

Note

Drawing Sensible Borders for the Definition of “Foreign Official” Under the FCPA

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I. Introduction.....	254
II. Who is a Foreign Official?.....	260
A. Broad language of the statute.....	260
B. <i>United States v. Noriega (Lindsey)</i>	262
C. <i>Carson</i>	263
D. SHOT Show.....	264
E. <i>O’Shea</i>	265
F. <i>Haiti Telecom/United States v. Esquenazi</i> and <i>United States v. Rodriguez</i>	266
III. Key Questions.....	268
A. Should There Be a Threshold Level of Organizational Responsibility for an Individual to Qualify as a Foreign Official?.....	268
B. Can an American Citizen Be a Foreign Official, or Would that Render “Foreign” to Be Mere Surplusage?.....	269
C. Level of Control to Be an Instrumentality	271
1. FSIA Definition	271
2. OECD Definition	272
IV. Creating a Test to Determine Whether an Entity Qualifies as an Instrumentality Under the FCPA	272
V. Conclusion	277

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I. Introduction

Recent high-profile scandals like the wiretapping by News Corp.,¹ Wal-Mart's business practices in Mexico,² and Ralph Lauren Corp.'s admitted bribery of Argentine customs officials³ have brought renewed attention to the 1977 Foreign Corrupt Practices Act (FCPA).⁴ Efforts to stamp out corruption have become increasingly common over the past decade in the wake of the adoption of the Organization for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵ Aggressive enforcement of the FCPA by the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) has resulted in a boom in investigations and prosecutions.⁶ The SEC's focus has resulted in the creation of a separate group within the Division of Enforcement dedicated to prosecuting FCPA cases.⁷ This newly invigorated enforcement of the FCPA by U.S. law enforcement agencies has gone hand-in-hand with

1. See David Folkenflik, *News Corp.'s U.K. Actions Under Scrutiny In U.S.*, NAT'L PUB. RADIO (Sept. 27, 2011), <http://www.npr.org/2011/09/27/140829858/news-corp-s-u-k-actions-under-scrutiny-in-u-s> (explaining the possible FCPA liability of News Corp. related to payments made to British police officials).

2. See David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1, available at <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all> (detailing alleged bribes of Mexican government officials by Wal-Mart with the purpose of securing permits).

3. See James O'Toole, *Ralph Lauren Admits Bribery at Argentina Subsidiary*, CNNMONEY (Apr. 22, 2013), <http://money.cnn.com/2013/04/22/news/companies/ralph-lauren-bribery/> (describing Ralph Lauren Corp.'s settlement agreements with the DOJ and SEC based on findings that its Argentine subsidiary "repeatedly bribed customs officials").

4. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–78ff (2006). For a comprehensive discussion of the FCPA's legislative history, see Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment, *United States v. Carson*, 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011).

5. ORG. FOR ECON. CO-OPERATION & DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (1997), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

6. See GIBSON, DUNN & CRUTCHER LLP, 2011 YEAR-END FCPA UPDATE 2 (2012), available at <http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf> (providing a graph illustrating the trend in FCPA enforcement from 2004 to 2011); see also Lanny A. Breuer, Ass't Att'y Gen., Address at the 24th National Conference on the Foreign Corrupt Practices Act, (Nov. 16, 2010) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>) (boasting that the DOJ's "FCPA enforcement is stronger than it's ever been—and getting stronger"); Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009) (transcript available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>) (outlining his strategy for employing the newly formed Foreign Corrupt Practices Act unit).

7. Khuzami, *supra* note 6. Conversely, some might argue that expanding the SEC's role to include tasks like combating foreign bribery is outside of the scope of its traditional role as market regulator and deleterious to that mission. Cf. Henry T. C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEXAS L. REV 1601, 1606 (2012) (stating that the original purpose behind its establishment was such that "[t]he SEC would not venture beyond the realm of information to that of substantive decision making").

legislation across the globe to bolster anti-corruption laws, with even unexpected players like Russia jumping on the bandwagon.⁸

Because of increased global competition and uneven enforcement among nations, many in the American business community say they are placed at a competitive disadvantage vis-a-vis Chinese rivals wholly unconstrained by laws like the FCPA.⁹ In 2010, the U.S. Chamber of Commerce called for amendments to the FCPA to bring greater clarity to the law and place U.S. businesses in a position more in line with the laws of other countries.¹⁰

This effort to limit the FCPA’s scope has been fought by organizations like the Open Society Foundations who claim that weakening the world’s flagship anti-corruption law would seriously hinder efforts to fight corruption across the globe.¹¹ In the summer of 2011, the U.S. House Subcommittee on Crime, Terrorism, and Homeland Security considered possible amendments to the FCPA.¹² Despite hints that amendments may be forthcoming, none have yet been proposed.¹³ The focus of any amendments would most likely address the lack of a *de minimis* exception, limiting successor and subsidiary liability, introducing a compliance defense, and clarifying the definition of who is a “foreign official,”¹⁴ the latter of which is the focus of this paper.

8. Bribery Act, 2010, c. 23 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf; FEDERAL’NYJ ZAKON O vnesenii izmenenij v Ugolovnyj kodeks ROSSIJA FEDERACII I Kodeks ob administrativnyh pravonarushenijah ROSSII V Svjazi s soveršenstvovanijem gosudarstvennogo upravlenija v Oblasti protivodejstvija korruptcii [Federal law on inclusion of changes to the Criminal Code of Russian Federation and to the Code of Administrative Offences in Connection with the Improvement of Government Administration in the Area of Fighting Corruption] SOBRANIE ZAKONODATEL’STVA ROSSIJKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 97-FZ; Press Release, Org. for Econ. Coop. & Dev., OECD Invites Russia to Join Anti-Bribery Convention (May 25, 2011), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdinvitesrussiatojoinanti-briberyconvention.htm>.

9. See, e.g., Jason Subler, *China Business Culture Means Countless Bribery Risks for U.S. Businesses*, REUTERS (Apr. 29, 2012), http://www.huffingtonpost.com/2012/04/29/china-business-culture_n_1463406.html (reporting that non-Chinese business people privately complain that local companies face less scrutiny in the application of anti-bribery laws in China).

10. U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT (2010) [hereinafter RESTORING BALANCE], available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf.

11. See, e.g., OPEN SOC’Y FOUND., BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 6 (2011), [hereinafter BUSTING BRIBERY], available at http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916 (stating that weakening the FCPA would signal a decreased commitment to fight corruption on the part of the U.S. resulting in a stalling of anti-corruption measures worldwide).

12. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *FCPA Hearing*].

13. Christopher M. Matthews, *Clinton Defends FCPA, as US Chamber Lobbys for Changes to Law*, WSJ BLOGS (Mar. 23, 2012), <http://blogs.wsj.com/corruption-currents/2012/03/23/clinton-defends-fcpa-as-us-chamber-lobbys-for-changes-to-law/> (describing support for amendments to the FCPA but noting that none have yet been proposed).

14. See RESTORING BALANCE, *supra* note 10.

The FCPA was originally passed in 1977 to combat what was seen as widespread bribery among American corporations doing business internationally.¹⁵ Despite having been in force for over thirty-five years, the FCPA has scant case law defining its contours; fewer than forty circuit-level opinions and no Supreme Court opinions have been rendered dealing with its application.¹⁶ This lack of case law is a major reason why the precise boundaries of the FCPA are undefined and uncertain.

Because of the staggering disincentives corporations face in litigating FCPA cases—including, but not limited to, debarment¹⁷—it is very rare for FCPA cases to go to trial.¹⁸ In the place of case law, a body of shadow precedent has arisen as a result of big-dollar settlement agreements that defendant corporations have entered into with the DOJ and SEC.¹⁹ Notably, this reliance on non-prosecution (NPA) and deferred prosecution agreements (DPA) was sharply criticized by former U.S. Attorney General Alberto Gonzales at the Dow Jones/Wall Street Journal Global Compliance Symposium held in Washington, D.C. in April 2013.²⁰ However, with the recent rise in individual prosecutions by the DOJ, the cost-benefit calculus has changed for the parties involved such that more cases may actually be tried.²¹

The vast majority of controversy surrounding FCPA enforcement has been centered on the definition of instrumentality and, by extension, foreign official.²² In fact, the first judicial opinions attempting to define a “foreign official” came in 2011 as the result of certain defendants

15. *Foreign Corrupt Practices Act*, U.S. DEP’T OF JUSTICE, available at <http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf>.

16. This figure was reached by searching Westlaw for “Foreign Corrupt Practices Act” and restricting results to U.S. Supreme Court and courts of appeals opinions.

17. U.S. DEP’T OF JUSTICE, *supra* note 15; Federal Acquisition Regulation 48 C.F.R. § 9.406-2(a) (2010) (providing agencies with the discretionary power to debar FCPA violators from contracting with the United States); see also Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, 11-9 BRIEFING PAPERS 1, 9–17 (2011) (detailing the potential domestic and foreign collateral consequences faced by contractors who violate the FCPA).

18. See GIBSON, DUNN & CRUTCHER LLP, *supra* note 6, at 10–11 (“In 2011, we saw a new all-time high of four FCPA trials.”).

19. See *id.* at 2–10.

20. *Former Attorney General Alberto Gonzales Criticizes Various Aspects of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), <http://www.fcprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement> (stating Gonzales’s critique that because of NPAs and DPAs “legitimate wrongdoing is not being prosecuted as it should” and that “these resolution vehicles do not necessarily reflect instances of companies violating the FCPA, but rather companies feel[] compelled to agree to the agreements”). For further critique of the overuse of NPAs and DPAs, see Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797 (2013) (explaining the “Andersen Effect” and analyzing the flawed assumptions driving current DOJ DPA policy through empirical analysis of organizational convictions between 2001 and 2010).

21. GIBSON, DUNN & CRUTCHER LLP, *supra* note 6, at 2–4. Because individuals do not have the same business risks related to fighting an FCPA charge, they are more likely to take the case to trial.

22. See, e.g., BUSTING BRIBERY, *supra* note 11, at 7 (attacking the Chamber of Commerce’s effort to narrow the definition of “foreign official”).

challenging whether or not the individuals they allegedly bribed were truly employees of an “instrumentality” of a foreign government.²³ Additionally, in February 2012, the U.S. Chamber of Commerce’s Institute for Legal Reform sent a letter to the DOJ requesting clarification of the Department’s guidance on who qualifies as a foreign official.²⁴ After receiving this letter, but prior to issuing the requested guidance, the DOJ surprisingly issued an opinion release in September 2012 saying that royal family members are not per se foreign officials so long as they do not hold an official post in the government or hold themselves out as governmental representatives.²⁵ Arguably, this “clarification” does little to assuage the fears of companies doing business in foreign countries, and it further muddies the waters of who exactly is a foreign official under the FCPA.

The FCPA Resource Guide that was finally jointly released by the DOJ and SEC in November 2012 is hardly better in terms of adding clarity, devoting just three of its one-hundred twenty pages to discussion of who qualifies as a foreign official and what qualifies as an instrumentality under the FCPA.²⁶ The DOJ and SEC make it clear that any employee can be a foreign official then simply state that “[t]he term ‘instrumentality’ is broad and can include state-owned or state-controlled entities.”²⁷ They then go on to decline the opportunity to delineate a clear standard, instead stating that “[w]hether a particular entity constitutes an ‘instrumentality’ under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function.”²⁸ This did little to bring any real certainty to companies’ exposure to FCPA liability, prompting the Chamber of Commerce to send another letter in February 2013.²⁹ In this letter the

23. See PAUL T. FRIEDMAN & RUTI SMITHLINE, MORRISON FOERSTER, FCPA: REGULATORS’ EXPANSIVE “FOREIGN OFFICIAL” DEFINITION UNDER ATTACK (2011), available at <http://www.mofo.com/files/Uploads/Images/110520-FCPA-Foreign-Official.pdf> (discussing the lack of case law addressing the definition of “foreign official”).

24. Brian Glaser, *U.S. Chamber Asks DOJ and SEC for Clear Guidance on FCPA Compliance*, CORPORATE COUNSEL (Feb. 23, 2012), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202543167877>.

25. U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE No. 12-01 at 5 (Sep. 18, 2012).

26. U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 19–21 (2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter FCPA RESOURCE GUIDE]. Furthermore, any reliance on SEC guidance may be an exercise in futility, due in no small part to the Commission’s less-than-stellar record of getting its rules upheld by the D.C. Circuit. See James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit’s Usurpation of SEC Rulemaking Authority*, 90 TEXAS L. REV. 1811 (2012) (detailing the difficulties faced by SEC rules when reviewed by the D.C. Circuit).

27. FCPA RESOURCE GUIDE, *supra* note 26, at 20.

28. *Id.*

29. Letter from U.S. Chamber of Commerce et al., to Hon. Lanny A. Breuer, Ass’t Atty. Gen., Criminal Div., U.S. Dept. of Justice & George S. Canellos, Acting Dir. of Enforcement, U.S. Sec. & Exch. Comm’n (Feb. 19 2013) (available at http://www.instituteforlegalreform.com/sites/default/files/Coalition%20Letter%20to%20DOJ%20and%20SEC%20re%20Guidance_v2.pdf) [hereinafter U.S. Chamber Letter].

Chamber expresses, among other things, how it “find[s] it regrettable that . . . the discussion of the definitions of ‘foreign official’ and ‘instrumentality’ does not contain a single hypothetical to help illustrate the enforcement agencies’ approach to this critical issue”—something the Chamber predicts will “perpetuate uncertainty in the business community.”³⁰

The cases that have addressed the FCPA—specifically the definition of foreign official—have done little to help bring the clarification that the DOJ and SEC both essentially punted on when issuing the above guidance. These cases have repeatedly come down in favor of squishy, fact-intensive balancing tests for determining an entity’s status as an instrumentality of a foreign government, a fact cited by the DOJ and SEC in support of their decision not to declare a firm standard.³¹ These cases are instructive as a starting point, but they ultimately fail to give the certainty that multinational corporations crave.³²

The main thrust of this Note is to develop a clear, easily applied test for determining whether a particular entity is an instrumentality of a foreign government and its employees qualify as foreign officials for the purposes of the FCPA. Though corruption and graft are unfortunate realities in some countries, these practices are generally bad for business.³³ Accordingly, this new test is not intended to make it easier to bribe and be bribed.³⁴ Without clear guidance, however, companies are left to make potentially costly judgment calls when conducting business in foreign countries where

30. *Id.* at 3. Additionally, as noted by former SEC General Counsel David M. Becker, this lack of transparency may end up contributing to a further erosion of the effectiveness of NPAs and DPAs due to the uncertainty potential defendants have as to what benefits are gained by cooperating with the government. See David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEXAS L. REV. 1849, 1873–74 (2012) (discussing the difficulties of inducing cooperation when the incentives are opaque, focusing particularly on FCPA enforcement).

31. FCPA RESOURCE GUIDE, *supra* note 26, at 109 n.119 (“To date, consistent with the approach taken by DOJ and SEC, all district courts that have considered this issue have concluded that this is an issue of fact for a jury to decide.”).

32. Glaser, *supra* note 24.

33. See, e.g., *Corruption and Governance*, THE WORLD BANK GROUP, <http://inweb90.worldbank.org/eca/eca.nsf/1f3aa35cab9dea4f85256a77004e4ef4/e9ac26bae82d37d685256a940073f4e9?OpenDocument> (“Corruption has a direct impact on the size of the informal economy. It increases the cost of creating new businesses and staying in business within the formal economy—unofficial payments and unpredictability of their size and frequency drive the costs and risks so high that the entrepreneurs prefer to move their businesses underground to avoid bribes that they have to pay for services such as registration licensing, permits.”).

34. As Chairman Sensenbrenner recognized,

There is no question in my mind that we have to bring this law up to date. Nobody here is in favor of bribery, but there has to be more []certainty. And I must say I was a bit befuddled at the statement that the former Chairman of the Committee, Mr. Conyers, made, saying that corporations should know what is illegal. I think while a corporation is not a human being, but everybody has a right to know what is illegal, and there has to be much more certainty in the law.

FCPA Hearing, *supra* note 12, at 73 (statement of F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary).

corruption is often accepted.³⁵ In many cases, companies may simply decline to do business in the emerging markets most likely to suffer from problems of public corruption rather than risk liability under the FCPA or other anti-corruption laws.³⁶ Furthermore, unlike the general anti-corruption focus of the U.K.’s Bribery Act of 2010,³⁷ the FCPA is only intended to criminalize the bribery of actual foreign public officials.³⁸ Attempting to sweep private bribery under the FCPA’s umbrella of criminality stretches the Act far beyond its intended scope and ultimately dulls the luster of the “world’s flagship anti-corruption legislation.”³⁹

To illustrate how the FCPA’s broad definition of foreign official creates uncertainty, examining a hypothetical situation will be helpful. Before tackling the hypothetical, it is worth noting that the prototypical FCPA case involves a company funneling bribe money to a foreign official in order to receive a contract with that official’s government.⁴⁰ Per the OECD, the industries most commonly affected by foreign bribery are those tied to infrastructure, defense, and medical services and supplies.⁴¹ Due to the FCPA’s broad language, however, the type of person who qualifies as a “foreign official” may be somewhat surprising, as the following hypothetical will illustrate.

John and Bill were classmates at business school. John is an American citizen and has never lived outside the United States. He works as an asset manager for a sovereign wealth fund (SWF)⁴² in New York City. His classmate, Bill, who is also an American citizen, founded his own

35. Glaser, *supra* note 24.

36. See D. Michael Crites & Mark A. Carter, *Why the Foreign Corrupt Practices Act Is Hurting Our Businesses and Needs to Be Reformed*, NAT’L L. REV. (May 15, 2011), <http://www.natlawreview.com/article/why-foreign-corrupt-practices-act-hurting-our-businesses-and-need-s-to-be-reformed> (“The real effect of DOJ’s aggressive enforcement is that it is stifling American companies from doing business abroad and here at home. Companies themselves have to bear the burden of conducting extensive internal investigations if faced with FCPA charges. Many businesses would rather end operations with foreign countries than risk expansive DOJ investigations and spend resources to fight FCPA charges.”).

37. Bribery Act 2010, c. 23 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

38. See generally WORLD COMPLIANCE, U.S. FOREIGN CORRUPT PRACTICES ACT POCKET HANDBOOK 13 (2012) (comparing the U.S. FCPA with the U.K. Bribery Act of 2010).

39. Ann Hollingshead, *A Critical Juncture for the FCPA*, TASK FORCE ON FIN. INTEGRITY & ECON. DEV. (June 15, 2011), <http://www.financialtaskforce.org/2011/06/15/a-critical-juncture-for-the-fcpa/>.

40. U.S. DEP’T OF JUSTICE, *supra* note 15.

41. *Foreign Bribery Factsheet*, OECD (Apr. 17, 2012), available at <http://www.oecd.org/dataoecd/0/10/45790915.pdf>.

42. Although there is no universally accepted definition for what SWFs are, Morgan Stanley’s Clay Lowery defining a SWF as “a government investment vehicle which is funded by foreign exchange assets, and which manages these assets separately from official reserves” is a strong definition. Stephen Jen, *The Definition of a Sovereign Wealth Fund*, MORGAN STANLEY (Oct. 26, 2007), <http://www.morganstanley.com/views/gef/archive/2007/20071026-Fri.html>. For a more thorough discussion of FCPA issues as they specifically apply to SWFs, see Court E. Golumbic & Jonathan P. Adams, *The “Dominant Influence” Test: The FCPA’s “Instrumentality” and “Foreign Official” Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1 (2011).

technology company, “BILLCO.” Bill is looking to raise money through a private placement and takes John on an all-expenses-paid ski vacation to Aspen. While on the trip, Bill discusses his business plan with John, who becomes intrigued by the possibilities of BILLCO. When John returns from the vacation, he discusses Bill’s business plan with his superiors, and they decide to have the SWF make a \$1 million investment in BILLCO.

Given these facts, is John a foreign official? If so, did Bill taking John on the ski trip constitute Bill and BILLCO giving value to John in order to secure an improper advantage, thereby violating the FCPA? Furthermore, if the SWF makes this investment in BILLCO and a third company wines and dines Bill so that he will retain the company’s services, has Bill become a foreign official causing this third company’s conduct to violate the FCPA?

After analyzing the statute’s plain language and recent cases dealing with the definition of foreign official, this Note addresses the key questions raised by this hypothetical. First, should there be a certain threshold requirement of an individual’s responsibility for decision making within an organization for that individual to qualify as a foreign official? Second, can an American citizen qualify as a foreign official, or would that render “foreign” mere surplusage? Finally, what level of government control and connection to state functions should be necessary for an entity to qualify as an instrumentality of a foreign government? After answering these questions, this Note will propose a four-factor test for determining whether an entity qualifies as an instrumentality of a foreign government under the FCPA, thereby making its employees foreign officials for the purposes of the statute.

II. Who is a Foreign Official?

A. Broad language of the statute

One of the major issues contributing to the amount of discretion in determining who is a foreign official under the FCPA is the statute’s broad language. As summarized by the DOJ, “The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.”⁴³ Additionally, the FCPA contains accounting provisions intended

43. U.S. DEP’T OF JUSTICE, *supra* note 15; *see also* 15 U.S.C. § 78dd-1 (2006). Section 78dd-1 states:

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of

to augment these anti-bribery provisions. These provisions basically require a company to record a bribe as a bribe in its ledgers in order to comply,⁴⁴ but this paper’s focus will be on the anti-bribery provisions.

The statute defines a foreign official as “any 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 [the same].”⁴⁵ Curiously, the statute goes on to define what “public international organization” means,⁴⁶ but it neglects to define instrumentality—a term that is also contained in and defined by the Foreign Sovereign Immunities Act (FSIA).⁴⁷

The lack of clarity as to what qualifies an entity as an instrumentality of a foreign government is compounded by the lack of a compliance defense⁴⁸ and the broad judicial interpretation for what qualifies as giving value in furtherance of business under the statute as established by *United States v. Kay*.⁴⁹ The DOJ has said that actions as trivial as paying for a taxi ride could be actionable under the FCPA, but it asserted that the DOJ would “never” bring a case on those grounds.⁵⁰ Furthermore, the DOJ and SEC are responsible for both interpreting and enforcing the law due to the lack of case law, which is a direct result of the huge disincentives for companies to actually fight the cases. This fact skews the scales in favor of over-enforcement of the statute and threatens to stretch the definition of foreign official past its logical breaking point. In addition, the creation of whistleblower bounties by Dodd-Frank⁵¹ will most likely lead to an increase

anything of value to—

(1) any foreign official for purposes of—

(A) (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; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

44. See 15 U.S.C. § 78m (2006).

45. *Id.* at § 78(f)(1)(A).

46. *Id.* at § 78(f)(1)(B).

47. 28 U.S.C. § 1603(b)(3) (2006).

48. See Stephen Fraser, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 91 TEXAS L. REV. 1009 (2012) (discussing the benefits that creating a compliance defense for the FCPA would confer on both the DOJ and corporations).

49. *United States v. Kay*, 359 F.3d 738, 743, 755–56 (5th Cir. 2004) (rejecting arguments that the FCPA’s language is unconstitutionally vague and supporting a broad definition of “giving value” under the statute, holding that it includes “both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country”).

50. *FCPA Hearing*, *supra* note 12, at 56 (statement of Greg Andres, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Criminal Div.).

51. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat 1376, 1841–42 (2010).

in cases being brought initially under the books and records provision of the FCPA⁵² and then followed up with a DOJ investigation.

As a result of increased enforcement by the SEC and DOJ due to the high-dollar value of FCPA settlements,⁵³ the government has begun bringing more individual prosecutions.⁵⁴ In connection with the increase in individual prosecutions is an increase in cases actually going to trial⁵⁵ and challenging the validity of the prosecutions on the grounds that the individuals who were allegedly bribed were not foreign officials under the FCPA because the entities that employed them did not qualify as instrumentalities.

B. *United States v. Noriega (Lindsey)*

In *United States v. Noriega* (commonly referred to as *Lindsey*), executives of Lindsey Manufacturing were charged with a scheme to bribe officials of the Comisión Federal de Electricidad (CFE), a Mexican state-owned utility.⁵⁶ The defendants filed a motion to dismiss based on the argument that CFE was not an instrumentality as a matter of law, and therefore employees of CFE were not foreign officials under the FCPA.⁵⁷ The court rejected the defendants' contention, and Judge A. Howard Matz of the Central District of California came up with the following non-exhaustive list of factors that would qualify an entity as an instrumentality:

[1] [t]he entity provides a service to the citizens . . . [or] inhabitants of the jurisdiction; [2] [t]he key officers and directors of the entity are, or are appointed by, government officials; [3] [t]he entity is financed . . . in large measure [by the government]; [4] [t]he entity is vested with and exercises exclusive or controlling power to administer its designated functions; [and 5] [t]he entity is widely perceived and understood to be performing [governmental] functions.⁵⁸

52. 15 U.S.C. § 78m (2006).

53. SHEARMAN & STERLING LLP, *FCPA Digest – Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, vii–xii (2012); see also Tillipman, *supra* note 17, at 7 (“[T]he top 10 FCPA corporate settlements of all time were imposed between 2008–2011, with Siemens AG holding the title of ‘most expensive FCPA violation’ to date. . . . The top 10 corporate settlements total nearly \$3.2 billion in fines and penalties.”).

54. SHEARMAN & STERLING LLP, *supra* note 53, at vi–vii.

55. See GIBSON, DUNN & CRUTCHER LLP, *supra* note 6, at 10–11 (“In 2011, we saw a new all-time high of four FCPA trials.”)

56. Indictment at 6–22, *United States v. Noriega*, 2:10-cr-01031 (C.D. Cal. Sept. 15, 2010).

57. Order Denying Motion to Dismiss at 9, *United States v. Noriega*, 2:10-cr-01031 (C.D. Cal. Feb. 28, 2011).

58. Order Denying Motion to Dismiss at 9, *United States v. Noriega*, 2:10-cr-01031 (C.D. Cal. Apr. 20, 2011).

Although *Lindsey* resulted in the first FCPA-related conviction of a corporation by a jury,⁵⁹ Judge Matz ultimately dismissed the case based on prosecutorial misconduct.⁶⁰ Nevertheless, *Lindsey* poignantly illustrates the danger of an ill-defined statute and misplaced prosecutorial zeal.⁶¹

C. *Carson*

In *Carson*, a valve manufacturing company—Control Components Inc. (CCI)—was charged with a conspiracy to bribe officials of state-owned utility companies in Korea, Malaysia, the United Arab Emirates, and China.⁶² In a replay of *Lindsey*, the defendants filed a motion to dismiss based on the contention that the allegedly bribed individuals were not foreign officials under the FCPA.⁶³ Once again, the court rejected the argument that various state-owned enterprises are not instrumentalities of foreign governments.⁶⁴ Judge James V. Selna provided his own non-exhaustive list of factors, including:

[1] [t]he foreign state’s characterization of the entity and its employees; [2] [t]he foreign state’s degree of control over the entity; [3] [t]he 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] [t]he circumstances surrounding the entity’s creation; and [6] [t]he foreign state’s extent of ownership of the entity, including the level of financial support by the state⁶⁵

As of this writing, all but one of the defendants has pled guilty.⁶⁶ The sole remaining defendant—Han Yong Kim, the former president of CCI’s Korean office—has not appeared in the U.S. to face trial.⁶⁷

59. Press Release, U.S. Dep’t of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html>.

60. Edvard Pettersson, *Lindsey Manufacturing Wins Dismissal of Foreign Bribery Case*, BLOOMBERG BUSINESSWEEK (Dec. 02, 2011), <http://www.businessweek.com/news/2011-12-02/lindsey-manufacturing-wins-dismissal-of-foreign-bribery-case.html>.

61. *Id.*

62. Indictment at 12–13, *United States v. Carson*, 8:09-cr-00077 (C.D. Cal. Apr. 8, 2009).

63. Motion to Dismiss, *United States v. Carson*, 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011).

64. Order Denying Motion to Dismiss at 5, *United States v. Carson*, 8:09-cr-00077 (C.D. Cal. May 18, 2011).

65. *Id.* The DOJ cited favorably to this test in its September 2012 FCPA Opinion Release regarding the status of royals as foreign officials. U.S. DEP’T OF JUSTICE, *supra* note 25, at 6.

66. Richard L. Cassin, *CCI’s Edmonds Pleads Guilty*, THE FCPA BLOG (June 15, 2012, 11:22 PM), <http://www.fcablog.com/blog/2012/6/15/ccis-edmonds-pleads-guilty.html>.

67. *Id.*

D. SHOT Show

In the single largest FCPA-related investigation and prosecution effort directed at individuals in the DOJ's history, the FBI constructed an elaborate scenario that culminated in the arrest of one individual in Miami and twenty-one individuals from a variety of defense contractors at the 2010 Shooting, Hunting, Outdoor Trade Show (SHOT Show) in Las Vegas.⁶⁸ The undercover investigation had no involvement from any actual foreign official, but the defendants nonetheless allegedly engaged in a scheme to pay bribes to the minister of defense for a country in Africa.⁶⁹ The scheme involved the defendants allegedly agreeing to pay a 20% "commission" to an undercover FBI agent, who they believed to be a sales agent representing Gabon's Minister of Defense, in order to win a portion of a \$15 million deal to outfit the country's presidential guard.⁷⁰

According to the DOJ, "[t]he defendants were told that half of that 'commission' would be paid directly to the minister of defense," and the defendants agreed to create two different price quotations for the deal—one reflecting the actual cost, and the second containing the additional "commission."⁷¹ Additionally, the defendants allegedly agreed to engage in a small test run of the deal to ensure the minister that he would in fact receive his 10% portion of the bribe.⁷² This sting garnered a good number of headlines and was heralded by the DOJ as a shot across the bow for would-be FCPA violators.⁷³

Initially, it seemed to be business as usual for the DOJ, with several defendants entering guilty pleas for their alleged crimes.⁷⁴ However, due in large part to credibility issues plaguing the government's main cooperating witness⁷⁵ combined with the practical difficulty posed by the fact that there was no actual foreign official involved in the conduct, one jury panel ended up deadlocked, and Judge Richard Leon granted the defendants' Rule 29 motion for judgment of acquittal in a second case.⁷⁶ These setbacks eventually led the DOJ to file a motion to dismiss.⁷⁷ Judge Leon granted

68. Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

69. *Id.*

70. *Id.*; see also Tom Schoenberg, *Bribery Defendants were Eager to Join Corrupt Gabon Deal, Jury is Told*, BLOOMBERG, May 17, 2011, <http://www.bloomberg.com/news/2011-05-17/bribery-defendants-were-eager-to-join-corrupt-gabon-deal-jury-is-told.html> ("The government said the defendants agreed to pay \$3 million in kickbacks for the business, half of which they were told would be paid to [Gabon's] defense minister.")

71. U.S. Dep't of Justice, *supra* note 68.

72. *Id.*

73. *Id.*

74. GIBSON, DUNN & CRUTCHER, LLP, *supra* note 6, at 11.

75. *Id.* at 11–12.

76. *Id.*

77. Motion to Dismiss, *United States v. Goncalves*, 1:09-cr-00335-RJL (D.D.C. Feb. 21, 2012).

this motion and dismissed all charges against the defendants, including the ones who had originally pled guilty.⁷⁸ Despite the DOJ’s failure in prosecuting these cases, it notably signaled a shift in tactics by the DOJ to include proactive undercover investigations alongside the sector sweeps and reactive FCPA enforcement measures that had previously been the norm.⁷⁹

E. *O’Shea*

In a situation very similar to *Lindsey*, John O’Shea was charged with funneling bribes to officials in Mexico’s CFE in order to secure contracts for the Swiss engineering firm ABB.⁸⁰ ABB pled guilty to the FCPA charges and expected that O’Shea would follow suit.⁸¹ Instead, O’Shea elected to fight the case at trial.⁸² Like the defendants in *Lindsey*, O’Shea challenged the definition of foreign official as applied to employees of CFE.⁸³ Judge Lynn Hughes denied this motion, but he declined to issue a written opinion.⁸⁴

Although Judge Hughes did not opine on the definition of foreign official, he granted the motion for acquittal due to the DOJ’s failure to prove that any alleged bribes actually took place during its case in chief.⁸⁵ This dismissal illustrates the difficulty the DOJ faces in proving actual bribery and intent: the majority of witnesses in FCPA cases live outside the subpoena power of the government.⁸⁶ This may change with the introduction of the Dodd-Frank whistleblower bounties,⁸⁷ but it may simply embolden more corporate defendants to actually take their cases to trial instead of settling.

78. Order Granting Motion to Dismiss, *United States v. Goncalves*, 1:09-cr-00335-RJL (D.D.C. Feb. 24, 2012).

79. U.S. Dep’t of Justice, *supra* note 59.

80. Indictment at 7–9, *United States v. O’Shea*, 4:09-cr-00629 (S.D. Tex. Nov. 16, 2009).

81. Nathan Vardi, *The FCPA Fiasco: Pressure Tactics In Corruption Cases Backfiring*, FORBES (Jan. 17, 2012, 1:41 PM), <http://www.forbes.com/sites/nathanvardi/2012/01/17/the-fcpa-fiasco/>.

82. *Id.*

83. Motion to Dismiss at 1–2, *United States v. O’Shea*, 4:09-cr-00629 (S.D. Tex. Mar. 7, 2011).

84. Order Denying Motion to Dismiss, *United States v. O’Shea*, 4:09-cr-00629 (S.D. Tex. Jan. 3, 2012).

85. Order on Acquittal, *United States v. O’Shea*, 4:09-cr-00629 (S.D. Tex. Jan. 17, 2012); *see also* Vardi, *supra* note 81 (discussing the government’s failure to prove the allegations).

86. *See* Robert W. Tarun & Peter P. Tomczak, Response, *A Brief Comment on Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. SEE ALSO 183, 191–92 (2012) (discussing the difficulties inherent in investigating and prosecuting FCPA cases).

87. *See* Ben Kerschberg, *The Dodd-Frank Act’s Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011), <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/> (explaining how the Dodd-Frank whistleblowing incentives work and discussing the impact they will have on FCPA compliance).

F. *Haiti Teleco/United States v. Esquenazi* and *United States v. Rodriguez*

The *Haiti Teleco* case is the largest FCPA enforcement action in the statute's history that does not spring from a scenario manufactured by the DOJ.⁸⁸ In the *Haiti Teleco* case, the DOJ charged Cinergy Telecommunications, Inc., several of its executives, intermediaries, and former Haitian government officials with involvement in a scheme to obtain telecommunications contracts in Haiti and launder money.⁸⁹ In contrast to the narrow scope found in the vast majority of FCPA enforcement actions, the *Haiti Teleco* investigation has yielded twelve total defendants—eleven of which are individuals.⁹⁰

Just as in *Lindsey* and *Carson*, the court denied a motion to dismiss premised on the claim that the employees of the state-owned Haiti Teleco were not foreign officials.⁹¹ Unlike the other cases, however, no guidance as to what factors should be weighed in determining whether an entity is an instrumentality were given in the order denying the motion to dismiss.⁹² Instead, jury instructions were given on what the jury should consider in determining whether Haiti Teleco qualified as an instrumentality.⁹³ These instructions were extremely similar to the multi-factor tests in *Lindsey* and *Carson*, and once again included a non-exhaustive list that required a fact-based determination balancing factors against one another.⁹⁴

As observed by the authors of the FCPA Compliance Blog, there is a great deal of overlap between the factors taken into consideration by the

88. *The Case That Just Keeps On Giving*, FCPA PROFESSOR (July 20, 2011), <http://www.fcprofessor.com/the-case-that-just-keeps-on-giving>.

89. *Id.*

90. *Id.*

91. Amended Order Denying Motion to Dismiss, *United States v. Esquenazi*, 1:09-cr-21010-JEM (S.D. Fla. Nov. 19, 2010).

92. *Id.*

93. Jury Instructions, *United States v. Esquenazi*, 1:09-cr-21010-JEM (S.D. Fla. Aug. 5, 2011).

94. *Id.* Specifically, the instructions stated,

An "instrumentality" of a foreign government is a means or agency through which a function of the foreign government is accomplished. State-owned or state-controlled companies that provide services to the public may meet this definition. To decide whether [Haiti Telecom] is an instrumentality of the government of Haiti, you may consider factors including but not limited to: (1) whether it provides services to the citizens and inhabitants of Haiti; (2) whether its key officers and directors are government officials or are appointed by government officials; (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans, or revenue from government-mandated fees; (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and (5) whether Teleco is widely perceived and understood to be performing official or government functions. These factors are not exclusive, and no single factor will determine whether [Teleco] is an instrumentality of a foreign government. In addition, you do not need to find that all the factors listed above weigh in favor of Teleco being an instrumentality in order to find that Teleco is an instrumentality.

Id.

three courts.⁹⁵ Although this overlap may offer companies some level of predictability when dealing with entities abroad, it is still far from uniform across all jurisdictions. Additionally, all of these tests for instrumentality are overbroad—all are non-exhaustive lists of factors—and include entities that should not be considered instrumentalities of foreign governments.

One interesting wrinkle to the *Haiti Teleco* case is that Haitian Prime Minister Jean Max Bellerive signed a declaration stating that Haiti Teleco was *not* a state enterprise a few days before the jury reached its verdict.⁹⁶ Less than a month later, Bellerive signed a new declaration to “clarify” the previous declaration.⁹⁷ This new declaration stated that Teleco was owned by the Bank of the Republic of Haiti (BRH)—an institution of the Haitian state—and that Bellerive only intended the prior declaration for internal use and was unaware that it would be used in criminal proceedings.⁹⁸ Whether this “clarification” resulted from pressure by the U.S. Government is unclear,⁹⁹ but it would certainly be puzzling to find that an entity specifically disclaimed as a state institution by its home government—even if only internally—was an instrumentality of that government for the purposes of the FCPA.¹⁰⁰

The most interesting progeny of the *Haiti Teleco* case are the pending appeals to the Eleventh Circuit that have been initiated by Carlos Rodriguez and Joel Esquenazi.¹⁰¹ These appeals will mark the first opportunity for a circuit court to weigh in on the proper definition of instrumentality, and therefore foreign official, under the FCPA.¹⁰² There is the real possibility that the challenges will succeed either on the grounds that the district court erred in its instructions relating to the definition of instrumentality or in its failure to take the declarations by Prime Minister

95. *Reading a Crystal Ball? Guidance on Instrumentality Under the FCPA-Part II*, FCPA COMPLIANCE & ETHICS BLOG (Aug. 19, 2011), <http://tfoxlaw.wordpress.com/2011/08/19/reading-a-crystal-ball-guidance-on-instrumentality-under-the-fcpa-part-ii/>.

96. Declaration by Jean Max Bellerive, Minister a.i. of Justice and Public Safety, Republic of Haiti, Legal Status of Teleco (July 26, 2011), available at <http://www.scribd.com/doc/63464626/Haitian-Government-Declaration-Re-Haiti-Teleco> (although Bellerive was also Prime Minister at the time of this declaration, he signed it in his capacity as Minister of Justice and Public Safety).

97. Statement of Jean Max Bellerive, Prime Minister, Republic of Haiti (Aug. 25, 2011), available at <http://www.scribd.com/doc/63599157/Declaration-of-Haitian-Prime-Minister-in-Haiti-Teleco-Case>.

98. *Id.*

99. See *Haiti Teleco – From Stunning To Strange*, FCPA PROFESSOR (Aug. 31, 2011), <http://www.fcpaprofessor.com/haiti-teleco-from-stunning-to-strange> (evaluating the circumstances leading to Prime Minister Bellerive’s new declaration).

100. This second declaration by Mr. Bellerive and the U.S. Government’s subsequent “explanation” were described as being “nothing short of disingenuous, border[ing] on the nonsensical, and are expressly contradicted by the previous correspondence” in the brief filed by the Haitian defendant—and alleged “foreign official”—Jean Rene Duperval on appeal. Initial Brief of the Appellant at 43–44, *United States v. Duperval*, No. 12-13009-CC (11th Cir. Feb. 4, 2013).

101. *United States v. Esquenazi*, 1:09-cr-21010-JEM (S.D. Fla. Oct. 26, 2011), *appeal docketed*, No. 11-15331 (11th Cir. May 9, 2012).

102. *Historic “Foreign Official” Appeals Filed*, FCPA PROFESSOR (May 10, 2012), <http://www.fcpaprofessor.com/historic-foreign-official-appeals-filed>.

Bellerive into consideration as exculpatory evidence.¹⁰³ These appeals provide the Eleventh Circuit with a unique opportunity to establish common-sense boundaries to the definition of “instrumentality” under the FCPA, and this paper contains a blueprint for what that definition should be.¹⁰⁴

III. Key Questions

Before establishing a test to evaluate whether an entity should be considered an instrumentality of a foreign government under the FCPA, there are a few questions worth considering. By addressing these questions first, the test will benefit from greater clarity and a more-directed focus.

A. Should There Be a Threshold Level of Organizational Responsibility for an Individual to Qualify as a Foreign Official?

With the plain language of the statute, there is no threshold for who can be a foreign official so long as the entity that employs the person qualifies as an instrumentality.¹⁰⁵ Thus, even a janitor can potentially be a foreign official for the purposes of the FCPA. On its face, this identification seems absurd and cannot be what Congress intended when passing the Act.¹⁰⁶ However, for a court to create a standard requiring a baseline of responsibility for an individual to qualify as a foreign official, it would require ignoring the plain language of the statute and would be a form of often-criticized judicial activism.¹⁰⁷ On the other hand, it is well within Congress’s authority to amend the statute to include this baseline level of responsibility.

Doing so makes sense because it is doubtful that a lower-level employee like a janitor or security guard could have sufficient prestige within an organization to influence any award or benefit. The counterpoint is that because the employee is of such a low level, no company would approach the employee in order to obtain an unfair advantage, thus there is no need to change the statute. While this contention has some merit, there is always the threat that an overzealous prosecutor could use the broad scope of the statute to scoop in misguided but ultimately harmless conduct and coerce a large settlement.

103. *Id.*; see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that withholding exculpatory evidence violates due process “where the evidence is material either to guilt or to punishment”).

104. See *infra* Part IV.

105. 15 U.S.C. § 78dd-1(f)(1)(A) (2006) (defining foreign official as “any employee or official of a foreign government . . .”).

106. Cf. U.S. DEP’T OF JUSTICE, *supra* note 15 (discussing the circumstances leading to the FCPA’s initial passage).

107. See, e.g., Randy Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002) (describing how the term “judicial activism” is used and the types of actions that attract the label).

The real reason that not having a baseline responsibility requirement for the employee to be considered a foreign official is troublesome is that the statute just requires the *intent* to secure an improper advantage¹⁰⁸—not the actual securing of it—a distinction that allowed the SHOT Show cases to proceed in the first place. By requiring an individual to have a certain amount of responsibility in the organization in order to be considered a foreign official, Congress could help ensure that prosecutions brought under the FCPA have real merit and are not just being used as a tool to coerce corporations into settling out of fear of the heavy consequences associated with an FCPA conviction.¹⁰⁹

B. Can an American Citizen Be a Foreign Official, or Would that Render “Foreign” to Be Mere Surplusage?

The FSIA is instructive on the question of whether an American citizen can be a foreign official insofar as it defines an instrumentality of a foreign government as being “neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.”¹¹⁰ Under this definition, it seems that the instrumentality must be a citizen of *only* the country for which it is claiming sovereign immunity.

Extending this to the FCPA, it seems to make sense to require that a particular individual who is being alleged to be a foreign official must be a citizen of the country wherein the alleged misconduct is happening. Additionally, it makes sense to require that the alleged instrumentality be based in the country wherein the alleged misconduct was directed. For example, if an American oilfield services company were to bribe officials of a Chinese state-owned oil company to secure business with that company in Iraq, it hardly seems that this is the type of conduct at which the FCPA was originally directed.¹¹¹ This is because the company is operating more like a typical multinational corporation in a foreign land than as an organ of the state in any domestic concerns. The fact that the entity is PetroChina instead of ExxonMobil should not change the calculus faced by a company when it is dealing with that entity in a third country unrelated to either the United States or China.

Furthermore, if an American citizen is bribed to obtain a benefit, that seems to be outside the original intent of a statute enacted to deal with *foreign*—rather than *domestic*—corruption.¹¹² The statute does appear to

108. See *supra* note 43 and accompanying text. Liability is predicated on the payment’s purpose, not its result. See *supra* note 43 and accompanying text.

109. See *supra* Part I.

110. 28 U.S.C. § 1603(b)(3) (2006).

111. See U.S. DEP’T OF JUSTICE, *supra* note 15 (describing the reasons underpinning the FCPA’s initial passage, namely, a concern about American corporations bribing officials of foreign governments).

112. Compare 15 U.S.C. § 78dd-1 (2006) (criminalizing the bribery of foreign public officials),

cover an American citizen who works for a foreign state-owned enterprise, however, due to the “any employee” language.¹¹³ Still, as held by the Supreme Court in *Bailey v. United States*,¹¹⁴ language of a statute will be read to have a purpose and not as mere surplusage.¹¹⁵ So, must a foreign official actually be a foreigner, or can an American still be a foreign official without rendering “foreign” to be surplusage?

The Department of State’s guidance regarding § 349(a)(4) of the Immigration and Nationality Act (INA)¹¹⁶ is helpful in drawing a conception of what level of involvement in a foreign government would be necessary for an individual to risk forfeiting his American citizenship.¹¹⁷ Basically, if an individual is in a policy-level position or is required to take an oath of allegiance in connection with the position within a foreign government, he runs the risk of losing his American citizenship.¹¹⁸ At least in a citizenship context, the U.S. draws the line at an intimate connection with the foreign government—giving a presumption that the individual did *not* intend to renounce his citizenship unless those thresholds are met.¹¹⁹

This standard goes hand-in-hand with the previous discussion about a threshold level of responsibility within an organization for that individual to qualify as a foreign official.¹²⁰ So it would make sense that if an American citizen is in a position with a high enough level of responsibility and/or loyalty to that foreign government, then, and only then, that American should qualify as a foreign official under the FCPA. Still, the FCPA’s plain language says *any* employee.¹²¹ Which controls in this struggle of non-surplusage? Does *foreign* control—requiring the individual to have non-American citizenship or, at the very least, risk losing his American citizenship by virtue of holding the position—or does *any* control—meaning that even if an American citizen is the janitor at a foreign embassy located in Washington D.C., making him an employee of that government, he qualifies as a foreign official under the FCPA? This is an interesting question worth considering that arguably merits the attention of Congress but is ultimately beyond the scope of this note.

with 18 U.S.C. § 201 (2006) (criminalizing the bribery of domestic public officials).

113. See *supra* note 45 and accompanying text.

114. 516 U.S. 137 (1995).

115. *Id.* at 144–46 (explaining principles of statutory interpretation that weigh against viewing words as surplusage).

116. 8 U.S.C. § 1481(a)(4) (2006).

117. *Advice About Possible Loss of U.S. Citizenship and Seeking Public Office in a Foreign State*, U.S. DEP’T OF STATE (Jan. 1, 2013), http://travel.state.gov/law/citizenship/citizenship_779.html.

118. *Id.*

119. *Id.* That being said, the government does *not* give such a presumption when an individual chooses to “voluntarily engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of—and, [potentially] absolutely contrary to—the intentions and desires of the individual[.]” *Perez v. Brownell*, 356 U.S. 44, 61 (1958). Additionally, the Supreme Court “reject[s] the notion that the power of Congress to terminate citizenship depends upon the citizen’s assent.” *Id.*

120. See *supra* Part II.A.

121. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

C. Level of Control to Be an Instrumentality

1. FSIA Definition

Providing a gloss to the statutory definition of instrumentality under the FSIA, the Supreme Court’s opinion in *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*¹²² laid out factors to be considered in assessing if an entity qualifies as a government instrumentality.¹²³ These factors include being created by an enabling statute that prescribes its powers and duties; existing as a separate juridical entity with property rights and the power to sue and be sued; and being run as a distinct economic enterprise not subject to budgetary and personnel restrictions common to government agencies.¹²⁴

The key to understanding this definition and its relation to the FCPA is that the FSIA is meant to carve out an exception to sovereign immunity when the entity is an “instrumentality” rather than an actual organ of the foreign government.¹²⁵ On the other hand, the FCPA lists instrumentality in the same provision as department and agency of a foreign government,¹²⁶ indicating a closer relation to central governmental functions. Additionally, this definition under FSIA seems to be specifically directed at the types of state-owned enterprises that the challengers in the previously discussed cases claim the FCPA is not meant to encompass.¹²⁷

The Supreme Court goes on to hold in *Banco* that “where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other.”¹²⁸ In light of the above discussion and considering that the FCPA’s goals are different from those of the FSIA, this is the type of control—principal–agent relationship—that makes more sense to assess in determining whether the entity is an instrumentality under the FCPA.¹²⁹

122. 462 U.S. 611 (1983).

123. *Id.* at 624.

124. *Id.*

125. See *Foreign Sovereign Immunities Act*, U.S. DEP’T OF STATE, http://travel.state.gov/law/judicial/judicial_693.html (explaining the scope of the FSIA for individuals interested in effecting service on a foreign government).

126. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

127. See, e.g., Motion to Dismiss at 6–22, *United States v. Noriega* 2:10-cr-01031 (C.D. Cal., Feb. 28, 2011) (arguing that state owned corporations do not meet the FCPA’s definition for “instrumentality”).

128. 462 U.S. at 629–30.

129. The principal–agent relationship is defined in § 2 of the Restatement (Second) of Agency as follows:

- (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
- (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is

2. OECD Definition

The OECD Convention defines “public enterprise”—its version of instrumentality—using the term “dominant influence.”¹³⁰ The OECD says this dominant influence exists “*inter alia*, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.”¹³¹ Just like the formulas laid out by the district courts that have addressed the definition of instrumentality under the FCPA, this test is non-exhaustive, indefinite, and potentially extremely expansive in its scope. Accordingly, it deprives companies of the predictability that would be afforded by a clear-cut definition, and it should not be the sole basis for any definition of instrumentality under the FCPA.¹³²

IV. Creating a Test to Determine Whether an Entity Qualifies as an Instrumentality Under the FCPA

Unlike the non-exhaustive lists of factors laid out in *Lindsey*, *Carson*, and *Esquenazi*, or the indeterminate language of the OECD standard, this list of factors will be exhaustive and allow companies to have a real measure of consistency and predictability in dealing with companies overseas. This bright-line test incorporates four factors, and it requires each to be met in order for an entity to qualify as an instrumentality under the FCPA.

First, the foreign government must own more than 50% of the enterprise. Majority ownership is a logical and easily-defined and observed benchmark for determining control of an entity. Additionally, as codified by the FSIA, an instrumentality is defined as “any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”¹³³ Because this is a place in the U.S. Code where an instrumentality of a foreign government is actually defined, this

subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

RESTATEMENT (SECOND) OF AGENCY §2 (1958). If we analogize instrumentalities of a government to agents of that government, the definitions in (1) and (2) bring valuable guidance. Additionally, an enterprise that a government uses to achieve some of its goals but retains a degree of autonomy in executing tasks related to those goals—like the private military corporations employed by the U.S. in Iraq and Afghanistan—could be understood as acting like an independent contractor.

130. ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 5, at 15.

131. *Id.*

132. *Contra* Golumbic & Adams, *supra* note 42 (arguing that the OECD’s “dominant influence” test should be the test adopted by courts tasked with interpreting the FCPA).

133. 28 U.S.C. § 1603(b)(2) (2006) (emphasis added).

ownership percentage is easily supported by referring to existing law and carries the added benefit of uniformity. Furthermore—in what was hailed as a “welcome clarification” by the U.S. Chamber of Commerce¹³⁴—the DOJ and SEC state in their FCPA Resource Guide that “as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.”¹³⁵ Making this a hard and fast standard rather than one piece of a multifaceted balancing test would go a long way towards bringing the FCPA the type of predictable enforcement that the Chamber and others have been asking for all along.

Second, the entity must perform traditional government functions related to health, safety, and welfare.¹³⁶ Remaining in the context of sovereign immunity, government employees traditionally can only assert a defense of immunity when acting both within the scope of their authority *and* not outside the traditional role of government.¹³⁷ Following the same logic applied above in the ownership context, if an individual is acting in a manner that would afford him immunity due to its official nature, this is the type of activity that would render that individual an official of that government. Thus, if an individual cannot claim immunity for acts outside the scope of the traditional role of government, an entity should not be considered an instrumentality of a foreign government if its activities fall outside that traditional role as well. This hurdle is admittedly fairly easy to overcome. It is not difficult to successfully argue that an activity is directed at health, safety, or welfare—as Supreme Court precedent addressing the issue shows.¹³⁸ Still, certain activities would require some extremely creative definitions of this traditional role. Thus, this factor would serve to give a court the discretion to limit the scope of the statute if it felt that application in a particular case would be absurd or unjust without allowing it to run wild.

134. U.S Chamber Letter, *supra* note 29, at 3.

135. FCPA RESOURCE GUIDE, *supra* note 26, at 21.

136. To help conceptualize this “traditional role of government,” case law applying the “state action” doctrine in the context of 42 U.S.C. § 1983 and the Fourteenth Amendment is very instructive. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 302–11 (2001) (explaining how performing a “traditional and exclusive public function” weighs in favor of “state action”). The U.S. Chamber of Commerce has also expressed support for this factor, stating they “continue to believe that if the entity does not perform a governmental function, it should not be considered a government instrumentality.” U.S Chamber Letter, *supra* note 29, at 3.

137. *See, e.g.*, *Minger v. Green*, 239 F.3d 793, 801 n.5 (6th Cir. 2001) (“[T]he defense of immunity can only be asserted by state employees performing discretionary functions within the scope of their authority or ministerial functions within the scope of their authority and not outside the traditional role of government.”).

138. *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). In *Kelley*, the Court stated, “The promotion of safety of persons and property is unquestionably at the core of the State’s police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State’s police power.”

Id.

Third, the foreign government must have the sole power to appoint and remove upper-level officials. This power may be delegated to other governmental appointees or be achieved by popular election, since these are generally consistent with the concept of agency and governmental function. If a foreign government is not the only entity with the power to appoint and remove upper-level officials of the entity, it does not follow that the organization is an instrumentality of that government.

Without the capacity to choose who is in charge of the entity, the government lacks any real power over its operation, and it would be a stretch of the imagination to conceptualize such an organization as an instrumentality of that government. Just as it is impossible to use a hammer to drive a nail unless one is holding the hammer or can compel the person who is holding it to do the driving for him (barring sheer luck), it is impossible for a government to use an entity to achieve its goals—essentially the dictionary definition of instrumentality¹³⁹—unless it can exert control over that entity either directly or indirectly. This analogy is imperfect because a government can coerce some actions through legislation and regulation without actually controlling the entity,¹⁴⁰ but the general point holds true.

As an example of how this appointment power is central to an entity's status as an instrumentality, one can look to the United States Postal Service (USPS). The USPS is a government-owned corporation in the U.S. despite not directly receiving taxpayer dollars.¹⁴¹ The board of governors is appointed by the President of the United States with the advice and consent of the Senate.¹⁴² These nine governors then select a postmaster general to serve as the tenth member of the board.¹⁴³

In addition to being explicitly authorized by the Constitution—one of very few agencies with this distinction—the USPS is subject to Congress's power to change postal rates as it sees fit, unlike UPS or FedEx, who may change rates at their sole discretion.¹⁴⁴ Although Congress

139. OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (“The quality or condition of being instrumental; the fact or function of serving or being used for the accomplishment of some purpose or end; agency.”).

140. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 268 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“*Political Power* then I take to be a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws . . . for the Publick Good.”).

141. *Postal Facts*, U.S. POSTAL SERV. (2012), <http://about.usps.com/who-we-are/postal-facts/welcome.htm>.

142. *About the Board of Governors*, U.S. POSTAL SERV. (2012), <http://about.usps.com/who-we-are/leadership/board-governors.htm>.

143. *Id.*

144. 39 U.S.C. § 3622 (2006) (establishing standards for postal rate regulation by the Postal Regulatory Commission); see also Brad Tuttle, *Post Office Wants to Raise Prices 11%, to 50¢ per Stamp*, TIME MONEYLAND (Feb. 17, 2012), <http://business.time.com/2012/02/17/post-office-wants-to-raise-prices-11-to-50%C2%A2-per-stamp> (reporting the difficulty the USPS has had in lobbying Congress to raise postal rates); *UPS Sets 2012 Rates*, UPS (Nov. 18, 2011), <http://www.pressroom.ups.com/Press+Releases/Archive/2011/Q4/ci.UPS+Sets+2012+Rates.print>

arguably *can* set the maximum rates charged by UPS and FedEx under its power to regulate commerce,¹⁴⁵ it would be just as odd to argue that either company is an instrumentality of the U.S. Government as it would be to argue that the USPS is not. The major difference is the fact that the USPS has its board appointed by the government, while UPS and FedEx have their boards chosen by private individuals.¹⁴⁶ Through this appointment power, the government can exercise direct rather than indirect control over the USPS’s actions. This measure of control is what makes the USPS an instrumentality of the U.S. when the other parcel carriers are not.

Fourth and finally, the entity *cannot* be publicly traded. This factor plays two roles. First, it limits the application of the FCPA to entities that SWFs take a majority interest in that are otherwise private corporations. Second—despite what opponents of *Citizens United*¹⁴⁷ might claim—there is not a single government on earth that can be traded openly on the market. If a government cannot be traded, it follows that its instrumentalities cannot be traded either. Adding the requirement that the entity cannot be publicly traded adds additional protection to companies doing business with the entity. There is potential for the first three factors to be in a constant state of flux in a scenario where the government’s ownership interest hovers between 49% and 51%, and this would deprive American companies of the predictability that this four-factor test intends.

Additionally, major players on the global energy stage, such as Petrobras and PetroChina, are publicly traded but have the majority of their shares owned by their governments—either directly or through subsidiaries.¹⁴⁸ Furthermore, contrary to popular expectations, the International Energy Agency found that China’s national oil companies actually exert a high degree of independence from the Chinese government

(announcing UPS’s 2012 rates and discussing the increase in terms of market forces).

145. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“We have never required Congress to legislate with scientific exactitude. When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”).

146. *Compare* 39 U.S.C. § 202(a)(1) (2006) (establishing the procedures for the President to nominate members to the Postal Service’s Board of Governors with the advice and consent of the Senate), with UNITED PARCEL SERVICE, INC., CORPORATE GOVERNANCE GUIDELINES (Nov. 2, 2011), available at <http://www.investors.ups.com/phoenix.zhtml?c=62900&p=irol-govhighlights> (providing for annual elections of directors by shareholders).

147. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 50 (2010) (holding that limiting campaign expenditures by corporations constitutes an unconstitutional abridgement of their First Amendment rights).

148. 2009 *Sustainability Report*, PETROBRAS (2010), <http://www.petrobras.com.br/rs2009/en/relatorio-de-sustentabilidade/apresentacao-forma-de-gestao-e-transparencia/perfil/estrutura-societaria/> (disclosing the Brazilian federal government as owning 55.6% of voting shares); PETROCHINA CO. LTD., FORM 20-F at 89 (2009), available at http://www.petrochina.com.cn/resource/EngPdf/annual/20-f_2009.pdf (disclosing that China National Petroleum Corporation—a Chinese state-owned oil and gas corporation—owns 86% of PetroChina’s shares). Additionally, as of March 31, 2011, Petrobras and PetroChina were the fifth- and second-largest corporations in the world as measured by market capitalization, respectively. *FT Global 500*, FIN. TIMES (Mar. 31, 2011), http://www.petrochina.com.cn/resource/EngPdf/annual/20-f_2009.pdf.

in their actions.¹⁴⁹ This supports the idea that entities competing in fields dominated by non-governmental companies will act in a manner similar to other companies in that field rather than merely as a vassal of the government holding the majority of their shares.¹⁵⁰

Furthermore, if the government has elected to raise funds for the company's activities by allowing a percentage of the company to be traded publicly, the government has made a conscious choice to surrender a measure of control over the entity. A government would not freely choose to surrender control—no matter how little—over a ministry it deemed to be central to its national interests.¹⁵¹ Therefore, if a government decides to cede complete control over an enterprise by allowing any portion of its shares to be publicly traded, this should serve as a signaling mechanism that the enterprise is not deemed as central to its national interest and should not be an instrumentality under the FCPA.

Several benefits spring from requiring that a company not be publicly traded for it to qualify as an instrumentality under the FCPA. First, it provides an easy method to screen out entities that are acting like traditional corporations rather than government agencies. Second, it gives American businesses a simple, bright-line rule for choosing what entities they wish to conduct business with abroad and what activities will be permissible with said entities. These two benefits provide American businesses with the predictability they crave so much and allow them to deal with partially-government-owned companies in the same manner that they would deal with any other company in the same scenario.

Referring to the circumstances surrounding the entity's creation, as is done by the other tests,¹⁵² is unnecessary and not necessarily determinative, so it has been left out of this calculus. For example, Telemex began its history as a private company, spent some time as a government utility, then was once again privatized.¹⁵³ Focusing on the circumstances surrounding its creation during the years when Telemex was a government utility would have led to the conclusion that it was not an instrumentality of Mexico, despite all of the other factors pointing in the opposite direction.¹⁵⁴ Moreover, any fully-privatized company that began its existence as a state-owned enterprise or a full-blown government agency would give a false positive for being an instrumentality of a foreign

149. JULIE JIANG & JONATHAN SINTON, INT'L ENERGY AGENCY, OVERSEAS INVESTMENTS BY CHINESE NATIONAL OIL COMPANIES 7–25 (2011).

150. *Id.* at 12–24.

151. *Cf.* Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes, G.A. Res. 50/172, U.N. Doc. A/RES/50/172 (Feb. 27, 1996) (reaffirming previous resolutions supporting the rights of Member States to self-determination and freedom from external interference).

152. *See supra* Part I.

153. *Telefonos de Mexico S.A. de C.V.*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/Telefonos-de-Mexico-SA-de-CV-company-History.html>.

154. *See id.* (describing the characteristics of Telemex); *supra* Part I (explaining the multi-factor tests established by lower courts).

government using this factor. For these reasons, the “circumstances factor” adds nothing at best and misleads at worst, and it is therefore not included in this proposed test.

V. Conclusion

Now that we have established a bright-line test for evaluating whether an entity qualifies as an instrumentality, let us revisit our hypothetical to determine if John and Bill would be foreign officials under this standard. Despite the above discussion of citizenship and responsibility thresholds in assessing whether an individual qualifies as a foreign official, we will proceed on the assumption that “any employee” means exactly that and focus entirely on whether the respective entity would qualify as an instrumentality of a foreign government.

First, we have John. John is an American citizen with no ties to a foreign government outside of his employment by the SWF. Using the tests established by the district courts and the OECD’s “dominant influence” test, the SWF would likely qualify as an instrumentality. However, due to the open-ended nature of those tests, we cannot come to a hard conclusion. With the proposed bright-line test, we can have a greater degree of certainty when making our decision.

Beginning with the first factor—greater than 50% ownership by a foreign government—the SWF is 100% owned by the foreign government, so that box may be checked. Skipping the second factor for the time being, the third factor is easily met, because the SWF is not publicly traded. Furthermore, the fourth factor is also met because the foreign government controls 100% of the SWF; as such, the foreign government retains full power to appoint and remove the SWF’s upper officials. Returning to the second factor, the SWF would only qualify under this test if the concepts of health, safety, and welfare were very broadly interpreted. Although the financial health of a government could qualify under these concepts, the sometimes speculative investment activities of SWFs¹⁵⁵ render this argument more difficult to sustain. Although it would plausibly be within a judge’s discretion to hold that an SWF is an instrumentality as a matter of law, the more prudent and logical choice would be that it does not qualify as an instrumentality under this test.

With Bill, we have an individual who started his own company that is tied to the foreign government only by virtue of the SWF’s investment of \$1 million in BILLCO. Under the tests established by the district courts and the OECD, it is unlikely that BILLCO would qualify as an instrumentality. However, because these tests are all non-exhaustive, this

155. See, e.g., *MGM Mirage and Dubai World Reach CityCenter Deal*, N.Y. TIMES DEALBOOK (Apr. 29, 2009), <http://dealbook.nytimes.com/2009/04/29/mgm-mirage-and-dubai-world-reach-citycenter-deal/> (detailing the terms reached by Dubai World—Dubai’s SWF—and MGM Mirage in financing CityCenter, an \$8.5 billion mixed-use development on the Las Vegas Strip that began construction during the height of the housing bubble).

cannot be said with certainty, and it would not be completely unfathomable for either a court to hold or a jury to find that BILLCO qualifies as an instrumentality of a foreign government under the FCPA.

With the proposed bright-line test, however, we can have definite answers. Whether the first and third factors would be met is dependent on the total value of BILLCO and what agreement the SWF made regarding director appointment as a condition of its investment, but a definitive answer can be reached the moment those facts are ascertained. In this case, it would not be unreasonable to assume that Bill retained at least some measure of control over appointment of top officials in BILLCO and that BILLCO has a value of more than \$2 million. Under these assumptions, these factors would not be met.

The fourth factor would be met in this case because BILLCO is still a private enterprise. However, if BILLCO were to begin publicly trading its shares, the fourth factor would no longer be met. Either way, we once again have a definitive answer. Finally, the factor requiring the assessment of whether BILLCO performs traditional government functions related to the health, safety, and welfare of its citizens would almost certainly not be met. Looking at American history as an example—outside of certain sectors, such as national defense—technological innovation is not a traditional government function related to the health, safety, and welfare of the citizenry.¹⁵⁶ Assuming BILLCO makes typical consumer electronics, this activity would not be related to traditional government functions unless those terms were very broadly interpreted. For this reason, it is doubtful that BILLCO would meet the second factor; therefore, BILLCO would not be an instrumentality of a foreign government under the FCPA using the proposed bright-line test.

As the application of the proposed bright-line test to the facts of the hypothetical illustrates, the second factor, assessing whether the entity serves in a capacity dealing with traditional government functions related to health, safety, and welfare, does allow some discretion. Nonetheless, this discretion is not so extreme as to completely negate the benefits of predictability of application offered by the other three factors. Because factors one, three, and four offer hard and fast standards for a company doing business with foreign entities to take into account when assessing its conduct, this test is superior to the open-ended balancing tests provided by the district courts and the OECD. Additionally, this test provides common-sense limits to the extent of the FCPA's application—something that is sorely needed in light of the increased emphasis on its enforcement by the DOJ and SEC—and, therefore should be adopted as the standard for

156. See generally National Inventors Hall of Fame, *Browse Inventors by Last Name*, INVENT NOW, INC. (2012), http://www.invent.org/hall_of_fame/1_1_2_listing_inventor.asp?vAlpha= (listing individuals who “hold a United States Patent that has contributed significantly to the nation's welfare and the advancement of science and useful arts,” a vast majority of whom are private citizens).

evaluating what qualifies an entity as an instrumentality of a foreign government under the FCPA.