STUDENT NOTES/COMMENTS

US v. Aguilar and the Foreign Corrupt Practices Act: Sending an S.O.S. to Congress

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INTRODUCTION

When Congress passed the Foreign Corrupt Practices Act ("FCPA") in 1977, United States citizens and people across the world were disgusted with the U.S. political system and the corrupt business practices of American companies in other countries.[2] However, since Congress enacted the popularly-demanded regulation to curb American businesses' abusive behavior, arguments over the FCPA have recently devolved into a minefield. This note will address one area of contention—the definition of an "instrumentality" and "foreign official" in light of *U.S. v. Aguilar*[3] and *U.S. v. Carson*.[4] This note begins by outlining the FCPA, including the events that brought about its genesis, as well as the limited case law interpreting the FCPA. The discussion will then turn to the meaning of the terms "foreign official" and "instrumentality" as used in the FCPA, and the controversy surrounding these definitions. This note will also provide an overview and analysis of *U.S. v Aguilar* and *U.S. v. Carson*, concluding that the *Aguilar* and *Carson* decisions provide some guidance to businesses regarding what constitutes unlawful business practices, although Congress must provide U.S. businesses with better guidance to enable such companies to abide by FCPA's provisions.

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1. B.A., University of Miami, 2007; J.D., University of Miami School of Law, 2013. When I met you in tennis camp fifteen years ago, Livia, I knew you were on a path to unbridled success, but little did I know, you would take me with you, and give me the greatest gifts of all: your parents and our son, Garyd.

2. *See generally* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act-1977 to 2010,* 12 SAN DIEGO INT'L L.J. 89, 92-93 (2010) (noting that the FCPA was a product of the Watergate era).

3. 783 F. Supp. 2d 1108, 1108 (C.D. Cal. 2011).

4. No. SACR 09-00077-JVS, 2011 WL 5101701, at *12 (C.D. Cal. May 18, 2011).

I. THE FCPA

A. Events Preceding the Enactment of the FCPA

Most associate the Watergate scandal with the attempted burglary of the Democratic National Committee's headquarters in 1972.[5] Behind the burglary drama, the Securities and Exchange Commission's ("SEC") enforcement chief, Stanley Sporkin, investigated the Nixon campaign's financial documents and discovered that many public companies illegally contributed to U.S. political campaigns.[6] This finding led Sporkin and the SEC to investigate the companies that contributed to the Nixon campaign to determine how the companies accounted for these illegal cash exchanges.[7] An analysis of the contributions revealed secret accounts maintained by companies that were used to bribe and pay illegal political contributions.[8]

After Sporkin's investigation, the SEC conducted additional formal investigations, which revealed that companies were making illegal contributions via cash slush funds maintained in foreign countries.[9] Further analysis revealed that U.S. companies were paying foreign officials in Japan, Italy, and Mexico.[10] In 1977 the SEC issued a report based on volunteered information from public companies, which were in return offered leniency from the SEC regarding questionable payments made to foreign governments.[11] From the self-reported information the companies provided, the SEC reported that American businesses, like Exxon-Mobil and Boeing, made hundreds of millions of dollars in "questionable" but legal payments to foreign government officials.[12]

B. Enactment of the FCPA

In response to U.S. companies' actions, Congress passed the Foreign Corruption Practices Act of 1977.[13] The FCPA, which amended the Securities and Exchange Act of 1932, changed how

5. Bixby, *supra* note 2, at 92.
6. *Id*.
7. *Id.* at 92-93.
8. *Id.* at 93.
9. Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified,* 29 REV. LITIG. 439, 442-43 (2010).
10. *International Anti-Bribery Act of 1998, in* FOREIGN CORRUPT PRACTICES ACT REPORTER, Appx. D, at 3 (2d ed. 2012).
11. H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 3 (1998).
12. Thomas, *supra* note 9, at 443.
13. 15 U.S.C. § 78dd-1 (1998).

companies may conduct business in foreign countries in two ways: pursuant to the FCPA, companies (1) must maintain transparent accounting methods, and (2) cannot make corrupt bribery payments to foreign officials.[14]

However, the anti-bribery sections of the FCPA, located in 15 U.S.C. §§ 78 dd-1–dd-3,[15] did not completely abolish payments made to foreign officials.[16] A company, or any agent acting on behalf of a U.S. company, violates the FCPA when "act[ing] in furtherance of an offer, payment, promise to pay, or authorization of the payment of something of value [to] any foreign official."[17] The term "foreign official" includes an official of a public international organization, a political candidate, or a political party. To violate the FCPA, an agent must also act with *mens rea*, with the intent to "corruptly induce or influence the official to act or refrain from acting, or to gain any improper advantage,[18] [in order] to assist the company in obtaining, retaining, or directing business to any person."[19]

The FCPA permits U.S. businesses to make three types of payments to foreign officials: "(1) facilitating payments, (2) promotional expenses, and (3) payments permitted under the written laws of the host country."[20] The first type of payment, facilitating payments, may only be made to foreign officials for the purpose of "secur[ing] the performance of a routine government action . . ."[21] Moreover, payments made to an official can only be for the purposes of "expediting or facilitating" routine government action.[22] Routine government actions include issuing licenses that are nec-

14. Brown, *supra* note 11, at 4.

15. Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379, 383 (2005) § 78 dd-1 pertains to "issuers;" § 78 dd-2 relates to "domestic concerns;" and § 78 dd-3 governs parties that are neither issuers or domestic concerns.

16. Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 381 (2011) (noting that the exceptional payments is a "concession to the culture of bribery").

17. Gary Eisenberg, *Foreign Corrupt Practices Act*, 37 AM. CRIM. L. REV. 595, 602-03 (2000).

18. *Id.* at 604 (citations omitted). *Foreign Corrupt Practices Act: Hearing before the Subcom. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary,* 112th Cong. 74 (2011) [hereinafter *Hearings*] (statement of Shana-Tara Regon, Dir., White Collar Crime Policy, Nat'l Ass'n of Criminal Def. Lawyers).

19. Eisenberg, *supra* note 17, at 603 (citations omitted).

20. RICHARD L. CASSIN, BRIBERY ABROAD: LESSONS FROM THE FOREIGN CORRUPT PRACTICES ACT 31 (1998).

21. 15 U.S.C. § 78dd-2 (b) (1998).

22. Frank W. Blue, *A Challenge to Multinational Corporate Counsel: Foreign*

essary for a business to operate in a foreign country and providing police protection and mail pick-up/delivery, which is "associated with contract performance . . . related to transit of goods across country." Moreover, "protecting perishable items . . . from deterioration," providing power, phone, or water, are also routine government actions.[23] A "routine government action" is an action by a government official that does not entail the official making a decision about whether "to award new business to or continue business with a particular party."[24]

The second type of permissible payment, a "promotional payment," is the payment of "reasonable and bona fide expenditure[s]."[25] Bona fide expenditures, such as travel and lodging expenses, are costs "directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof."[26] "Many of the FCPA's detractors bemoan the usefulness of these exceptions[27] because the Department of Justice ("DOJ") narrowly interprets this provision.[28] For example, a business expenditure is deemed unlawful if a foreign official is treated extravagantly or a business pays the costs associated with the travel of a foreign official's family or friends.[29]

Both the SEC and the DOJ are tasked with enforcing the FCPA. The SEC levies civil fines against those who violate the FCPA's accounting provisions,[30] while the DOJ prosecutes those who violate its anti-bribery provisions.[31] The Attorney General

Corrupt Practices Act Compliance and the Federal Sentencing Guidelines, 33 TEX. J. BUS. L. 2, 10 (1996).

23. 15 U.S.C. § 78dd-1 (f)(3)(A)(i)-(v) (1998).

24. 15 U.S.C. § 78dd-1 (f)(3)(B) (1998).

25. 15 U.S.C. § 78dd-2 (c)(2) (1998).

26. 15 U.S.C. § 78dd-2 (c)(2)(A)-(B) (1998).

27. *See generally Hearings*, *supra* note 18, at 76 (statement of F. James Sensenbrenner, Jr., Chairman, S. Comm. On Crime, Terrorism, and Homeland Security).

28. Bonneau, *supra* note 16, at 381.

29. Todd Swanson, *Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law,* 35 GA. J. INT'L & COMP. L. 397, 413 (2007) (citing DONALD R. CURVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 22 (2d ed. 1999)).

30. James W. Chang, *Legal Issues Relating to Transacting Business Abroad: What Every Lawyer Should Know About the Foreign Corrupt Practices Act*, 35 HOUS. L. 16, 17 (1997); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 508-09 (2011).

31. CASSIN, *supra* note 20, at 13.

responds to requests by U.S. companies regarding whether specified conduct violates the FCPA.[32] The FCPA cautions that the DOJ's responses correspond to the "specific conduct" conveyed in a company's opinion request.[33] FCPA violations can result in both individual and company-wide criminal sanctions. For example, a violation of the accounting provisions could result in a twenty-year prison sentence, while anti-bribery provision violations could result in a five-year prison sentence.[34] The SEC can fine companies and impose non-monetary penalties, such as loss of export privileges and restrictions on the ability to obtain government contracts. As a result, both companies and individuals suffer from incalculable reputational damages.[35]

C. Issues Surrounding the FCPA

Perhaps one of the greatest issues surrounding the FCPA has been the resurgence in enforcement. Over the FCPA's first twenty-five years, the SEC and the DOJ pursued only sixty cases against corporations.[36] While the reason for such limited action is unclear, some argue that the FCPA was "underutilized," while others argue that the FCPA, as initially passed, was ambiguously worded such that it frightened businesses away from venturing into foreign markets.[37] Some have even noted that the 1988 amendments to the FCPA were a reaction to corporate complaints that the FCPA was "too vague and wide in scope."[38]

Recently, the number of individuals fined and prosecuted for FCPA violations has dramatically increased. Initially, the business world deemed the FCPA to be a statute that only threatened

32. 15 U.S.C. § 78dd-2 (e)(1) (1998).

33. *Id.*

34. *Id*.

35. *Id.*

36. Bixby, *supra* note 2, at 103.

37. *Id*.

38. *Id.* For example, before 1988 the FCPA excluded from the definition of foreign official those individuals who performed "ministerial or clerical" work. Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L L. 755, 761 (1989). The purpose of the initial exclusion was to allow certain "grease payments" that would allow for the expedited performance of "ministerial or clerical" functions that would have been performed in any event. *Id.* at 762. The 1988 amendment allows for the payment to be directed at "any foreign official," as long as the action is "ordinarily and commonly performed" by that foreign official. *Id.* Thus, this was an attempt to clarify a "facilitating payment" by focusing on the underlying purpose of the payment rather than focusing on the person who actually receives the payment.

corporations.[39] Over the last decade, however, the DOJ has made it clear that individuals will be held accountable for foreign bribery.[40] The DOJ adopted this practice under the belief that the most powerful deterrent to bribery is prison time for corporate officers. Numerous DOJ officers have opined that "the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations."[41]

Accordingly, the DOJ and the SEC zealously devised a plan to hold corporate officers accountable for FCPA violations. The DOJ strategically partnered with the Internal Revenue Service's ("IRS") Crimes Division as well as the U.S. Attorney's office.[42] Moreover, in 2009 the SEC authorized a separate FCPA-violations division that would "focus on new and proactive approaches to identifying violations by being more proactive in investigations, working more closely with [its] foreign counterparts, and taking a more global approach to these violations."[43]

Some believe this unprecedented resurgence in enforcement is indirectly a result of the Sarbanes-Oxley Act ("SOX").[44] To comply with SOX, corporate officers must conduct internal investigations and publish their findings to the SEC or DOJ to gain leniency for any wrongdoing.[45] Such internal investigations, as one may expect, have led to the discovery of FCPA violations.[46] Others find that the issues surrounding the enforcement of the

39. Bixby, *supra* note 2, at 111; *see* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 81 (2d ed. 2010) (noting that prior to 1994 there had been no incarcerations relating to FCPA violations).

40. Bixby, *supra* note 2, at 111.

41. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence,* 43 IND. L. REV. 389, 404 (2010) (citing Lanny A. Breuer, Assistant Attorney General); *see also* Drury D. Stevenson & Nicolas J. Wagoner, *FCPA Sanctions: Too Big to Debar*, FORDHAM L. REV. 775, 794 n.130 (2011) (citing former FCPA chief prosecutor, Mark Mendelsohn, who stated that the increased number of individual prosecutions is intentional because "to have a credible deterrent effect, people have to go to jail").

42. Stevenson & Wagoner, *supra* note 41, at 784.

43. *Id.*

44. 18 U.S.C § 1514A (2010).

45. CASSIN, *supra* note 20, at 11; Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008); Bixby, *supra* note 2, at 116; Stevenson & Wagoner, *supra* note 41*,* at 787 ("The DOJ and SEC, realizing the incentive-altering force of massive sanctions, have parlayed a handful of highly publicized multi-million dollar prosecutions into many more self-disclosures by companies hoping for more lenient sentencing.").

46. Bixby, *supra* note 2, at 116.

FCPA, such as the "appropriateness of legislating morals," disappeared with the corrupt corporate culture of the 1990s.[47]

The issue faced by companies and agents as a result of increased enforcement of the FCPA is the lack of guidance provided by both the DOJ and the courts as to interpreting the FCPA's provisions. The DOJ has notoriously provided companies with limited guidance regarding FCPA compliance.[48] The DOJ is generally uncomfortable with issuing advisory opinions to companies because such preemptory guidance is unique to the DOJ.[49] As of December 22, 2011, the DOJ had only issued one opinion for the 2011 calendar year.[50] One may, therefore, deduce that so few opinions were issued because companies found the opinions unhelpful and disconcerting.[51]

Companies, which find divulging sensitive information to be risky, are uncomfortable with the opinion process.[52] There are FCPA provisions that corroborate this fear. Notably, the DOJ will only respond to prospective transactions rather than hypotheticals.[53] Moreover, the opinions only bind the DOJ and the requesting party; however, the SEC is not bound to the opinion.[54] If the DOJ's opinion concludes that the requesting party's actions did not violate the FCPA, the opinion only creates a rebuttable presumption that the requesting company did not violate the FCPA.[55] The DOJ can still overcome such a presumption and prosecute the requesting party for the given action upon which it based its opin-

47. Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 286-87 (2007) (citations omitted).

48. Comm. on Int'l Bus. Transactions, *The FCPA and its Impact on International Business Transactions – Should Anything be Done Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?*, N.Y. CITY B ASS'N 19 (2011), *available at* http://www2.nycbar.org/pdf/report/uploads/FCPAImpacton InternationalBusinessTransactions.pdf (noting that one of the needs to improve the FCPA is to alter the DOJ's opinion writing function).

49. James R. Doty, *Toward A Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1238 (2007).

50. *See* Opinion Procedure Release from the United States Dep't of Justice Foreign Corrupt Practices Act Review (Jun. 30, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/.

51. Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, n. 101 (2006) (citations omitted).

52. Doty, *supra* note 49, at 1238.

53. Colares, *supra* note 51, at 15.

54. *Id*.

55. *Id.*

ion by the preponderance of evidence.[56] Moreover, since the opinion only binds the DOJ to the party who requests the opinion, the opinion's utility for other companies is in question.[57]

Many of the FCPA's critics agree with the aims of the FCPA. Many, in fact, consider the principles behind the FCPA as imperative to an American business's ability to thrive in foreign markets.[58] The business community, however, is acutely aware that inherent ambiguities in the FCPA make it difficult and costly to abide by.[59]

The courts have added to the confusion by playing a minimal role in interpreting the FCPA's provisions. The courts' lack of participation can be partly attributed to businesses' desire to avoid court proceedings.[60] While individuals have challenged FCPA violations in the courts, companies would rather pay substantial fines to avoid corruption charges and the resultant reputational impact.[61] As a result of this desire to avoid trial, companies have indirectly given prosecutors "unchecked authority to define the contours of FCPA liability."[62]

II. AMBIGUITIES WITHIN THE FCPA: AMBIGUOUS BUT NOT VAGUE

There are numerous ambiguities within the FCPA that place unwary businesses in danger of indictment and sanctions.[63] Nevertheless, courts have steadfastly held that the FCPA is not so ambiguous to render it constitutionally vague. In *U.S. v. Kay*, the defendants, David Kay and Douglas Murphy, were president and

56. *Id.*

57. *Id.*

58. Doty, *supra* note 49, at 1239 ("U.S. business interests benefit by the strengthening of legal institutions that counter the pressures of state-sponsored (or state-condoned) corruption.").

59. Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 155 (2010).

60. Stevenson & Wagoner, *supra* note 41, at 786 ("[M]ost companies have chosen to sweep charges under the rug by entering into a plea agreement.").

61. Koehler, *supra* note 41, at 406 ("In fact, no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years.") (citations omitted).

62. Marceau, *supra* note 47, at 287; *Hearings*, *supra* note 18, at 1-2 (statement of F. James Sensenbrenner, Jr., Chairman, S. Comm. on Crime, Terrorism, and Homeland Security).

63. *See* Doty, *supra* note 49, at 1239 ("[I]n the entire canon of FCPA law there is little judicial development of the concept of 'corruptly' and no administrative definition of 'facilitating payment.'") (citations omitted).

vice-president of American Rice, Inc. ("ARI"), which exported rice to Haiti, among other countries.[64] The Haitian government levied taxes and duties on rice importers.[65] Both Kay and Murphy took steps to reduce these costs by purchasing licenses from government officials that designated ARI as a charity. This designation resulted in ARI not having to pay the applicable duty. Also, ARI paid government officials to give them a "service corporation" license that allowed it to avoid paying duties by claiming that it did not own the rice it imported.[66]

While the defendants did not deny bribing Haitian officials, they argued the "untested" defense that the FCPA was too vague and ambiguous to apply to hold them criminally liable.[67] The defendants argued that the FCPA fails to provide businesses clear warning of violations.[68] The defendants further argued that because the FCPA does not specifically state that payments to lower taxes or duties are not related to obtaining or retaining business, the statute should be found void for vagueness.[69]

Although the Fifth Circuit agreed with the defendants that the FCPA failed to define the point at which a payment given to a foreign official is in consideration for the retention or continuation of business,[70] it held that the FCPA is not vague, thereby upholding the defendant's conviction.[71] The court concluded that the FCPA maintains seven standards that are likely to lead to conviction, and all of the standards are "reasonably clear so as to allow the common interpreter to understand their meaning."[72] Brushing aside the defendant's vagueness argument, the Fifth Circuit noted that the defendants merely "raised a technical interpretive question as to the exact meaning of 'obtaining or retaining business.'" rather than setting forth a vagueness defense.[73] While agreeing that the FCPA contains many ambiguities, the Fifth Circuit ulti-

64. United States v. Kay, 513 F.3d 432, 439 (5th Cir. 2007).

65. *Id.*

66. *Id.*

67. CASSIN, *supra* note 20, at 39 (citing Kay, 513 F.3d at 440).

68. *Id.* at 38-39.

69. *Id*.

70. United States v. Kay, 513 F.3d at 442 n. 11 (5th Cir. 2007) (citing U.S. v. Kay, 359 F.3d 738, 744, 746-47 (5th Cir. 2004)) (questioning the "linkage [ ] between the effects of that which is sought from the foreign official in consideration of a bribe (here, tax minimization) and the briber's goal of finding assistance or obtaining or retaining foreign business with or for some person, and still satisfy[ing] the business nexus element of the FCPA?").

71. *Kay*, 513 F.3d at 442.

72. *Id.* at 441.

73. *Id.*

mately decided that the FCPA is not so vague that the defendants were not "reasonably aware" that the payments they made to Haitian officials to lower their tax burden through misrepresentation were unlawful under the statute.[74]

Overall, *Kay*'s significance could be that "hairsplitters [should] beware . . . the FCPA means what it says."[75] Commentators have noted that alleged FCPA ambiguities are merely contrived from the lawyers' need to "quibble";[76] many judges and juries do not have trouble understanding the FCPA.[77] On the other hand, other commentators have described *Kay* as "equivocal,"[78] noting that the Fifth Circuit's 2004 *Kay* decision, which found that the defendant's actions did not necessarily violate the FCPA.[79] The Fifth Circuit posited that the defendant's actions are not considered obtaining or retaining business because reducing customs or tax duties could be described as innocently increasing a company's profitability.[80] Putting aside the legal arguments, the *Kay* decision emboldened the DOJ and the SEC to actively increase enforcement actions.[81]

A. Who Is a Foreign Official?

The question as to who qualifies as a foreign official has plagued many attorneys and their clients and has resulted in cases with controversial outcomes. Of all the FCPA's noted vagaries,[82] some argue that the term "foreign official" is the most ambiguous.[83] Attempting to define a foreign official in the context of the FCPA necessarily involves defining the term "instrumentality."[84] The relevant section of the FCPA prohibits an individual from making a payment to a foreign official that

> induces such foreign official, political party, party official,

74. *Id.*

75. CASSIN, *supra* note 20, at 41.

76. Richard L. Cassin, *We Get It*, FCPA BLOG (Sept. 17, 2009, 8:28 PM), http://www.fcpablog.com/blog/2009/9/18/we-get-it.html.

77. *Id.*

78. Koehler, *supra* note 41, at 393.

79. United States v. Kay, 359 F.3d 738, 740 (5th Cir. 2004).

80. Koehler, *supra* note 41, at 393.

81. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 918 (2010) [hereinafter Koehler, *Façade*].

82. *See* Doty, *supra* note 49, at 1239 ("in the entire canon of FCPA law there is little judicial development of the concept of 'corruptly' and no administrative definition of 'facilitating payment.'").

83. Koehler, *Façade*, *supra* note 81, at 961.

84. Brooks, *supra* note 59, at 143-44.

> or candidate to use his or its influence with a foreign government or *instrumentality* thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[85]

Thus, an employee of an instrumentality will be considered a foreign official, once an instrumentality of the government is properly defined.[86] Unlike other statutes,[87] the FCPA does not explicitly define instrumentality,[88] which has left the government without restraint in categorizing foreign individuals as foreign officials. Although the statute only applies to bribing foreign officials, the lack of clarity has resulted in the "foreign official element simply mean[ing] what the enforcement agencies say it means."[89] The FCPA defines a foreign official as follows:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[90]

Until recently, the DOJ and courts have provided little guidance as to the type of employees that constitute a foreign official. The DOJ has stated that whether an employee is considered a foreign official will be broadly construed.[91] An example of such a broad construction can be found in *United States v. Young & Rubicam, Inc.*[92] In *Rubicam*, the defendant paid two men to use their influence over members of the Jamaican Tourist Board, although neither man worked for the Jamaican Tourist Board.[93] The government predicated its argument on the fact that "the term 'foreign official' as defined in the FCPA has a meaning broader than

85. 15 U.S.C. § 78dd-1(a)(3)(B) (1998) (emphasis added).

86. Brooks, *supra* note 59, at 143.

87. United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *7 (C.D. Cal. May 18, 2011) ("[i]n the Foreign Sovereign Immunities Act ('FSIA'), Congress expressly defined an 'agency or instrumentality' to include state-owned enterprises.").

88. United States v. Aguilar, 783 F. Supp. 2d 1108, 1112 (C.D. Cal. 2011).

89. Koehler, *supra* note 41, at 410.

90. 15 U.S.C.A. § 78dd-1(f)(1)(A).

91. Brown, *supra* note 11, at 4-5 n.15; Joel M. Cohen, Michael P. Holland, Adam P. Wolf, *Under the FCPA, Who Is A Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1250 (2008).

92. 741 F. Supp. 334, 334 (D. Conn. 1990).

93. *Id*.

the ordinary meaning of the phrase."[94] Under the broad interpretation employed in *Rubicam*, the DOJ may consider any person who works for a company, from the chief executive to a mailroom clerk, to be a foreign official.[95] Thus, this unchecked interpretation of the "foreign official" element contributes to the recent rise in FCPA enforcement.[96]

Whether the DOJ and the SEC are taking advantage of these vagaries to increase their enforcement of the FCPA is a controversial topic. Both critics and supporters of the FCPA can point to numerous sources that justify current FCPA enforcement activity. The philosophical battle regarding whether a state-owned entity is, or can ever be, considered an instrumentality is another issue because both critics and proponents can cite the congressional legislative history to supports their positions. The FCPA's critics note that the limited role played by the courts in interpreting the FCPA has allowed regulators broadened power, which conflicts with Congress's legislative intent, to favor lenity towards the defendant.[97]

Moreover, the critics argue that the statute places a specific limit on the individuals that are to be considered "foreign officials" and the types of entities considered "instrumentalities." The statute specifically states that a foreign official is considered an "employee of a foreign government or any department, agency, or instrumentality thereof. . . ."[98] The FCPA, therefore, notes that an "instrumentality" can be a government entity outside of a department or agency. The determination of whether an entity is an instrumentality, however, is limited to those entities where the government has majority ownership.[99] Thus, many critics believe

94. *Id.* at 353.

95. *See, e.g., Hearings, supra* note 18, at 21-23 (statement of Hon. Michael Mukasey, former Att'y Gen. of the United States, Partner, Debevoise & Plimpton LLP).

96. Koehler, *Façade*, *supra* note 81, at 917.

97. Doty, *supra* note 49, at 1255 ("[w]ithout Reg. FCPA and the administrative apparatus it implies, there is a policy vacuum in which law is developed on an ad hoc basis by Assistant U.S. Attorneys and by the Staff of the SEC and DOJ as they respond to the exigencies of particular factual situations."); *see* H. Lowell Brown, *The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act,* 12 INT'L TAX & BUS. LAW. 260, 270-71 (1994) ("it should be anticipated that prosecutors and the courts will be expansive in their construction of "foreign official" in enforcing the FCPA."); Veronica Foley & Catina Haynes, *The FCPA and Its Impact in Latin America*, CURRENTS: INT'L TRADE L.J., 27, 29 (2009); Cohen *et al*., *supra* note 91, at 1267.

98. 15 U.S.C. § 78dd-1(f)(1)(A).

99. Cohen *et al.*, *supra* note 91, at 1258-59.

that an entity must be "majority-owned or dominantly controlled. . .[to be an]. . .instrumentality" of that government.[100]

On the other hand, the proponents of the reinvigorated FCPA cite legislative history that justifies the broad interpretation of "instrumentality" and "foreign official." The amended versions of the FCPA broadened the jurisdiction and scope of the DOJ. In 1988 Congress expanded the definition of foreign official to even include those government employees who did ministerial or clerical work.[101] Additionally, the 1999 amendments[102] provide support to those who argue that the term "instrumentality" was meant to be interpreted broadly because they stipulate that the FCPA should follow the definitions established by the Organization for Economic and Cooperation Development's ("OECD") in the "International Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [International Convention]."[103] The OECD created the International Convention to provide a solution for transnational bribery and other related concerns.[104] The convention broadly defined a foreign official as follows:

> [A]ny person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.[105]

In response, Congress amended the FCPA through the International Anti-Bribery and Fair Competition Act.[106] Although Congress failed to adopt the OECD's "foreign official" definition, comments made during its passing indicated that the FCPA will be interpreted so as to be consistent with the OECD.[107] Because

100. *Id.* at 1245.

101. Fremantle & Katz, *supra* note 38, at 761-62; Brown, *supra* note 11, at 5 n.15 (noting that the term "foreign official" did not include "employees whose duties were primarily ministerial or clerical").

102. *See, generally,* S. Rep. No. 105-277, at *1 (1998).

103. Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 140-41 (2010).

104. *Id.* at 139.

105. ORG. FOR ECON. COOPERATION & DEV., CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (Apr. 1997), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

106. Carrington, *supra* note 103, at 139.

107. S. REP. NO. 105-277, at *2 (1998), *reprinted in* BUSINESS LAWS INC., FOREIGN CORRUPT PRACTICES ACT REPORTER app. D (2d ed. 2008) ("[t]hird, the OECD Convention includes officials of public international organizations within the

the OECD's definition of "public official" encompasses employees of a state-owned corporation, the FCPA necessarily adopted this definition as well.[108] The OECD's International Convention focuses the "foreign official" inquiry on the "function and conduct" of an employee. This focus does not create a clear means to determine whether the employee is a foreign official.[109] As a result, defendants in enforcement actions like Lindsey and Carson now find themselves in a perfect storm: under the auspices of a benign and relatively unclear statute, which is subject to little judicial oversight, and a DOJ eager to enforce it against them.

B. Aguilar

Lindsey Manufacturing Company is a privately owned U.S. company that manufactures emergency restoration systems.[110] A large number of Lindsey's clients were foreign, state-owned companies.[111] Lindsey obtained the aid of Grupo Internacional De Asesores S.A. ("Grupo") as sales liaisons to Latin America.[112] The government alleged that Lindsey hired defendant Enrique Aguilar, director of Grupo, because of his "close personal relationship" with an official in Mexico's wholly state-owned utility company,[113] Comisión Federal de Electricidad ("CFE").[114] The contract between Aguilar and Lindsey not only provided Aguilar with a thirty percent commission for goods sold to the CFE, but also acknowledged that one percent of that thirty percent commission would be used to pay bribes to CFE officials who aided in obtaining the contracts.[115] Lindsey attempted to conceal the illicit thirty-percent price increase by having Aguilar create false invoices that claimed the excess money received was for commissions and services.[116] The government further claimed that Lindsey shifted the bribe costs to CFE by increasing its goods and services prices by thirty percent.[117]

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definition of "public official." Accordingly, the bill similarly expands the FCPA definition of public officials to include officials of such organizations.").

108. *Id.*

109. Cohen *et al*., *supra* note 91, at 1260.

110. *Aguilar*, 783 F. Supp. 2d at 1111.

111. *Id*.

112. *Id.*

113. *Id.* at 1109.

114. *Id.* at 1111.

115. *Id.*

116. First Superseding Indictment at Count 1(B)-(C), United States v. Aguilar, 2010 WL 4316920, (C.D. Cal. Oct. 21, 2010).

117. *Aguilar*, 783 F. Supp. 2d at 1111.

With this contract in place, Aguilar commissioned his wife, Angela Aguilar, Grupo's financial director, to bribe CFE officials to obtain contracts on Lindsey's behalf.[118] CFE paid Lindsey for its services by distributing money into Grupo's brokerage account located at Global Financial.[119] Angela and Enrique Aguilar would then withdraw money from the brokerage account to bribe CFE officials.[120] Under these orders, Grupo allegedly bribed CFE's current and former Directors of Operations, Nestor Moreno,[121] by paying his personal American Express card beginning in July 2006, purchasing him an eighty-two foot yacht worth over $1.8 million,[122] a Ferrari Spyder worth $297,500, and insurance for said car,[123] and making other payments from a Swiss bank account to Moreno's half-brother.[124] Grupo also allegedly bribed Arturo Hernandez, who was CFE's Director of Operations until 2007,[125] by disbursing funds from Grupo's Global Account to Hernandez's relatives.[126] Grupo concealed the improper payments by stating that such payments were compensating Hernandez's relatives for services.[127]

1. The Decision

The court begins its analysis by providing the relevant FCPA section and noting that the FCPA "does not define instrumentality."[128] After defining the applicable subsections, the court provides information about the Mexican government's constitutional obligation to supply power and electricity to citizens and the CFE's role in carrying out this function.[129] In so doing, the court stresses the relationship that CFE has with the government by noting that the statute that created the CFE defines it as "a decentralized public entity with legal personality and its own patrimony."[130] The CFE's governing board consists of various govern-

118. *Id.*
119. First Superseding Indictment at Count 1(B)(3)(c), *Aguilar*, 2010 WL 4316920.
120. *Id.* at Count 1(B)(3)(g).
121. *Aguilar*, 783 F. Supp. 2d at 1109-10 (also showing that Mr. Moreno served as the Sub–Director of Generation for CFE in 2002 and became the Director of Operations in 2007).
122. First Superseding Indictment at Count 1(C)(6), *Aguilar*, 2010 WL 4316920.
123. *Id.*
124. *Id.*
125. *Aguilar*, 783 F. Supp. 2d at 1111.
126. First Superseding Indictment at Count 7(C)(6), *Aguilar*, 2010 WL 4316920.
127. *Id.*
128. *Aguilar*, 783 F. Supp. 2d at 1112.
129. *Id.*
130. *Id.*

ment officials, and the President of Mexico appoints the CFE's Director General.[131] Moreover, the CFE's own website describes itself as a "government agency [that is] owned by the Mexican government."[132]

The court provides the defendant's various arguments that attempt to prove that Congress did not intend for the FCPA to punish payments made to state-owned corporations.[133] The court begins by noting that statutory interpretation mandates looking at the "language of the statute."[134] The court notes that the term instrumentality "inherently [has a] broad scope," but defeats the defendant's argument using the defendant's own suggested "instrumentality" definition.[135] Using the defendant's instrumentality definition,[136] the court finds that the defendants incorrectly use two canons of statutory interpretation to arrive at their conclusion.[137] The defendant's first argument relies on *noscitur a sociis*, wherein "words are to be judged by their context and that words in a series are to be understood by neighboring words in the series."[138] The defendants argue that when defining "foreign official," the FCPA restricts a foreign official to those "officer[s] or employee[s] of a foreign government or any department, agency, or instrumentality thereof."[139] Therefore, the defendant's argument restricts an instrumentality to the characteristics of those government branches specifically mentioned.[140]

The court notes that the defendant's other argument relies on *ejusdem generis*, wherein "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[141] The defendant argues that "instrumentality," a general word, refers to the government, a specific word, and those institutions used by the government to

131. *Id.*
132. *Id.*
133. *Id.* at 1113.
134. *Aguilar*, 783 F. Supp. 2d at 1113.
135. *Id.*
136. *Id.* ("the ordinary meaning of instrumentality is 'the quality or state of being instrumental,' which, in turn, means 'serving as a means or agency: implemental,' or 'of, relating to, or done with an instrument or tool.").
137. *Id.*
138. *Id.* at 1113 n.5 (citing United States v. King, 244 F.3d 736, 740-41 (9th Cir. 2001)).
139. 15 U.S.C. § 78dd-2 h(2)(A).
140. *Aguilar,* 783 F. Supp. 2d at 1113.
141. *Id.* at 1113 n.5 (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001)).

"accomplish its functions of setting forth and administering public policy or public affairs or exercising political authority."[142] The defendant considers the functions of these government entities to be static. They argue that because corporations assume various forms and serve various purposes, state-owned corporations should not be considered an instrumentality of the state.[143] Moreover, state-owned corporations are not instrumentalities of the state because state-owned corporations "lack uniformity" regarding their formation and operation. The court then reduces the defendant's argument regarding the ability of a state-owned entity to be an instrumentality to the following syllogism: "as a matter of law no state-owned corporation is an instrumentality." Thus, no CFE employee can be a foreign official.[144]

The court further notes that the defendant's logic regarding a state-owned entity's ability to constitute an instrumentality is necessarily flawed because such state-owned entities share many of the same characteristics as agencies and departments. The court posits broad and defining characteristics[145] of departments and agencies, and concludes that the CFE possesses all of these characteristics.[146] The court continues its analysis by reviewing arguments set forth by the government and the defendant about how the term "instrumentality" relates to the congressional purpose for enacting the FCPA.[147] The court considers the defense's argument that the congressional history demonstrates that the FCPA is focused on "government and politics."[148] The defendant notes that Congress could have criminalized all bribery payments made abroad, but it failed to do so.[149] Thus, the defendant argues that the FCPA should be construed narrowly solely as it relates to "bribery on governmental affairs."[150]

142. *Id.* at 1114.
143. *Id.*
144. *Id.* at 1112.
145. *Id.* at 1115 ("The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction; The key officers and directors of the entity are, or are appointed by, government officials; The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park; The entity is vested with and exercises exclusive or controlling power to administer its designated functions; The entity is widely perceived and understood to be performing official (*i.e.,* governmental) functions.").
146. *Aguilar,* 783 F. Supp. 2d at 1115
147. *Id.* at 1116.
148. *Id.* at 1115.
149. *Id.*
150. *Id.*

The state, on the other hand, argues that the FCPA should be construed broadly. The State argues that the defendant's interpretation of the statute would violate the *Charming Betsy* doctrine, which stipulates that statutes should not be construed in a manner that conflicts with international law or U.S. international agreements.[151] Specifically, the state argues that the defendant's actions violate the OECD, and Congress amended the FCPA to adopt the OECD.[152] Thus, because the OECD defines a public enterprise as "any enterprise, *regardless of its legal form,* over which a government, or governments, may, directly or indirectly, exercise a dominant influence," an employee who exercises influence over such an enterprise should be deemed a foreign public official.[153] Additionally, the State argues that Congress amended the FCPA "to conform it to the requirements of and implement the OECD Convention."[154]

The final step in the court's analysis to determine the scope of an "instrumentality" necessitates an analysis of the FCPA's legislative history.[155] After hearing persuasive arguments from both the defendant and government, the court finds the legislative history "inconclusive."[156] The court notes that it is obvious that Congress did not intend for all state-owned corporations to fall under the FCPA but did intend that some state-owned corporations be excluded.[157]

Attempting to glean Congress's intent, the court then poses a hypothetical: the payments made were illegal and supplies many details corresponding with the current case.[158] Because the person receiving the payments was an employee of a state-owned entity, the court asks the lead defense attorney whether Congress would tell the DOJ not to prosecute the hypothetical person under the FCPA.[159] The attorney replies that the answer would depend on whether the legislator was on the campaign trail or given "truth serum."[160] This equivocal reply demonstrates to the court that Congress must have intended to criminalize such behavior even if

151. *Id.* at 1116 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18, 2 L.Ed. 208 (1804)).
152. *Aguilar,* 783 F. Supp. 2d at 1116.
153. *Id.*
154. *Id.* (citing S. REP. NO. 105-277, at *2 (1998), 1998 WL 438894, at *2).
155. *Id.* at 1117.
156. *Id.* at 1119.
157. *Id.*
158. *Aguilar,* 783 F. Supp. 2d at 1119.
159. *Id.* at 1120.
160. *Id.*

a business entity is a state-owned corporation.[161] The court ultimately decides, based on the attorney responses to the written hypothetical, that Congress intended to make the alleged actions of the defendant illegal.[162] Thus, the court denies the defendant's motion to dismiss.[163]

2. Providing Guidance

Aguilar is an influential case because it is the first published case that touches on the state-owned corporation and instrumentality issue within the FCPA, but it does little to aid the business community. The factors listed by District Judge Matz to determine whether an entity is an instrumentality of the state were similarly listed by the DOJ in its review of the OECD in 1999.[164] However, the *Aguilar* court, unlike the DOJ, hints at a presumption that a state-owned corporation will be considered an instrumentality.[165] The DOJ limits its opinion by noting that only in "appropriate circumstances" will state-owned corporations be government instrumentalities.[166] The "instrumentality" and "foreign official" opinions have at least finally given FCPA critics some form of judicial guidance.

Indeed, the *Aguilar* opinion capped a recently active judicial outburst in defining "instrumentality" and "foreign official."[167] The issue surrounding the DOJ's expansive definition of "foreign offi-

161. *Id.*

162. *See id.*

163. *Id.*

164. Cohen *et al*., *supra* note 91, at 1254 ("[s]tate-owned businesses may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials. Among the factors that [the DOJ] considers are the foreign state's own characterization[sic] of the enterprise and its employees, i.e. whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.").

165. The *Aguilar* court provided a non-exclusive list of factors and noted that a company only needs to evince "*some*" of the characteristics to be considered an instrumentality. *Aguilar,* 783 F. Supp. 2d at 1115.

166. Cohen *et al*., *supra* note 91, at 1254.

167. Prior to 2008 there had been only one published opinion even mentioning payments made to foreign officials. Cohen *et al*., *supra* note 91, at 1257; *see also* Michael Volkov, *What is an 'Instrumentality' Thereof? Let's Keep It Real*, THE FCPA BLOG (Mar. 9, 2011, 7:08 AM), http://www.fcpablog.com/blog/2011/3/9/what-is-an-instrumentality-thereof-lets-keep-it-real.html (noting that the recent number of cases asking the court to interpret the FCPA's ambiguous instrumentality provision is a "welcome development" that will indeed aid businesses) (last visited November 13, 2011); *Hearings*, *supra* note 18, at 63 (statement of Greg Andres, Deputy Assistant Att'y Gen. of the United States, Criminal Division) (noting that the DOJ provided guidance in defining a foreign official. Mr. Andres also noted that the courts have

cial" first appeared in *U.S. v. Esquenazi*.[168] *Esquenazi*[169] involves a Florida-based telecommunications company funneling more than $800,000 through shell companies to pay bribes to officials in Haiti's state-owned telecommunications company, Haiti Teleco.[170] The trial judge denied the defendant's "foreign official" argument without issuing an opinion.[171] Although the *Aguilar* court finally addressed the issue of state-owned corporations, *Aguilar* leaves much to be desired.

First, Aguilar's applicability to other situations is arguable because subsequent information provided to the court reveals that the CFE is a "decentralized public entity."[172] Since the CFE has always been a public entity, the court's findings state the obvious: the CFE shares a sufficient amount of characteristics with an agency or department because it is an official agency. Second, the courts have only addressed those state corporations that are wholly-owned by the state. Although the court admits that there are limitations as to the types of entities that can be considered an instrumentality, the courts do not define these limitations.[173] Thus, it is unclear how business leaders must act to comply with the FCPA in the event that a company is partially-owned by a government. Perhaps mirroring the unprecedented number of FCPA cases, less than a month later the same court issued another written opinion concerning "instrumentality" and "foreign official" in *U.S. v. Carson*.[174]

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recently provided practitioners with multiple decisions on this topic in addition to the statutory definition.).

168. Richard L. Cassin, *Foreign Official Challenge on Appeal*, THE FCPA BLOG, (May 14, 2012, 7:18 AM), http://www.fcpablog.com/blog/2012/5/14/foreign-offical-challenge-on-appeal.html [hereinafter Cassin, *Esquenazi*].

169. Indictment at *1, United States v. Esquenazi. 09-CR-21010-JEM (S.D. Fla Dec. 4, 2009).

170. Press Release, Department of Justice, Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (Dec. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-crm-1307.html.

171. Cassin, *Esquenazi*, *supra* note 168.

172. United States v. Aguilar, 783 F. Supp. 2d 1108, 1120. (C.D. Cal. 2011). Moreover, the *Aguilar* opinion has been tainted since Judge Matz dismissed the convictions of Lindsey and Lee due to prosecution misconduct including "providing false information to get a search warrant, making unauthorized searches and giving incorrect testimony to a grand jury." Edvard Pettersson, *Lindsey Manufacturing Judge Tentatively Dismisses Executives' Bribery Case*, BLOOMBERG (Nov. 29, 2011), http://www.bloomberg.com/news/2011-11-29/lindsey-manufacturing-judge-tentatively-dismisses-executives-bribery-case.html (last visited Dec. 26, 2011).

173. *See Hearings*, *supra* note 18, at 20, 26-28 (statement of Michael Mukasey).

174. United States v. Carson, SACR 09-00077-JVS, 2011 WL 7416975, at *12 (C.D. Cal. Sept. 20, 2011).

In *U.S. v. Carson,*[175] the court further refined the totality-of-the-circumstances approach advocated in *Aguilar* and provided answers to questions left open by the *Aguilar* court. In *Carson* a grand jury indicted the defendants[176] for alleged bribery payments made by Controlled Components, Inc. ("CCI"), a business that manufactured "control valves for the use in the nuclear, oil, gas, and power generation industr[y]."[177] Between 2003-2007, CCI allegedly paid $4.9 million in bribes to its state-owned company customers in China, Korea, and the United Arab Emirates.[178] The government alleged that the Carson defendants knowingly decided to make improper payments to bribe officials by transferring money from the company's U.S. bank account to another bank account.[179]

Like the defendants in *Aguilar*, the *Carson* defendants argued that employees of state-owned entities can "never" be considered a foreign official, and, the issue of whether a state-owned corporation is an instrumentality of the state is a question of law that can be decided by the court.[180] The court, however, concluded that whether a state-owned entity is an instrumentality of the state is a question of fact, and "simply assuming that a company is wholly owned by the state is insufficient for the Court to determine as a matter of law whether the company constitutes a government instrumentality."[181] As the *Aguilar* court explained, government ownership of a business entity is but one variable in deciding whether that business is indeed an instrumentality.[182] Moreover, the court found that the following non-exhaustive factors should be considered in determining whether a business entity is a government instrumentality:

> (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

175. See id.

176. *Id.* at 1 (naming Stuart Carson, Hong "Rose" Carson, Paul Congrove, and David Edmonds as defendants).

177. *Id.* at 2.

178. *Id.*.

179. Indictment at *15-28, United States v. Carson, SACR 09-00077-JVS (C.D. Cal May, 5, 2011), 2009 WL 1043797.

180. United States v. Carson, SACR 09-00077-JVS, 2011 WL 7416975, at *4 (C.D. Cal. Sept. 20, 2011).

181. *Id.* at 5.

182. United States v. Aguilar, 783 F. Supp. 2d 1108, 1109 (C.D. Cal. 2011) (noting that the government's sole ownership of a corporation is but one factor in determining whether the business is an instrumentality).

> 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.)[183]

Similar to the *Aguilar* court, Judge Selna's non-exhaustive list presented businesses with the same problems when trying to operate in a foreign territory: the list provided little guidance as to how to comply with the FCPA.[184]

The *Carson* court nevertheless attempted to clarify when a state-owned entity is an "instrumentality." Diverging from the *Aguilar* court, *Carson* offered a more general guide, observing that a government's "mere monetary investment" in a business does not make that business an "instrumentality."[185] The court declared that there must be "additional factors that objectively indicate" that the business at issue is used as a means to accomplish "governmental objectives."[186]

To do so, the court cited numerous historical examples where corporations have been used to carry out governmental functions such as the first and second banks of the United States.[187] The court stressed that among numerous historical examples, the government's control over these enterprises varies, with some of the corporations having even been involved with the "commercial sale of goods and services."[188] The court notes, however, that the overarching quality among all of the state-owned corporations is that they "further[ed] the policy interests of the federal government."[189] The court concluded that a state-owned entity that has a commer-

183. *Carson*, 2011 WL 7416975, at *5.

184. *See, supra* text accompanying notes 144-46.

185. *Carson*, 2011 WL 7416975, at *7. This point made by the court seems to be in response to the many FCPA defense attorneys and detractors who argue that under this broad definition of instrumentality employed by the DOJ, the various American car manufacturers would now qualify as an instrumentality of the state after the massive bailout. *Hearings*, *supra* note 18, at 71 (statement of Greg Andres, Deputy Assistant Att'y Gen. of the United States, Criminal Division).

186. *Carson*, 2011 WL 7416975, at *7.

187. *Id.* at 7-8. The court also listed the Panama Railroad Company, United States Grain Corporation, the War Finance Corporation for World War I, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, and the United States Spruce Production Corporation. *Id.* at 9.

188. *Id.* at 9.

189. *Id.* (citing Optiperu, S.A. v. Overseas Private Inv. Corp., 640 F. Supp. 420, 424 (D.D.C. 1986)).

cial purpose can still be an instrumentality of the government.[190]

While the *Carson* court expounded upon the *Aguilar* court's definition of instrumentality, the definition it provided still fails to define what constitutes a government instrumentality and who may be considered a foreign official.[191] The *Carson* court merely reaffirms that state-owned entities can be considered an instrumentality and notes that a government must have more than just a monetary interest and the entity in question must serve some government purpose.[192] A more ominous sign for businesses is that the *Carson* court does not deem the term "instrumentality to be an ambiguous concept."[193] The court implies that businesses will, and should, determine from a non-exhaustive list of various factors whether a state-owned entity is an instrumentality.[194]

Simply providing businesses with a non-exhaustive list of factors fails to guide them as to FCPA compliance.[195] Most businesses make operational decisions on a cost-benefit analysis. If businesses cannot determine the risk associated with doing business in a foreign country, then the business may abstain from doing so.[196] Because businesses are creatures of cost benefit-analysis,[197] lack of guidance actually deters businesses from developing compliance programs,[198] which may then lead to harsher sanctions.[199]

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190. *Id.*

191. *Hearings, supra* note 18, at 28 (statement of Michael Mukasey) (noting that *Carson* and *Aguilar* conceded that there were limits to the definition of an instrumentality but that both courts provided a clear definition).

192. United States v. Carson, SACR 09-00077-JVS, 2011 WL 7416975, at *12. (C.D. Cal. Sept. 20, 2011).

193. *Id.* at 11.

194. *Id.*

195. *Hearings, supra,* note 18, at 28 (statement of Michael Mukasey) ("[i]f the definitions of these fundamental statutory terms vary by circumstance and by case, and therefore have to be decided by a jury rather than as a matter of law, it becomes impossible for companies to figure out in advance what conduct may and may not provide a meaningful risk of violating the FCPA.").

196. *See* Stevenson & Wagoner, *supra* note 41, at 803.

197. *Id.*; *Hearings*, *supra* note 18, at 37 (statement of George J. Terwilliger, III, Partner, White & Case LLP) (noting that the new enforcement regime associated with the ambiguous FCPA has resulted in business's decision to abstain from international commerce, which has had a detrimental effect on the economy).

198. *Hearings, supra* note 18, at 20 (statement of Hon. Michael Mukasey, former Att'y Gen. of the United States, Partner, Debevoise & Plimpton LLP) (noting that the lack of a clear definition for instrumentality and foreign official "makes it difficult for companies to focus their monitoring and compliance programs on clearly identifiable situations involving foreign officials and foreign instrumentalities.").

199. CASSIN, *supra* note 20, at 23 (noting that an "effective compliance program" can result in a mitigation of up to 95% of the normal penalties") (citations omitted); Huskins, *supra* note 45, at 1447 (noting that a multinationals "don't ask, don't tell

If a business cannot determine the risk of prosecution, then the business will not be able to implement an effective compliance program to educate its staff about the FCPA, thereby failing to meet the FCPA's goal: compliance.[200]

Although business leaders advocate for changes to the FCPA so that a state-owned corporation is considered an instrumentality when the foreign government owns a majority share of the state-owned corporation,[201] there is evidence that setting such an arbitrary standard would be harmful.[202] Moreover, four U.S. district courts have already refused such a bright-line test.[203] Although business leaders clamor for additional guidance regarding how to abide by the FCPA, the same conditions still exist that stop the courts from providing this guidance: businesses are choosing to pay hefty settlements rather than face corruption charges and litigation.[204] While the courts continue to sit on the sidelines, the DOJ and SEC have extended the reach of the term "instrumentality" to include those entities where a state is a minority shareholder.[205] Moreover, the scope of the SEC and DOJ's instrumentality definition could possibly extend to all levels of a foreign country's product-manufacturing operation, which will necessarily render those employees foreign officials.[206]

In the context of Fourth and Fifth Amendment jurisprudence,

policy" regarding FCPA violations will act as an aggravating factor in determining punishment); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 180 (2011) (concluding that the failure of corporate officers to become experts in the FCPA and developing a compliance program could lead to sanctions for the company and criminal charges as well); Eisenberg, *supra* note 17, at 613 (noting that with the recent trend of the FCPA, a FCPA compliance program "should be standard practice").

200. Blue, *supra* note 22, at 23-24.

201. *Hearings, supra* note 18, at 20 (statement of Hon. Michael Mukasey, former Att'y Gen. of the United States, Partner, Debevoise & Plimpton LLP).

202. *Hearings, supra* note 18, at 71 (statement of Greg Andres, Deputy Assistant Att'y Gen. of the United States, Criminal Division) (noting that ownership needs to be one of many factors to be considered when determining whether an entity is an instrumentality).

203. United States v. Carson, SACR 09-00077-JVS, 2011 WL 7416975, at *12 (C.D. Cal. Sept. 20, 2011) (noting that three other district courts, including *Aguilar*, have interpreted the FCPA's "instrumentality" and "foreign official" provision in the same manner).

204. Stevenson & Wagoner, *supra* note 41, at 803 (noting that the business world still considers FCPA fines as merely the cost of doing business with little deterrent effect).

205. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 820-21 (2012).

206. *Id.* at 820-21.

the courts employ a totality of the circumstances test determining reasonableness, but such a test necessitates an active judiciary that fleshes out the conduct that constitutes a search or seizure.[207] With the court system's inability to provide sufficient guidance in *Carson* and *Aguilar*, the totality-of-circumstances approach offers little guidance to businesses. Furthermore, businesses do not seem to be affected by the increase in the FCPA's enforcement[208] because they avoid trial by settling with the DOJ through deferred prosecution and non-prosecution agreements.[209] As a result, given that businesses are not fighting the corruption charges, the courts cannot provide businesses with more direction,[210] such as defining an instrumentality and the type of employees that will rise to the level of a foreign official.

III. CONCLUSION

The totality-of-circumstances approach, without more, provides little guidance for businesses attempting to operate in foreign territories. As a result, the FCPA, ironically, was intended to help U.S. companies compete in foreign markets, but now cripples those businesses.[211] Even more troubling for the business community, the enforcement of the FCPA includes fines and prison time for company executives, both of which have rapidly increased as well.[212] Thus, Congress must take the initiative and act. The legal

207. Alysa B. Koloms, *Stripping Down the Reasonableness Standard: The Problems with Using in Loco Parentis to Define Students' Fourth Amendment Rights*, 39 HOFSTRA L. REV. 169, 181 (2011) ("[t]he Singleton Court's misplaced emphasis on cases that did not support their legal proposition undoubtedly stems from the Supreme Court's refusal to flesh out what constitutes a reasonable search.").

208. Yockey, *supra* note 205, at 801 (arguing that the FCPA sanctions do not deter businesses from engaging in corruption and the U.S. government should sanction businesses by denying contracts to really make the FCPA effective).

209. Westbrook, *supra* note 30, at 562 (noting that businesses rarely challenge FCPA charges); Pete J. Georgis, comment, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 281 (2012) (noting that the DOJ prefers these tools because it avoids litigation).

210. Westbrook, *supra* note 30, at 562.

211. *Hearings*, *supra* note 18, at 2 (statement of F. James Sensenbrenner, Jr., Chairman, S. Comm. On Crime, Terrorism, and Homeland Security) ("The business community complains that the absence of case law interpreting the breadth and scope of the FCPA inflates the Department's prosecutorial discretion and confounds industries' ability to conform to the law. For instance, there is no clear rule on what qualifies as a foreign official, nor what percentage of state ownership qualifies a company as an instrumentality of the state. Companies lack guidance on how expensive a gift must be to be considered a bribe.").

212. *See, supra* text accompanying notes 38-40.

community poses numerous suggestions as to changes to be made to the FCPA. A discussion of each suggestion is beyond the scope of this article, but Congress must act lest they desire to chill American businesses' ability to compete in foreign markets.