was to include officers, employees, and agents of a government and its related branches.⁷³ Although the FCPA states that foreign official includes *any employee* of a government or instrumentality, the House did not intend for foreign officials to include “employees whose duties were primarily ministerial or clerical.”⁷⁴ Thus, at the time of the FCPA's enactment, payments to ministerial officers would not be prohibited.⁷⁵

In 1988, Congress revised the FCPA to exempt payments to clerical employees made for the purpose of expediting an action that the employee would ordinarily take in the course of his duties.⁷⁶ These payments are

requirements. S. REP. NO. 105-277, at 3 (1998). The definition was revised to include officers of public international organizations such as the United Nations (UN) or World Health Organization (WHO). *Id.*; see also H.R. REP. 105-802, at 29 (1998) (defining the terms “foreign official” and “public international organization”). The Senate history of the 1998 Amendments stated that Congress would define public international organizations as those designated by Executive Order pursuant to the International Organizations Immunities Act (IOIA). S. REP. NO. 105-277, at 3. The United Nations received public international organization status in 1946. Exec. Order No. 9,698, 3 C.F.R. Supp. 508–09 (1943–1948). The World Health Organization received public international organization status in 1948. Exec. Order. No. 10,025, 13 Fed. Reg. 9361 (Dec. 30, 1948).

Although the FCPA's final amended version included “any officer or employee” of a public international organization as part of its definition of a foreign official, the legislative history of the 1998 Amendments shows that Congress intended a narrower scope, mentioning only “officials.” Compare 15 U.S.C. § 78dd-2(h)(2)(A), with S. REP. NO. 105-277, at 3.

71. See Cohen et al., *supra* note 30, at 1243, 1245, 1250 (arguing that it is unclear whether the term foreign official encompasses employees of foreign companies that are state-owned or state-controlled and explaining that the lack of DOJ and SEC guidance creates difficulties for companies conducting business abroad).

72. H.R. REP. NO. 94-831, at 12 (1977) (Conf. Rep.) (stating that the term did not include employees whose duties were ministerial or clerical in nature).

73. See *id.* (explaining that the original House definition—with which the Senate agreed—of a foreign official was “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, department, agency or instrumentality”).

74. *Id.*; see also H.R. REP. NO. 95-640, at 8 (1977). A ministerial officer is “[o]ne who performs specified legal duties when the appropriate conditions have been met, *but who does not exercise personal judgment or discretion in performing those duties.*” BLACK'S LAW DICTIONARY 1086 (9th ed. 2009) (emphasis added).

75. See H.R. REP. NO. 95-831, at 12.

76. Matt A. Vega, *The Sarbanes-Oxley Act and The Culture of Bribery: Expanding The Scope of Private Whistleblower Suits To Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 436 (2009); see also 15 U.S.C. § 78dd-1(b), -2(b), -3(b) (2006).

commonly referred to as “grease” or “facilitating” payments.”⁷⁷ These payments are “exception[s] for routine governmental action.”⁷⁸ The legislative history of the 1998 amendments refers to such “routine” actions as discretionary authority to award new business or maintain existing business.⁷⁹

Just as the definition of foreign official has fluctuated in the past, the definition of an “instrumentality” also remains nebulous.⁸⁰ This is problematic because every employee of a foreign government instrumentality may be considered a foreign official.⁸¹ The DOJ and the SEC have taken advantage of this murkiness and pushed the definition of foreign official to its maximum limits.⁸²

Intertwined with the definition of a foreign official is the definition of a foreign government “instrumentality.” *Black’s Law Dictionary* defines “instrumentality” as “[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.”⁸³ Courts use

77. See Vega, *supra* note 76, at 436. The House conference emphasized that the grease-payment exception would not apply to any discretionary action by a foreign official where that action resulted an improper business advantage. See H.R. REP. NO. 100-576, at 921 (1988) (Conf. Rep.). This amendment also enumerated the set of official actions for which grease payments are permissible. See 15 U.S.C. §§ 78dd-1(f)(3)(A)(i)-(v), -2(h)(4)(A)(i)-(v), -3(f)(4)(A)(i)-(v) (listing the permissible “routine governmental action[s]” for which an individual or entity may make grease payments to a foreign official).

78. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b); see *United States v. Kay*, 359 F.3d 738, 747 (5th Cir. 2004) (quoting H.R. REP. NO. 95-640, at 8 (1977)) (explaining that grease payments involved no misuse of an official’s discretion and that they were meant simply to “move a particular matter toward an eventual act or decision”).

79. See H.R. REP. 105-802, at 37 (1998) (“The term ‘routine governmental action’ does not include any decision by a foreign official . . . to award new business to or to continue business with a particular party . . .”).

80. Cohen et al., *supra* note 30, at 1250 (stating that the DOJ and the SEC have declined to provide any guidance on what an instrumentality is). Since many FCPA enforcement actions end either in a settlement or as DPAs, these settlements are used as quasi-case law for compliance with the statute. See Mike Koehler, *The FCPA, Foreign Agents, and Lessons from the Halliburton Enforcement Action*, 36 OHIO N.U. L. REV. 457, 457 (2010) (discussing how the lack of substantive case law on the FCPA makes settlements under the act noteworthy for determining legal precedent). Certain settled SEC actions involved instrumentalities such as state-owned “corporations, railways, or airlines.” Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 574-77 (2011). However, Professor Westbrook has suggested that, in the case of subsidiaries whose ownership is several links removed from the government, such entities should not qualify as instrumentalities. *Id.* at 533.

81. See *House Judiciary Committee Hearing*, *supra* note 3, at 20 (statement of Hon. Michael Mukasey, Former Att’y Gen., Partner, Debevoise & Plimpton LLP) (“The DOJ and the SEC considers [sic] everyone who works for an instrumentality, from the most senior executive to the most junior mailroom clerk, to be a foreign official.”).

82. Cohen et al., *supra* note 30, at 1243 (stating that the DOJ and the SEC interpret the foreign official definition to include employees of foreign state-owned or state-controlled entities).

83. BLACK’S LAW DICTIONARY 870 (9th ed. 2009).

this definition as a starting point when determining if a given foreign entity is a government instrumentality⁸⁴ because the FCPA provides no guidance as to what constitutes an instrumentality.⁸⁵ Yet, determining whether an entity is a government instrumentality permits courts to ascertain if the entity's employees are, in fact, foreign officials under the FCPA.⁸⁶

C. The DOJ and the SEC Provide Administrative "Guidance" on the FCPA Definitions

1. The DOJ's FCPA Opinion Procedure Releases Present an Unclear Picture of an Instrumentality

The DOJ permits individuals and companies to obtain the Attorney General's opinion, known as an FCPA Opinion Procedure Release, to determine whether certain prospective conduct would violate the FCPA.⁸⁷ This procedure encourages businesses to seek the DOJ's opinion as a precautionary measure to protect themselves from committing FCPA violations.⁸⁸ To utilize the procedure, an issuer or domestic concern must submit in writing "all relevant and material information" concerning the prospective transaction for which an FCPA Opinion is requested.⁸⁹ Upon receipt of a request that meets the procedural requirements, the Attorney General or his or her representative will issue an opinion within thirty days.⁹⁰ The DOJ retains the right to pursue action.⁹¹

84. See, e.g., *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *4 (C.D. Cal. May 18, 2011) (using *Black's Law Dictionary's* "instrumentality" definition); see also *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1113 (C.D. Cal. 2011) (adopting the *Black's Law Dictionary* definition of "instrumentality" that the defendants proffered in a case arising under the FCPA).

85. See *Cohen et al.*, *supra* note 30, at 1249-50. For example, the term instrumentality appears in section 78dd-2 under the definition of foreign official, but Congress made no attempt to further define what such an entity entails. See 15 U.S.C. § 78dd-2(h) (2006).

86. See, e.g., 15 U.S.C. § 78dd-2(h)(2)(A) ("The term 'foreign official' means any officer or employee of a foreign government or any . . . instrumentality thereof . . . or any person acting in an official capacity for or on behalf of any such . . . instrumentality . . .").

87. 28 C.F.R. § 80.1 (2010).

88. See *House Judiciary Comm. Hearing*, *supra* note 3, at 67-68 (Testimony of Greg Andres, Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice) (discussing how companies may use the Opinion Procedure to obtain advisory opinions for clarification as to whether certain conduct violates the FCPA).

89. 28 C.F.R. §§ 80.2, 80.4, 80.6 (2010).

90. 28 C.F.R. § 80.8 (2010).

91. *Id.*

i. FCPA Opinion Procedure Release 93-01

To date, no FCPA Opinion Procedure Release clearly defines an instrumentality.⁹² However, the DOJ has issued several instructive Opinion Procedure Releases that help clarify what qualifies as an instrumentality. Opinion Procedure Release 93-01, for example, declares that quasi-commercial entities⁹³ wholly owned and operated by a foreign government are instrumentalities under the FCPA.⁹⁴ The opinion was based on a Texas-based American company that entered into a joint venture partnership with a state-owned business of a former Communist Bloc nation.⁹⁵ Some of the joint venture directions were to be drawn from the foreign entity.⁹⁶ The American partner, fearing FCPA repercussions, solicited a DOJ opinion to determine whether proposed monthly fees to a joint venture's foreign directors would violate the statute.⁹⁷ The company assured the DOJ that its payments to the foreign directors would be reimbursed by the foreign partner.⁹⁸ The DOJ declared that the state-owned enterprise qualified as an instrumentality,⁹⁹ but stated that it would not take enforcement action.¹⁰⁰ The DOJ based its decision on the company's reassurances that it would be reimbursed by the foreign partner for the directors' fees.¹⁰¹

92. According to Cohen et al., *supra* note 30, at 1251, the DOJ has issued twenty-seven opinion procedure releases over a fifteen year span (from 1993 through June 2008). Of those twenty-seven releases, only three examine the definition of instrumentality. *Id.* Furthermore, those three releases relate only to government ownership in business enterprises and the most "recent" opinion release involving an instrumentality dates back to 1994. Dep't of Justice, *Opinion Procedure Release 94-01*, DEP'T OF JUSTICE (May 13, 1994), <http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.pdf> [hereinafter *FCPA OPR 94-01*].

93. *Cf.* BLACK'S LAW DICTIONARY 393 (9th ed. 2009) (defining a quasi-corporation and explaining that such entities are often public corporations with limited authority and powers).

94. Dep't of Justice, *Opinion Procedure Release 93-01*, DEP'T OF JUSTICE (Apr. 20, 1993), <http://www.justice.gov/criminal/fraud/fcpa/opinion/1993/9301.pdf> [hereinafter *FCPA OPR 93-01*].

95. *Id.* at 1. The commercial entity was wholly owned and operated by the foreign government. *Id.* The parties agreed that members of both the American side and the foreign side would comprise the joint venture's board of directors. *Id.*

96. *Id.*

97. *Id.* The American partner indicated that it would initially pay the joint venture's directors' fees. *Id.*

98. *Id.* The American partner explained that the foreign partner would reimburse the fees paid either from the foreign side's net profits derived from the joint venture or from other funds it possessed. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The American side also made assurances that it would educate its foreign partners regarding FCPA compliance. *Id.*

ii. *FCPA Opinion Procedure Release 94-01*

The following year, in Opinion Procedure Release 94-01, the DOJ declared that an individual officer of a foreign state-owned enterprise—acting in his personal and private capacity to contract—is a foreign official under the FCPA.¹⁰² The opinion was based on an American company that, through its foreign subsidiary, planned to set up manufacturing operations on land it purchased from a foreign state-owned enterprise.¹⁰³ The American company wished to retain the private consulting services of the foreign enterprise's general director for assistance with obtaining permits and negotiating with the local power company for electricity supply.¹⁰⁴ Concerned that the general director's consulting fees would violate the FCPA's anti-bribery provisions, the American company requested the DOJ's opinion.¹⁰⁵ In its request, the company noted that the foreign general director made several assurances that the American company's actions would not run afoul of the FCPA.¹⁰⁶ The DOJ decided, however, that the director of the state-owned enterprise was a foreign official under the FCPA even though the foreign jurisdiction did not consider the director to be a foreign official.¹⁰⁷ Ultimately, the DOJ elected not to pursue any enforcement action against the American company.¹⁰⁸

iii. *FCPA Opinion Procedure Release 08-01*

In some instances, the DOJ opinions do not explicitly state that the individual in question qualifies as a foreign official.¹⁰⁹ In a 2008 opinion, a U.S. company requested a DOJ opinion regarding a foreign official as interpreted by previous opinion releases.¹¹⁰ A U.S.-based Fortune 500

102. *FCPA OPR 94-01*, *supra* note 92. The facts of this case resemble the previous opinion release only to the extent that the foreign national was the general director of a state-owned enterprise. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* at 1–2. The general director, among other things, assured the American company that: (1) he would contract with the American company in his personal and private capacity; (2) he would not use his official position to influence any acts or decisions of the foreign government; and (3) that the consulting payments were legal under his nation's law. *Id.*

107. *Id.* The DOJ's disregard for the foreign jurisdiction's laws in determining whether the director was a foreign official is particularly noteworthy. *See id.* (“[T]he foreign attorney's opinion is not dispositive, and we have considered the foreign individual to be a ‘foreign official’ under the statute.”).

108. *Id.* at 2.

109. *See* Dep't of Justice, *Opinion Procedure Release 08-01*, DEP'T OF JUSTICE (Jan. 15, 2008), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf> [hereinafter *FCPA OPR 08-01*] (declaring only that the DOJ does not plan to take any enforcement action and failing to mention whether the party in question is a foreign official).

110. *Id.* The facts in this opinion are similar to the previous releases from the early 1990s insofar as they involve a party seeking to do business in a foreign country without violating the FCPA. *See supra* notes 94–101 and accompanying text.

corporation wished to purchase a foreign government's majority share in a local public services provider, divesting the government of its majority share and wholly privatizing the company.¹¹¹ However, the general manager of the public services provider also held a minority share in the government entity.¹¹²

The complicated prospective transaction would involve the minority shareholder's purchase of the state-owned shares in the government company, fully privatizing that entity.¹¹³ Next, the American company would purchase a majority share from the minority owner.¹¹⁴ The American company requested the DOJ's opinion on whether the minority owner/entity general manager would be considered a foreign official.¹¹⁵ Despite a lengthy discussion on the proposed transaction and associated due diligence, the DOJ did not opine on whether the minority owner was a foreign official and stated that it would not pursue an enforcement action.¹¹⁶ The opinion arguably implies that an official of an entity majority-owned by a foreign state is a foreign official, even prior to impending privatization.

2. The SEC's Litigation Releases & Administrative Orders Further Shape the Contours of the Definitions of Foreign Official and Instrumentality

The SEC litigation releases and administrative orders have further declared, albeit without clarity, who may be considered a foreign official and what may be an instrumentality.¹¹⁷ Particularly, these orders have addressed whether foreign physicians or foreign hospitals fall into either category.

In 2002, the SEC settled an FCPA enforcement proceeding with Syncor International Corporation that involved bribes to foreign physicians employed by state-run medical facilities.¹¹⁸ The SEC found that, between the mid-1980s and late 2002, Syncor had made improper payments to physicians who controlled purchasing decisions in the nuclear-medicine departments of certain

111. *FCPA OPR 08-01*, *supra* note 109, at 1–2. The company's minority shareholder was a foreign private company. *Id.* at 2.

112. *Id.*

113. *Id.* at 3.

114. *Id.*

115. *Id.* at 4. The U.S. company assured the DOJ that the U.S. company was concerned that the transaction could constitute payments to a foreign official. *Id.* at 9–11. The assurances emphasized the legitimate purpose of the payments in the prospective transaction. *Id.* The relevant assurances included: (1) the minority owner would not receive additional financing from the American company for the transaction; (2) the American company would not make any extra payments to the minority owner; (3) the minority owner's premium for the shares in the entity would be based on legitimate business considerations; and (4) the minority owner's status as a "foreign official" would soon cease. *Id.* at 9–10.

116. *Id.* at 12.

117. See text accompanying *infra* notes 122, 127, 128 (noting how the SEC orders declare certain things to be instrumentalities without any explanation).

118. *SEC v. Syncor Int'l Corp.*, Litigation Release No. 17887, 2002 WL 31761454 (Dec. 10, 2002); see also *Syncor Int'l Corp.*, Exchange Act Release No. 46979, 55 S.E.C. 1256 (Dec. 10, 2002) (detailing Syncor's anti-bribery violations in several state-run hospitals).

Taiwanese state-owned hospitals,¹¹⁹ physicians employed by Mexican government-owned hospitals,¹²⁰ and physicians employed by state-owned hospitals in Belgium, Luxembourg, and France.¹²¹ Without additional clarification or analysis, the SEC declared that the doctors were foreign officials and that the hospitals were instrumentalities under the FCPA.¹²² Despite the SEC's broad declaration, Syncor consented to the issuance of an SEC administrative order that detailed these FCPA violations.¹²³

In a similar enforcement proceeding, the SEC issued a cease-and-desist order against Diagnostic Products Corporation (DPC) for violations of the anti-bribery provisions of the FCPA.¹²⁴ In October 1991, DPC entered into a joint venture with a local Chinese government entity; the new entity was named DePu Biotechnological & Medical Products Incorporated (DePu) and eventually became DPC's wholly owned Chinese subsidiary.¹²⁵ According to the SEC's findings, DePu made illicit payments to physicians and laboratory employees over a span of eleven years in an effort to influence purchasing decisions in their respective foreign state-owned hospitals.¹²⁶ As in the Syncor litigation release, the SEC declared that "the [physicians] who received improper payments from DePu were foreign officials within the meaning of the FCPA, and the hospitals were instrumentalities of a foreign government within the meaning of the FCPA."¹²⁷ Again, notwithstanding the SEC's lack of explanation regarding foreign officials and instrumentalities, DPC consented to the issuance of the administrative order.¹²⁸

D. Two California Cases Set Forth Multi-Factor Tests for the Instrumentality Determination

Due to the increase in FCPA enforcement,¹²⁹ the U.S. District Court for the

119. *Syncor*, 55 S.E.C. at 1258 (stating that improper commissions totaled at least \$400,000).

120. *Id.* at 1260 (detailing the methods used, which included unpaid loans and improper hospital invoices).

121. *Id.* at 1262.

122. *Id.* at 1264.

123. *Id.* at 1257.

124. Diagnostic Prods. Corp., Exchange Act Release No. 51724, 2005 SEC LEXIS 1185, at *1 (May 20, 2005).

125. *Id.* at *2-3.

126. *Id.* at *3 (finding that payments totaled approximately \$1.6 million from 1991 to 2002).

127. *Id.* at *4-5.

128. *Id.* at *1.

129. See *House Judiciary Comm. Hearing, supra* note 3, at 63 (statement of Rep. Judy Chu, Member, H. Comm. on the Judiciary) (noting that in 2004, the DOJ and the SEC brought a total of five enforcement actions, whereas in 2010, the DOJ and the SEC brought seventy-four enforcement actions); see also *Year-by-Year SEC Enforcement Actions*, SEC (2011), <http://www.sec.gov/news/newsroom/images/enfstats.pdf> (noting that in 2011, the SEC filed twenty FCPA enforcement actions).

Central District of California recently opined on the scope of an instrumentality.¹³⁰

I. United States v. Aguilar

In *United States v. Aguilar* [hereinafter *Lindsey*] two high-ranking employees of the Lindsey Manufacturing Company were charged with funneling bribes to high-level officials of a Mexican public utility, the Comisión Federal de Electricidad (CFE), in order to obtain contracts with the utility.¹³¹ The *Lindsey* defendants, in an attempt to dismiss the indictment, argued that the CFE's status as a state-owned corporation meant that it did not qualify as an instrumentality under the FCPA.¹³²

The defense, utilizing two canons of statutory interpretation, argued that an instrumentality must share characteristics with agencies and departments—the neighboring statutory entities—by exercising and enforcing government policy.¹³³ The Government countered by arguing that an instrumentality must cover the interstices between departments and agencies because, otherwise, the term “would be robbed of independent meaning.”¹³⁴ The court was hesitant to

130. See *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011) (addressing the issue of whether state-owned companies fell under the FCPA's definition of instrumentality); *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1113–20 (C.D. Cal. 2011) (defining instrumentality for the purposes of finding liability under the FCPA).

131. 783 F. Supp. at 1108–12. The case was eventually dismissed with prejudice for prosecutorial misconduct. *United States v. Aguilar*, 831 F. Supp. 2d 1180, 1210 (C.D. Cal. 2011) (order granting defendants' motion to dismiss the indictment); see also C.M. Matthews, *Lindsey Dismissal Stings, But Is Not an FCPA Rebuke*, CORRUPTION CURRENTS (Nov. 30, 2011, 5:51 PM), <http://blogs.wsj.com/corruption-currents/2011/11/30/lindsey-dismissal-stings-but-is-not-an-fcpa-rebuke/>. Lindsey Manufacturing was a privately-held company in California whose primary business was the manufacture and sale of equipment used by electrical utility companies. *Aguilar*, 831 F. Supp. 2d at 1111. Defendants Keith Lindsey and Steve Lee were the President and Vice President of the company respectively. *Id.* CFE was the public utility responsible for the supply of electricity to the entirety of Mexico, save for Mexico City. *Id.* at 1110.

132. *Aguilar*, 831 F. Supp. 2d at 1112–13 (stating that the defendants also argued that, logically, no employee would be considered a foreign official). Noteworthy is the court's strongly emphasized statement, “[t]he FCPA does not define ‘instrumentality.’” *Id.* at 1112.

133. *Id.* at 1113–15. The defendants utilized the statutory interpretation canons of *noscitur a sociis* and *ejusdem generis*. *Id.* The former principle requires the examination of a statutory term in context and by comparison to its neighboring terms. *Id.* at 1113 n.5. The latter principle provides that if a general term follows in a sequence of more specific terms, the general term is defined by analogy to the objects that the specific terms entail. *Id.* Applying these principles, the defendants argued that an instrumentality ought to share characteristics of agencies and departments, and that a corporation cannot be an instrumentality as it shares no such characteristics. *Id.* at 1114.

134. *Id.* at 1114. The Government rejected the defense's all-or-nothing approach. *Id.* at 1115. Instead, the government argued that an instrumentality could not entail only those entities that shared qualities with agencies and departments. *Id.* at 1114. Furthermore, the Government argued that if an instrumentality must share *all* of its characteristics with a department and an agency, it is moot to include the term “instrumentality” in the statute. *Id.*

render an instrumentality a clone of a department or agency, noting that “[c]anons of statutory construction counsel against this outcome.”¹³⁵

Considering each side’s position on the definition of instrumentality, Judge A. Howard Matz of the Central District of California set forth a “non-exclusive” list of possible characteristics of an instrumentality:¹³⁶

[1] The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction[;]

[2] The key officers and directors of the entity are, or are appointed by, government officials[;]

[3] 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, such as entrance fees to a national park[;]

[4] The entity is vested with and exercises exclusive or controlling power to administer its designated functions[;]

[5] The entity is widely perceived and understood to be performing official (i.e., governmental) functions.¹³⁷

Applying these factors, the court determined that CFE had all of these characteristics of an instrumentality.¹³⁸

135. *Id.* at 1114.

136. *Id.* at 1115.

137. *Id.* Notably, the final factor listed conflicts with the Foreign Sovereign Immunities Act (FSIA). See 23 U.S.C. § 1603(b) (2006) (defining “agency of instrumentality” of a “foreign state”). According to FSIA case law, a foreign instrumentality is an entity engaged in predominantly commercial, rather than governmental, government-supported activity. See, e.g., *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1163–64 (C.D. Cal. 2006) (concluding that a Spanish art foundation engaged in sufficient commercial activity that was funded by the Spanish government qualified as an instrumentality), *aff’d in part, rev’d in part*, 580 F.3d 1048 (9th Cir. 2009); see also *Karaha Bodas Co., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (“Pertamina”)*, 313 F.3d 70, 75–76 (2d Cir. 2002) (holding that a wholly state-owned and operated oil and gas company is “an agency or instrumentality of a foreign state”). Despite the contradiction in terms between FCPA instrumentality functions (governmental) and FSIA instrumentality functions (commercial), the outcome appears to be the same—a government-financed and government-operated entity that serves a population is an instrumentality.

138. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011). Some of the listed factors also mirror the features that the OECD Convention Commentaries state a public enterprise should entail. See Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 14, 15, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (hereinafter OECD Convention Commentaries) (describing a public enterprise as government controlled when a government controls the company’s capital, its shareholders votes, or board of directors). The court noted that Congress “embrace[d]” the OECD Convention despite excluding state-owned corporations from its instrumentality definition. *Aguilar*, 783 F. Supp. 2d at 1117. In addition, in determining CFE was a Mexican government instrumentality, the court emphasized factors two, four, and five and believed CFE’s constitutional and statutory origins, autonomy from the central government, and government-appointed leadership were persuasive. *Id.* at 1115.

The court also examined the FCPA's use of the term instrumentality as well as the statute's legislative history.¹³⁹ However, despite an in-depth analysis, the court found neither examination particularly helpful or necessary.¹⁴⁰ Ultimately, the court reasoned that its factors, its interpretation of the legislative history, and a consideration of the *Charming Betsy* doctrine¹⁴¹—which states that U.S. law must not conflict with international law or agreements¹⁴²—required it to deny the defense's motion to dismiss the indictment.¹⁴³

2. United States v. Carson

One month after the *Lindsey* opinion was issued, Judge James V. Selna of the Central District of California also addressed the question of “whether state-owned companies qualify as instrumentalities under the FCPA.”¹⁴⁴ In a case with many factual similarities to *Lindsey*, the defendants in *United States v. Carson* were charged with bribing several foreign state-owned power company officials throughout Asia and the Persian Gulf for the benefit of their employer, Controlled Components Incorporated (CCI).¹⁴⁵ The defendants filed a motion to dismiss the FCPA counts of the indictment and argued that state-owned employees were not foreign officials as understood by the FCPA because state-based companies were not departments, agencies, or foreign government instrumentalities.¹⁴⁶

139. *Id.* at 1115–20.

140. *See id.* at 1117–19 (describing a structural analysis of the FCPA as “unnecessary” and the legislative history as “inconclusive.”). However, the court spent some time contemplating the government's statutory-construction argument. *Id.* at 1116–17. Based on the doctrine derived from an 1804 U.S. Supreme Court case, the government argued that no construction of the FCPA could violate the government's obligations under the OECD Convention. *Id.* at 1116 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). Because the OECD considers certain government-controlled organizations to fall within its definition of a “public enterprise,” the government argued, and the court agreed, that excluding state-owned corporations from the definition of instrumentality would violate the United States' obligations under the OECD Convention. *Id.* at 1116–17.

141. Relying, in part, on the *Charming Betsy* doctrine, the *Aguilar* court held that statutes are to be considered in a manner consistent with any international law or international agreement entered into on behalf of the United States. *Aguilar*, 783 F. Supp. 2d at 1116 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987)). Thus, the *Aguilar* court interpreted the FCPA in a way that would not impair the U.S. government's obligations under the OECD Convention. *See id.* at 1116–17 (discussing role of the *Charming Betsy* doctrine in the analysis of the definition of ‘instrumentality’).

142. *See id.* at 1116 (citing *Murray*, 6 U.S. at 118).

143. *Id.* at 120.

144. *United States v. Carson*, SACR 09–00077–JVS, 2011 WL 5101701, at *3 (C.D. Cal. May 18, 2011) (order denying defendants' motion to dismiss counts one through ten of the indictment).

145. *Id.* at *1–2.

146. *Id.* at *1.

The arguments advanced by the defense in *Carson* were similar to those advanced in *Lindsey*.¹⁴⁷ However, the court in *Carson* resolved that it could not decide as a matter of law whether a state-owned company was an instrumentality.¹⁴⁸ Rather, the court concluded that a jury should ascertain whether a state-owned company may be considered an instrumentality.¹⁴⁹ To assist with this factual determination, the court set forth a list of non-exclusive factors to supplement the comparable list enumerated in *Lindsey*.¹⁵⁰ These factors require the parties to present evidence that demonstrates:

- [1] The foreign state's characterization of the entity and its employees;
- [2] The foreign state's degree of control over the entity;
- [3] The purpose of the entity's activities;
- [4] 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;
- [5] The circumstances surrounding the entity's creation; and
- [6] The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).¹⁵¹

Next, the court examined the FCPA's statutory text and determined that instrumentalities include entities that are not "agencies" or "departments," but that do carry out government functions.¹⁵² Similar to the *Lindsey* court, the *Carson* court stated that the definition of instrumentality could not categorically exclude state-owned companies.¹⁵³ The court explained that although evidence of a government's monetary investment into a business entity is insufficient to define that entity as an instrumentality, evidence of that investment, coupled with evidence indicating that an entity is carrying out

147. See *id.* at *8 ("In *Aguilar* . . . defendants made virtually identical arguments to those made here. . ."). The arguments advanced were based on a statutory analysis designed to exclude state-owned companies from the definition of instrumentality. *Id.* The defendants even advanced a *nosctur a sociis* defense to restrict "instrumentality" to a very narrow meaning. *Id.* at *5. This was rejected by the court because construction of a statutory term requires consideration of the entire statute. *Id.* The court stated that Congress meant for an instrumentality to encompass entities that an "agency" or "department" does not cover. *Id.*

148. *Id.* at *3.

149. See *id.* at *9 (concluding that state-owned companies generally may be encompassed by the term "instrumentality," but that a jury must decide whether a specific business qualifies).

150. *Id.* at *3-4.

151. *Id.* These factors also mirror the OECD Convention Commentaries' description of a state-owned enterprise. See *supra* note 138.

152. *Carson*, 2011 WL 5101701, at *4-5.

153. *Id.* at *5.

government functions,¹⁵⁴ would suffice to characterize that entity as an instrumentality.¹⁵⁵

The court also looked to domestic examples of instrumentalities to bolster its point that a state-owned corporation such as the Federal Deposit Insurance Corporation (FDIC) or the Tennessee Valley Authority (TVA) could qualify as an instrumentality.¹⁵⁶ Additionally, the court examined the Foreign Sovereign Immunities Act—another statute containing the term instrumentality in its language—to demonstrate that corporations can be instrumentalities.¹⁵⁷ Ultimately, the court denied the defendants' motion to dismiss the indictment because it could not determine as a matter of law that a state-owned corporation was an instrumentality.¹⁵⁸

II. THE FCPA REQUIRES REFINEMENT IN THE FACE OF THE CURRENT ENFORCEMENT TREND

The FCPA is a broad statute which requires the compliance of overseas businesses.¹⁵⁹ Anyone doing business abroad—including foreign nationals employed by U.S. companies and their subsidiaries—is subject to the FCPA's

154. See, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011) (explaining that the provision of electricity in Mexico constitutes a “quintessential government function”); see also *Carson*, 2011 WL 5101701, at *6 (providing examples of state-owned entities that carry out government functions, such as rail transport or regional economic development).

155. See *Carson*, 2011 WL 5101701, at *5.

156. See *id.* at *6 (explaining that the United States has historically utilized corporations to carry out government goals).

157. See *id.* at *7 (arguing that because Congress passed the FSIA a year before the FCPA, the inclusion of state-owned corporation under the definition of instrumentality in the FSIA helps to support the conclusion that instrumentalities under the FCPA may include a state-owned company). The court examined the FSIA because that statute includes state-owned corporations in its definition instrumentalities. *Id.*; see also 28 U.S.C. § 1603(b)(2) (2006) (“An ‘agency or instrumentality of a foreign state’ means any entity . . . which is a separate legal person, corporate or otherwise, . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . .”). The defense argued that Congress previously defined instrumentality to entail state-owned corporations, and that by excluding said entities from the FCPA, Congress intended the exclusion from the FCPA's definition of an instrumentality. *Carson*, 2011 WL 5101701, at *7. The court was unconvinced, noting that the doctrine of statutory interpretation by which an omission of particular language that appears elsewhere in the statute is done intentionally by Congress only applies *intra*-statutorily, not *inter*-statutorily. *Id.* Therefore, the exclusion of a phrase in the FCPA indicating that an instrumentality could include a state-owned company is not presumed to be an intentional or purposeful exclusion by Congress. *Id.*

158. *Carson*, 2011 WL 5101701, at *3, 9, 11.

159. See *supra* Part I (discussing the ways in which various institutions have interpreted the FCPA's foreign official and instrumentality terms and analyzing how this has caused difficulty for business owners seeking to ascertain a standard under the statute).

prohibitions.¹⁶⁰ Additionally, the DOJ and the SEC are currently engaged in a record-breaking enforcement campaign,¹⁶¹ and despite recent setbacks,¹⁶² those agencies have promised to continue strong enforcement.¹⁶³

Despite such stringent enforcement and broad jurisdiction, the FCPA's administrative guidance and interpretive case law pales in comparison with other statutes.¹⁶⁴ This creates a difficult choice for businesses with overseas operations: either enter into risky business arrangements abroad with individuals or entities who have unclear connections to a foreign government, or conduct business conservatively and risk losing a competitive edge by eschewing foreign markets.¹⁶⁵

A. The Plain Meaning of the FCPA and Its Legislative History Do Not Support the DOJ's and the SEC's Interpretations of Foreign Officials and Instrumentalities

1. The Original Act's Legislative History Indicates Congress's Intent to Limit the Definition of Foreign Officials

The legislative history of the original FCPA enacted in 1977 indicates that Congress wanted the statute to cover only those bribes made to a government

160. See 15 U.S.C. § 78dd-3(a) (2006) (prohibiting foreign nationals and corporations from engaging in bribery while in U.S. territory).

161. See Westbrook, *supra* note 80, at 522–23 (providing statistics demonstrating a dramatic increase in FCPA enforcement actions brought by the DOJ and the SEC from 2007 to 2010).

162. See C.M. Matthews, *Houston Judge Tosses Foreign Bribery Case, Hands DOJ New Setback*, CORRUPTION CURRENTS (Jan. 17, 2012 12:36 PM), <http://blogs.wsj.com/corruption-currents/2012/01/17/houston-judge-tosses-foreign-bribery-case-hands-doj-new-setback/> (explaining that the defendant's FCPA indictment was dismissed because the judge found the government's chief witness unreliable); C.M. Matthews, *Judge Dismisses Landmark Bribery Conviction, Rips DOJ*, CORRUPTION CURRENTS (Dec. 1, 2011, 6:57 PM), <http://blogs.wsj.com/corruption-currents/2011/12/01/judge-dismisses-landmark-bribery-conviction-rips-doj/> (explaining that the *Lindsey* conviction was dismissed due to gross prosecutorial misconduct); C.M. Matthews, *Justice Dept. Drops FCPA Sting Case*, WSJ LAW BLOG (Feb. 21, 2012, 11:56 AM), <http://blogs.wsj.com/law/2012/02/21/justice-dept-drops-fcpa-sting-case/> (explaining that, in light of several mistrials and acquittals, the DOJ would decline to further prosecute sixteen defendants ensnared in an FCPA sting operation).

163. Jenna Greene, *Agency Officials Say Feds Remain Committed to FCPA Enforcement*, THE BLT: THE BLOG OF LEGAL TIMES (Mar. 8, 2012, 3:30 PM), <http://legaltimes.typepad.com/blt/2012/03/agency-officials-say-feds-remain-committed-to-fcpa-enforcement.html> (quoting the DOJ Fraud Department Assistant Chief as saying “We’re in this for the long haul”).

164. See Matthew J. Kovacich, *Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act (“FCPA”) on Minnesota and Wisconsin*, 32 HAMLINE L. REV. 529, 537–38 (2009) (explaining how key terms in the FCPA lack definition and that there is a dearth of binding precedent interpreting the statute's terms).

165. Cf. *House Judiciary Comm. Hearing*, *supra* note 3, at 20 (statement of the Hon. Michael Mukasey, Former Att’y Gen., Partner, Debevoise & Plimpton LLP) (emphasizing that a lack of clarity in the statutory terms makes it difficult for companies to determine what constitutes permissible conduct).

official or employee who carry out a government function.¹⁶⁶ Further, the House of Representatives, by initially excluding employees with ministerial or clerical duties from the law's prohibitions, did not intend for every government employee to qualify as a foreign official.¹⁶⁷ Rather, the House understood the realities of doing business abroad and meant "foreign official" to encompass only those individuals whose authority was susceptible to corruption.¹⁶⁸

The Senate's acceptance of the House's foreign official definition supports the argument that Congress intended a restrained definition.¹⁶⁹ The decision to use the word government "officials" rather than "employees" indicates that Congress wished to criminalize bribes to individuals with decision-making authority to execute a government function.¹⁷⁰ Congress believed that those functions, when exercised, could secure a business advantage and potentially be corruptible.¹⁷¹ However, ministerial officers have no discretion that is corruptible¹⁷² because corruption entails the gain of an advantage through dereliction of that discretion.¹⁷³ Congress, realizing this reality, intended to

166. H.R. REP. NO. 95-831, at 12 (1997) (Conf. Rep.).

167. *Id.*; see also H.R. REP. NO. 95-640, at 8 (1977) (indicating that the proscribed payments would be those made to foreign officials with influence over other officials or branches of government).

168. H.R. REP. NO. 95-640, at 8. In particular, the legislative history notes that,

While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world . . . As a result, the committee has not attempted to reach such payments. However, where the payment is made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy or other *discretionary* governmental functions, such payments would be prohibited.

Id. (emphasis added).

169. See H.R. REP. NO. 95-831, at 12 (stating that the Senate receded to the House's definition of foreign official, which excluded those employees with ministerial or clerical duties); see also Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 889-90 (2011) (explaining that Congress intended this circumscription of "foreign official" to be the statute's original "grease payments" exception).

170. See *House Judiciary Comm. Hearing, supra* note 3, at 50-51 (written testimony of Shana-Tara Regon, Dir., Nat'l Ass'n of Criminal Def. Lawyers) (arguing that the FCPA's original purpose neither comports with current government interpretations of mid-level officials as foreign officials nor with a layperson's interpretation of what individuals would be considered true "officials"); see also H.R. REP. NO. 95-640, at 8 (emphasizing that the reasoning behind the use of the adjective "corrupt" to describe the prohibited action and why this adjective cannot apply to ministerial officers).

171. Cf. H.R. REP. NO. 95-640, at 8. (providing examples of corruptible official duties, such as directing business to the payor or obtaining preferential legislation). Ministerial officers can only take actions that involve no discretion; they cannot secure a business advantage. *Id.*

172. See *id.* (explaining that such duties involve no discretion and will occur in any event).

173. BLACK'S LAW DICTIONARY 397 (9th ed. 2009) ("The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others"); see also 3

limit the term foreign official to those officials who have discretionary governmental authority.¹⁷⁴

2. Subsequent FCPA Amendments Support a Narrow Reading of Foreign Official to Apply Only to Officials with Discretionary Authority

Subsequent amendments to the FCPA demonstrate a hesitation to expand the definition of a foreign official, demonstrating a common thread of limiting the definition to those who possess some discretion to act.¹⁷⁵ The 1988 Amendments, which created the grease payments exception,¹⁷⁶ narrowed the original ministerial exception and stated that a payment to any foreign official with discretionary power could not qualify as a grease payment.¹⁷⁷ The legislative history of the 1998 Amendments, however, expanded the definition to incorporate officials of public international organizations.¹⁷⁸ Although the amended statute's final version prohibited bribes to officials and employees of foreign governments,¹⁷⁹ the legislative history demonstrates an implied unease with any expansion of the definition of a foreign official.¹⁸⁰

3. The Plain Meaning of Foreign Official and Instrumentality Do Not Support Broad Definitions

The plain meanings of foreign official and instrumentality do not coincide with the broad, non-binding meanings that the DOJ and the SEC have ascribed to them.¹⁸¹ *Black's Law Dictionary* defines an "official" as someone who is "elected or appointed to carry out some portion of a government's sovereign powers"¹⁸² and an "instrumentality" as "[a] means or agency through which function of another entity is accomplished, such as a branch of a governing

OXFORD ENGLISH DICTIONARY 972 (2d ed. 1989) (defining "corrupt" as "[t]o destroy or pervert the integrity or fidelity of (a person) in his discharge of duty").

174. See H.R. REP. NO. 95-640, at 8 (explaining that the FCPA is violated when a payment to a government official is made to influence "the passage of law, regulation, the placement of government contracts, the formulation of policy, or other discretionary government functions").

175. See H.R. REP. NO. 100-576, at 921 (1988) (Conf. Rep.) (stating that the grease payment exception does not apply to official actions involving an exercise of discretion by a government official); see also S. REP. NO. 105-277, at 3 (1998) (stating that officials of public international organizations are to be included in the definition of foreign official).

176. See *supra* notes 76–79 and accompanying text.

177. See *supra* note 77 (discussing how the 1988 Amendments limited acceptable grease payments to an enumerated list of actions).

178. See S. REP. NO. 105-277, at 3.

179. See, e.g., 15 U.S.C. § 78dd-2(h)(2)(A) (2006) (providing that the phrase foreign official includes "any officer or employee").

180. Compare *id.* (defining officials of public international organizations to include their officers and employees), with H.R. REP. 105-802, at 21 (1998) (defining only the officials of a public international organization as foreign officials).

181. See *supra* Part I.C.

182. BLACK'S LAW DICTIONARY 1195 (9th ed. 2009).

body.”¹⁸³ The plain meaning of “official” connotes that the individual is tasked with carrying out a government function, like protecting the health and welfare of the nation.¹⁸⁴ Similarly, a government “instrumentality” plainly means that the entity assists in the accomplishment of a government purpose.¹⁸⁵ However, the DOJ’s Opinion Procedure Releases focus on government-owned commercial entities.¹⁸⁶ The DOJ appears more concerned with a government’s presence in an instrumentality than with whether the instrumentality carries out a government purpose.¹⁸⁷ An entity must have both government presence and the ability to assist in exercising the government’s sovereign powers to be an instrumentality.

B. Lindsey and Carson Demonstrate Cautious, Yet Positive, Steps Toward Refined Definitions of Foreign Official and Instrumentality

The cases from the Central District of California mark positive steps toward the creation of an analysis for determining what constitutes an instrumentality.¹⁸⁸ In doing so, the *Lindsey* and *Carson* courts promulgate criteria that are altogether more restrictive and definite than the DOJ’s and the SEC’s expansive interpretations of the FCPA.¹⁸⁹ The courts’ inquiries centered on an instrumentality’s financing, level of government ownership, vested controlling power, and purpose.¹⁹⁰ These inquiries mirrored some of the public enterprise features discussed in the commentaries of the OECD Convention.¹⁹¹ Both the DOJ’s and the SEC’s interpretations of

183. *Id.* at 870; *see also* 7 OXFORD ENGLISH DICTIONARY 1052 (2d ed. 1989) (“[T]he fact or function of serving or being used for the accomplishment of some purpose or end.”).

184. *Cf.* Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101, 133 (2005) (noting that the WHO Constitution states that governments are responsible for protecting the public health and well-being).

185. *Cf. House Judiciary Comm. Hearing, supra* note 3, at 27 n.15 (statement of the Hon. Michael Mukasey, Former Att’y Gen., Partner, Debevoise & Plimpton LLP) (analogizing the current definition of instrumentality to General Motors as an example of a ‘state-owned’ corporation: if the United States was a foreign government, GM would be an instrumentality). *See* Gen. Motors Co., Annual Report (Form 10-K), at 1 (Apr. 7, 2010) (detailing the change of ownership from the former private-owned GM Corporation to the government-owned GM Company).

186. *See supra* Part I.C.1.

187. *See supra* Part I.C.1; *see also, e.g., FCPA OPR 93-01, supra* note 94 (declaring that a quasi-commercial entity wholly owned and operated by a foreign official is an instrumentality despite the organization’s primary purpose).

188. *See supra* Part I.D.

189. *See supra* Part I.D (noting that the majority opinions in *Aguilar* and *Carson* provide a non-exclusive list of factors to assist the jury in making a factual determination regarding whether a state-owned corporation is an instrumentality).

190. *See* text accompanying notes 137 and 141.

191. *See* OECD Convention Commentaries, *supra* note 138, at 15 (providing factual scenarios that help determine whether an enterprise is a public enterprise/instrumentality).

instrumentalities look only for the *presence*, not the *degree*, of government control/financing.¹⁹² Although both courts ultimately accepted the government's position that the entities in question were instrumentalities, the opinions demonstrate that the courts are unwilling to rule blindly.¹⁹³ One such example is the *Lindsey* opinion's focus on whether an instrumentality is "perceived and understood" to perform an official function.¹⁹⁴ If a reasonable juror believes that the alleged instrumentality does not perform an official function, the entity may fall outside the instrumentality definition.¹⁹⁵ For corporate counsel to the pharmaceutical industry, this factor will require examining the depth a government's involvement with a hospital or research institute. The perceptions of the local population will also indicate if the entity is a government instrumentality.¹⁹⁶ This factor will serve as a beneficial asset to future counsel tasked with determining their client's corporations' FCPA liability.

C. The DOJ and the SEC Have Broadened the Meaning of Foreign Official and Instrumentality

In stark contrast to the FCPA's legislative history and the *Lindsey* and *Carson* decisions, the DOJ and the SEC have adopted expansive views of the terms foreign official and instrumentality in their non-binding administrative pronouncements.¹⁹⁷ The DOJ Opinion Procedure Releases are unclear about the type of entity that will qualify as an instrumentality.¹⁹⁸ Although the releases do indicate that the DOJ will look for state ownership when it examines if an entity—either explicitly or implicitly—is an instrumentality,¹⁹⁹ the agency is silent about the degree of government ownership necessary for

192. Compare *supra* Part I.C (discussing the DOJ and SEC releases that declared certain entities to be instrumentalities without providing guidance regarding level of state ownership necessary for that determination), with *supra* Part I.D (discussing the factors applied by courts to examine the level of control and financing needed by the subject for it to be considered an instrumentality).

193. See *supra* Part I.D (describing the detailed list of factors promulgated by the *Aguilar* and *Carson* courts).

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

195. See *id.* (listing whether the entity performs an official government function as one of the five non-exhaustive characteristics that are often common with an instrumentality).

196. See *id.* (noting that community perception and level of government involvement are among the important factors for determining whether an entity is an instrumentality under the FCPA).

197. See *supra* Part I.C.

198. See *supra* Part I.C.1.

199. See *FCPA OPR 93-01*, *supra* note 94, at 1 (determining that the wholly state-owned entity was an instrumentality); *FCPA OPR 94-01*, *supra* note 92, at 1 (determining that the general director of the state-owned enterprise was a foreign official); *FCPA OPR 08-01*, *supra* note 109, at 12 (determining that the DOJ would not take action against the American company for engaging the chairman of a part-owned government entity).

the instrumentality designation.²⁰⁰ Additionally, the DOJ will not take into account a foreign jurisdiction's opinion as to who qualifies as a foreign official.²⁰¹ Ultimately, these releases indicate that even if the DOJ determined that an entity is an instrumentality, it may not commence enforcement proceedings if the entity's status as a foreign official was ending,²⁰² payments or fees to the official would be reimbursed by the foreign government,²⁰³ or if the American company made promises to educate its foreign partner about FCPA compliance.²⁰⁴

The SEC's non-binding litigation releases and administrative orders, although more factually specific than the DOJ's pronouncements, define foreign official and instrumentality in equally broad terms.²⁰⁵ For example, the Syncor and DePu releases demonstrate two important considerations for businesses working with foreign health systems: (1) state-operated hospitals are considered instrumentalities by the SEC,²⁰⁶ and (2) physicians employed by those hospitals—especially those who control purchasing decisions—are treated as foreign officials.²⁰⁷ These considerations, when viewed in light of the DOJ's Opinion Procedure Releases, indicate that some level of state ownership places an entity within the instrumentality category.²⁰⁸ Further, the DOJ and SEC releases show that entities either wholly owned²⁰⁹ or

200. Compare *FCPA OPR 93-01*, *supra* note 94, at 1 and); *FCPA OPR 94-01*, *supra* note 92, at 1 (discussing foreign instrumentalities that were apparently wholly state-owned), with *FCPA OPR 08-01*, *supra* note 109, at 2 (noting that the purported instrumentality in question was partly state-owned).

201. See *supra* note 107 and accompanying text.

202. *FCPA OPR 08-01*, *supra* note 109, at 10, 12.

203. *FCPA OPR 93-01*, *supra* note 94, at 1.

204. *Id.*

205. See generally *Diagnostic Prods. Corp.*, Exchange Act Release No. 51724, 2005 SEC LEXIS 1185, at *1 (May 20, 2005) (arguing that defendant DPC violated the FCPA by making commission payments to doctors and employees of state-owned hospital laboratories); *SEC v. Syncor Int'l Corp.*, Litigation Release No. 17887, 2002 WL 31761454 (Dec. 10, 2002) (arguing that Syncor violated the FCPA by making payments to doctors in hospitals that were controlled by foreign authorities).

206. See *Diagnostic Prods. Corp.*, 2005 SEC LEXIS 1185, at *3–5 (stating that the Chinese state-owned hospitals that comprised DePu's customer base were instrumentalities); see also *Syncor Int'l Corp.*, 2002 WL 31761454, at *1258 (explaining that Syncor's foreign subsidiaries made payments to physicians employed by state-run hospitals).

207. *Syncor Int'l Corp.*, 2002 WL 31761454, at *1262; see also *Diagnostic Prods. Corp.*, 2005 SEC LEXIS 1185, at *3 (finding that the defendant violated the FCPA by making payments to doctors at government-owned hospitals in China).

208. Compare *supra* note 202 and accompanying text (explaining that the SEC views state-owned hospitals as instrumentalities), with *supra* notes 138 and 151 and accompanying text (explaining that state-ownership, whether in whole or in part, is seemingly a factor in the instrumentality determination).

209. See, e.g., *FCPA OPR 93-01*, *supra* note 94, at 1 (providing an example of a wholly owned government entity as an instrumentality).

majority-owned²¹⁰ by a government are instrumentalities, which could lead to the argument that entities minority-owned by a government are not instrumentalities.

D. The Lack of Clarity in the Statute and the Current Enforcement Trend Has an Adverse Effect on Business

The lack of clarity in the FCPA and the current trend of increased enforcement has resulted in high costs for American businesses and foreign businesses with American branches that may conduct business abroad. In order to comply with the FCPA, many companies must undertake onerous due diligence and implement large-scale compliance programs.²¹¹ Furthermore, the cost of due diligence and compliance does not include the potentially enormous fines that a company may have to pay under a settlement agreement,²¹² with Siemens's \$800 million settlement as a prime example.²¹³ Although large multinational corporations can afford the costs of doing business related to the FCPA,²¹⁴ smaller companies may not have such fiscal flexibility.²¹⁵ Therefore, smaller companies may face greater barriers to entry into foreign markets due to the large costs related to FCPA compliance.²¹⁶

210. See, e.g., *FCPA OPR 08-01*, *supra* note 109, at 2 (discussing the majority government-owned entity in a release in which the DOJ refrained from acting yet declined to state that the entity was not an instrumentality).

211. See *House Judiciary Comm. Hearing*, *supra* note 3, at 3–4 (stating that many businesses spend millions of dollars to develop and implement sophisticated compliance systems); see also Koehler, *supra* note 18, at 1001 (explaining that compliance based on information gleaned from non-binding plea agreements is wasteful and expensive); Westbrook, *supra* note 80, at 561 (explaining that the FCPA's uncertainty results in significant costs for companies, especially in compliance measures).

212. See Westbrook, *supra* note 80, at 555–56 (detailing the multi-million dollar FCPA settlements that companies such as Siemens, Halliburton/KBR, and BAE Systems have paid).

213. See Dan Slater, *Siemens Settles in U.S. for \$800 Mil, Leaving \$\$ for German Authorities*, WSJ LAW BLOG (Dec. 15, 2008, 8:57 AM), <http://blogs.wsj.com/law/2008/12/15/siemens-settles-in-us-for-800-mil-leaving-for-german-authorities> (noting an \$800 million settlement entered into by a European company to dismiss an action arising under the FCPA).

214. See Mike Koehler, *Two-Tiered Justice?*, FCPA PROFESSOR (Apr. 20, 2010), <http://www.fcprofessor.com/two-tiered-justice> (postulating that the current FCPA enforcement trend has created a “two-tiered justice system” in which large corporate actors are able to pay the settlement's full cost and even retain business with the U.S. government, whereas smaller actors cannot so easily avoid FCPA liability).

215. See Rashna Bhojwani, Note, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 95–96 (2012) (explaining that the private consequences of an FCPA violation are potentially catastrophic for small-to-medium-sized businesses).

216. Cf. DAVID KENNEDY & DAN DANIELSEN, *BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 13* (2011), available at <http://www.opensocietyfoundations.org/reports/busting-bribery-sustaining-global-momentum-for-eign-corrupt-practices-act> (explaining that current FCPA enforcement trends not tempered by judicial review will create high barriers to entry in foreign markets for small businesses).

If the FCPA terms were narrowed and clarified, the playing field would be leveled.²¹⁷ Introducing transparency in the foreign official and instrumentality terms—whether through amendment, case law, or agency guidance—will reduce the costs required for compliance efforts.²¹⁸ Further, lowering costs for due diligence and compliance will allow smaller and larger companies to fairly compete, resulting in greater consumer choice and pricing.²¹⁹

III. A TWO-PART ANALYSIS FOR THE DETERMINATION OF INSTRUMENTALITIES AND FOREIGN OFFICIALS WILL PROMOTE GREATER OVERSEAS INVESTMENT AND ACCURATELY TARGET TRUE VIOLATORS OF THE FCPA

As discussed previously, the DOJ and the SEC vowed to continue rigorous FCPA enforcement.²²⁰ However, the FCPA could potentially chill overseas investment as businesses have little binding authority or guidance to precisely analyze whether an individual or entity is a foreign official or instrumentality.²²¹ The majority of the “law” that corporate counsel have to work with is the DOJ’s and the SEC’s broad positions in their administrative rulings and settlements.²²² To remedy this demand for authoritative guidance, courts should adopt a two-step analysis based on the *Lindsey* and *Carson* opinions and the FCPA’s legislative history.

This analysis would first examine whether an alleged government entity is an instrumentality, and second whether an employee of said instrumentality possesses any discretionary authority. Application of this framework will assist authorities in targeting only those companies that affirmatively attempt to corrupt government employees that have actual discretion over government action. A refined analysis that clarifies the foreign official and instrumentality terms would prevent corrupt actors from relying on a defense based on the vague and undefined nature of the statute’s terms. This will allow for more accurate prosecution of foreign corruption and eliminate any potential chilling effect on foreign investment.

217. See Koehler, *supra* note 4, at 131–32 (arguing for a narrow definition, which would lead to more consistent rulings).

218. Cf. Westbrook, *supra* note 80, at 575 (explaining that clarified terms in the FCPA will make it easier for companies to effectuate compliance programs).

219. See Kovacich, *supra* note 164, at 559 (finding that compliance will be easier if the regulations are interpreted more narrowly and consistently).

220. See Greene, *supra* note 163.

221. See Kovacich, *supra* note 164; see also Roger M. Witten et al, *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 723 (2009) (noting the non-binding nature of SEC and DOJ releases).

222. See Westbrook, *supra* note 80, at 560; see also *supra* Part II.C.

A. An Instrumentality Should Be Either Wholly or Majority-Owned by a Foreign Government and Operate as a Dependent Arm of the State

The *Lindsey* and *Carson* cases represent positive steps in clarifying what entities qualify as an instrumentality.²²³ To determine whether a foreign entity may qualify as an instrumentality, courts should first examine the extent of the entity's government ownership and operation.²²⁴ Majority ownership is the most rational level of ownership and is most closely aligned with the *Lindsey* and *Carson* opinions²²⁵ as well as the DOJ and SEC releases.²²⁶ As part of this analysis, some practitioners have suggested looking at the degree of nationalization or privatization in a country.²²⁷

In addition to the foregoing factors, courts should analyze the entity's function or purpose because this may be relevant to whether the entity is an instrumentality.²²⁸ This part of the analysis would examine whether the entity is commercial in nature, like a state-owned pharmaceutical company,²²⁹ or governmental in nature, like a public health agency.²³⁰ If the entity is primarily

223. See *supra* Part II.B.

224. See *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *5 (C.D. Cal. May 18, 2011) (explaining that the extent of government ownership is a relevant factor for determining if an entity is an instrumentality); *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011) (explaining that an instrumentality is financed in large part by the public).

225. See *Aguilar*, 783 F. Supp. 2d at 1115 (explaining that a government should finance an instrumentality and that CFE possessed that characteristic); cf. *Carson*, 2011 WL 5101701, at *4 (explaining that a "mere" financial stake by a government in an entity is not sufficient to determine its instrumentality status); see also *House Judiciary Comm. Hearing, supra* note 3, at 20 (statement of the Hon. Michael Mukasey, Former Att'y Gen, Partner, Debevoise & Plimpton LLP) (recommending that the statute be amended to indicate the level of government ownership required for the entity to qualify as an instrumentality, and specifying that a majority share is "the most plausible threshold").

226. See *supra* Part II.C.

227. See STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 19-20 (2d ed. 2010) (discussing national socialization when defining instrumentalities and explaining that the more privatized a nation is, the less likely a given entity is an instrumentality).

228. See *Aguilar*, 783 F. Supp. 2d at 1115 (stating CFE was responsible for the supply of electricity, a function described by the Mexican government as a "quintessential government function."). In *Carson*, the defendants were charged with bribing power companies. *Carson*, 2011 WL 5101701, at *1-2. As in *Aguilar*, where the entity in question was an instrumentality that had a "quintessential" government function, the court denied the motion to dismiss the indictment. *Id.* at *8.

229. See, e.g., *Central Public Sector Undertakings, GOV'T OF INDIA, DEP'T OF PHARM., MINISTRY OF CHEMS. AND FERTILIZERS*, at 2, <http://pharmaceuticals.gov.in/cpsu.pdf> (describing Indian Drugs & Pharmaceuticals Limited, one of India's five publicly-owned pharmaceutical companies).

230. See *Meier & Mori, supra* note 184, at 133 (noting that the WHO Constitution states that governments are responsible for protecting the public health and well-being). But see James B. Roche, *Health Care in America: Why We Need Universal Health Care and Why We Need it Now*, 13 ST. THOMAS L. REV. 1013, 1028-29 (2001) (noting that in Germany, the private sector, and not the government, is responsible for healthcare).

commercial in nature, a court should examine the level of ownership²³¹ before examining whether or not the entity is “widely understood to be performing official government functions.”²³² However, where the entity is primarily governmental, a court may conclude that the entity is an instrumentality.²³³ This part of the inquiry would allow a court to discern those commercial ventures in which a government may have a stake from those instrumentalities that provide services to a population.²³⁴ This additional analysis allows a court to examine with precision whether a company was truly targeting an official of a government entity to secure an improper business advantage.

B. A Foreign Government Employee Should Possess Discretionary Authority to Secure a Business Advantage in Order to Qualify as a Foreign Official

After the instrumentality assessment, an additional step is necessary to determine if that employee has any corruptible discretion. The legislative history demonstrates a struggle between including a broad definition of official versus including a restrictive definition that encompasses only those with discretionary authority.²³⁵ Because the statute requires corrupt intent,²³⁶ however, an official must have some duty involving free will so that a payment could persuade him or her against acting properly.²³⁷ The statutory language does not support the assertion that every employee is corruptible and, therefore, should qualify as a foreign official.²³⁸

Requiring courts to examine whether the employee in question possesses corruptible discretionary authority would separate actual officials from mere government employees. Individuals with a position of power or influence who could secure opportunities for foreign businesses would qualify as foreign officials within the original meaning of the statutory term.²³⁹ Further, employees, such as mid-level staff members, who do not have the discretionary authority of management-level employees would not qualify as foreign

231. See text accompanying notes 224–26.

232. *Aguilar*, 783 F. Supp. 2d at 1115.

233. See *id.* (concluding that the CFE was an instrumentality carrying out a government function of providing electricity).

234. See notes 229–30 and accompanying text.

235. See *supra* Part II.B.

236. See, e.g., 15 U.S.C. § 78dd-1(a) (2006) (prohibiting a corrupt payment to a foreign official). *Black's Law Dictionary* defines the verb “corrupt” as “to change (a person’s morals or principles) from good to bad.” BLACK’S LAW DICTIONARY 397 (9th ed. 2009).

237. See H.R. REP. NO. 95-640, at 8 (1977) (“In using the word ‘corruptly’, the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments . . . which do not involve any discretionary action.”).

238. See *supra* Part II.B.

239. See *supra* Part II.B.

officials.²⁴⁰ Focusing on discretionary authority aligns the “foreign official” term with the legislative history.²⁴¹ Further, such analysis would ensure that the law targets only those companies that, in fact, targeted a foreign instrumentality’s employee with bribes because of his or her influence within the government.

IV. CONCLUSION

In the wake of the DOJ and the SEC’s current enforcement push, the business community is grappling with the FCPA’s terms. Companies seeking to conduct business abroad are confronted with a difficult choice—engage in expensive due diligence and implement a costly compliance program to cover all potential scenarios, or risk massive fines or settlements from concurrent DOJ and SEC enforcement proceedings. Companies subject to the FCPA’s jurisdiction need an appropriate tool to navigate the FCPA in this heightened enforcement environment. The proposed two-part analysis based on the FCPA’s legislative history and recent court opinions will introduce transparency into the FCPA and allow the business community to ensure that they are engaged in fair and honest business dealings. A clarified FCPA will adequately equip those who are subject to the Act’s jurisdiction with the tools to respond to the government’s current enforcement push, while ensuring that those who are truly engaged in foreign bribery will be cast into the sunlight.

240. See, e.g., Staff Scientist, Intramural Prof’l Designations & Procedures, *Intramural Research Sourcebook*, Nat’l Insts. of Health, <http://sourcebook.od.nih.gov/prof-desig/staff-sci.htm> (explaining that the staff scientist position at NIH is a time-limited support position that does not have the authority to initiate new research programs). The sourcebook also notes that staff scientists are not paid via the traditional General Schedule Civil Service (GS) salary mechanism for federal employees. *Id.* A comparable employee in a foreign research institute potentially may not receive a salary directly from the government and similarly lack authority within the institute for new research. It seems unlikely that such an individual with circumscribed authority could be considered a foreign official under the FCPA.

241. See *supra* part II.B (discussing the legislative history of the FCPA).

