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

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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

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Since 2007, American companies engaged in commerce overseas have grappled with an increasingly stringent regulatory environment. The U.S. government utilizes the Foreign Corrupt Practices Act (FCPA) 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. 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. Furthermore, the ambiguity in the
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 instrumentalities.\(^7\)

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 instrumentalities.\(^9\) 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).


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


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).
Such an interpretation is contrary to the FCPA’s legislative intent of preventing the bribery of foreign officials. 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). The absence of definitions of these terms either in the statute or in case law offers little guidance on how to comply with the FCPA to companies that conduct business abroad. Consequently, these companies become subject to the statute’s harsh penalties without a practical tool with which to conduct due diligence.

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. On Capitol Hill, the business community and the defense bar have pressed Congress to bring greater clarity to the FCPA through amendments. However, amending the FCPA to achieve clarity is not

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).
21. See infra Part I.B.2.i.
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).
met with universal support. For example, anti-corruption advocates cite the recent Walmart Mexico bribery scandal\(^{25}\) 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 courts\(^{28}\) and on Capitol Hill\(^{29}\) 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).


29. See supra note 24 and accompanying text.

I. THE FOREIGN CORRUPT PRACTICES ACT AND ITS UNBRIDLED EXPANSION


In 1977, Congress enacted the FCPA as an amendment to the Securities Exchange Act of 1934. This legislative action created the United States’ primary tool for combating foreign bribery by U.S. corporations and citizens.

1. The Waves of Watergate

The FCPA’s origins trace back to the exposure of corruption in the Nixon administration, uncovered in the wake of the Watergate break-in. 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
The 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. As a result, numerous U.S. corporations were criminally prosecuted and accused of paying into these slush funds. 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. More than five hundred U.S. companies disclosed “questionable payments” made to foreign government officials. Congress, concerned about damage to the reputation of American businesses resulting from corrupt business practices, passed the FCPA in 1977.

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

The FCPA contains two major provisions—the anti-bribery provisions and the accounting provisions. 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.


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.


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

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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. § 78m(b)(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.


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 falsify[es] 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

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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. The FCPA’s expanded scope leaves no party out of the statute’s reach. 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.

The DOJ and the SEC share the enforcement responsibilities of the anti-bribery provisions. 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. 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, actual penalties for an FCPA violation can extend beyond the statute’s requirements. 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.

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

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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).


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
terms 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(c)(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).
67. 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
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);
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

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\(^{71}\) 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.

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

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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(i)(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 instrumentalties 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 instrumentalties. 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 instrumentality\footnote{84} because the FCPA provides no guidance as to
what constitutes an instrumentality.\footnote{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.\footnote{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.\footnote{87}
This procedure encourages businesses to seek the DOJ’s opinion as a
precautionary measure to protect themselves from committing FCPA
violations.\footnote{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.\footnote{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.\footnote{90}
The DOJ retains the right to pursue action.\footnote{91}

\footnote{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 \textit{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 \textit{Black’s Law
Dictionary} definition of “instrumentality” that the defendants proffered in a case arising under the
FCPA).}

\footnote{85}{See \textit{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 \textit{15 U.S.C. § 78dd-2(h)} (2006).}

\footnote{86}{See, e.g., \textit{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 . . .”).}

\footnote{87}{28 C.F.R. § 80.1 (2010).}

\footnote{88}{\textit{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).}

\footnote{89}{28 C.F.R. §§ 80.2, 80.4, 80.6 (2010).}

\footnote{90}{28 C.F.R. § 80.8 (2010).}

\footnote{91}{\textit{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 entities 93 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).


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. 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. 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. Concerned that the general director’s consulting fees would violate the FCPA’s anti-bribery provisions, the American company requested the DOJ’s opinion. 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. 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. Ultimately, the DOJ elected not to pursue any enforcement action against the American company.

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. In a 2008 opinion, a U.S. company requested a DOJ opinion regarding a foreign official as interpreted by previous opinion releases. A U.S.-based Fortune 500 company...
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. However, the general manager of the public services provider also held a minority share in the government entity.

The complicated prospective transaction would involve the minority shareholder’s purchase of the state-owned shares in the government company, fully privatizing that entity. Next, the American company would purchase a majority share from the minority owner. The American company requested the DOJ’s opinion on whether the minority owner/entity general manager would be considered a foreign official. 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. 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. 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. 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

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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).

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

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. 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. 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. 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.” Again, notwithstanding the SEC’s lack of explanation regarding foreign officials and instrumentalities, DPC consented to the issuance of the administrative order.

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

Due to the increase in FCPA enforcement, 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.
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.
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


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 1110, 1210 (C.D. Cal. 2011) (order granting defendants’ motion to dismiss the indictment); see also C.M. Matthews, Lindsey Dismissal Sting, 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.”

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:

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.

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

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. However, despite an in-depth analysis, the court found neither examination particularly helpful or necessary. Ultimately, the court reasoned that its factors, its interpretation of the legislative history, and a consideration of the Charming Betsy doctrine—which states that U.S. law must not conflict with international law or agreements—required it to deny the defense’s motion to dismiss the indictment.

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.” 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). 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.

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 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.
145. Id. at *1–2.
146. Id. at *1.
The arguments advanced by the defense in *Carson* were similar to those advanced in *Lindsey*. However, the court in *Carson* resolved that it could not decide as a matter of law whether a state-owned company was an instrumentality. Rather, the court concluded that a jury should ascertain whether a state-owned company may be considered an instrumentality. To assist with this factual determination, the court set forth a list of non-exclusive factors to supplement the comparable list enumerated in *Lindsey*.

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).

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. Similar to the *Lindsey* court, the *Carson* court stated that the definition of instrumentality could not categorically exclude state-owned companies. 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

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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 *noscitur 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.


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).


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.


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

Despite such stringent enforcement and broad jurisdiction, the FCPA’s administrative guidance and interpretive case law pales in comparison with other statutes. 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.

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 official.


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).


official or employee who carry out a government function. 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. 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.

The Senate’s acceptance of the House’s foreign official definition supports the argument that Congress intended a restrained definition. 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. Congress believed that those functions, when exercised, could secure a business advantage and potentially be corruptible. However, ministerial officers have no discretion that is corruptible because corruption entails the gain of an advantage through dereliction of that discretion. Congress, realizing this reality, intended to

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

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).


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.

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. Similarly, a government “instrumentality” plainly means that the entity assists in the accomplishment of a government purpose. However, the DOJ’s Opinion Procedure Releases focus on government-owned commercial entities. The DOJ appears more concerned with a government’s presence in an instrumentality than with whether the instrumentality carries out a government purpose. 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. 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. The courts’ inquiries centered on an instrumentality’s financing, level of government ownership, vested controlling power, and purpose. These inquiries mirrored some of the public enterprise features discussed in the commentaries of the OECD Convention. Both the DOJ’s and the SEC’s interpretations of

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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.”).


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. 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. One such example is the Lindsey opinion’s focus on whether an instrumentality is “perceived and understood” to perform an official function. If a reasonable juror believes that the alleged instrumentality does not perform an official function, the entity may fall outside the instrumentality definition. 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. 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. The DOJ Opinion Procedure Releases are unclear about the type of entity that will qualify as an instrumentality. 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, the agency is silent about the degree of government ownership necessary for

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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).


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. Additionally, the DOJ will not take into account a foreign jurisdiction’s opinion as to who qualifies as a foreign official. 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, payments or fees to the official would be reimbursed by the foreign government, or if the American company made promises to educate its foreign partner about FCPA compliance.

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. 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, and (2) physicians employed by those hospitals—especially those who control purchasing decisions—are treated as foreign officials. 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. Further, the DOJ and SEC releases show that entities either wholly owned or

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200. Compare FCPA OPR 93-01, supra note 94, at 1 and 2, 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.


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-owned 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. 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, with Siemens’s $800 million settlement as a prime example. Although large multinational corporations can afford the costs of doing business related to the FCPA, smaller companies may not have such fiscal flexibility. Therefore, smaller companies may face greater barriers to entry into foreign markets due to the large costs related to FCPA compliance.

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).


214. See Mike Koehler, Two-Tiered Justice?, FCPA PROFESSOR (Apr. 20, 2010), http://www.fcpaprofessor.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).


If the FCPA terms were narrowed and clarified, the playing field would be leveled.\footnote{See Koehler, supra note 4, at 131–32 (arguing for a narrow definition, which would lead to more consistent rulings).} 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.\footnote{Cf. Westbrook, supra note 80, at 575 (explaining that clarified terms in the FCPA will make it easier for companies to effectuate compliance programs).} Further, lowering costs for due diligence and compliance will allow smaller and larger companies to fairly compete, resulting in greater consumer choice and pricing.\footnote{See Kovacich, supra note 164, at 559 (finding that compliance will be easier if the regulations are interpreted more narrowly and consistently).}

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.\footnote{See Greene, supra note 163.} 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.\footnote{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).} 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.\footnote{See Westbrook, supra note 80, at 560; see also supra Part II.C.} 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.

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

\footnote{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

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223. See supra Part II.B.


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 ownership\textsuperscript{231} before examining whether or not the entity is “widely understood to be performing official government functions.”\textsuperscript{232} However, where the entity is primarily governmental, a court may conclude that the entity is an instrumentality.\textsuperscript{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.\textsuperscript{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.\textsuperscript{235} Because the statute requires corrupt intent,\textsuperscript{236} however, an official must have some duty involving free will so that a payment could persuade him or her against acting properly.\textsuperscript{237} The statutory language does not support the assertion that every employee is corruptible and, therefore, should qualify as a foreign official.\textsuperscript{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.\textsuperscript{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 officials.\textsuperscript{239}

\textsuperscript{231} See text accompanying notes 224–26.
\textsuperscript{232} Aguilar, 783 F. Supp. 2d at 1115.
\textsuperscript{233} See id. (concluding that the CFE was an instrumentality carrying out a government function of providing electricity).
\textsuperscript{234} See notes 229–30 and accompanying text.
\textsuperscript{235} See supra Part II.B.
\textsuperscript{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.”).
\textsuperscript{238} See supra Part II.B.
\textsuperscript{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-design/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).