Government Inc.: The FCPA Realistically Defined

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The Foreign Corrupt Practices Act (FCPA) criminalizes bribing foreign officials. Colloquially, the term “foreign official” evokes images of presidents, prime ministers, and other state representatives. Rarely would one think of doctors, veterinarians, or liquor store employees as officials of foreign governments. For FCPA purposes, however, a liquor store employee can be treated the same as a head of state.

Last year for the first time, two federal courts addressed the FCPA’s expansive interpretation. In response to the courts’ abstract guidance, critics contend that the FCPA—the most influential foreign anti-bribery law of all time—is much too vague. Contrary to ongoing criticism, this Article is the first piece to defend the courts’ new standard for determining who qualifies as a foreign official.

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state representatives.² Rarely would one think of doctors,³ veterinarians,⁴ or liquor store employees⁵ as officials of foreign governments.⁶ Yet for FCPA purposes, the definition of

¹ Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1 to -3 (2006). Specifically, the FCPA prohibits the “use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to 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.” Id.
² Robert A. Barron, The Surprisingly Broad Meaning of the Term “Foreign Official” in the Anti-bribery Provisions of the Foreign Corrupt Practices Act, 38 SEC. REG. L.J. 5 (2010) (“At first blush, it might seem that the term “foreign official” comprehends only fairly high officials in a foreign government. However, as noted below, the language of the FCPA, as well as the broad interpretation given to the term by the SEC and the DOJ have resulted in the term ‘foreign official’ having a very broad scope.”)
“foreign official” includes any government “instrumentality,” or any person acting on behalf of a government instrumentality. The term “instrumentality” is undefined, and controversially, federal enforcement agencies interpret it broadly.

Since the late 1990s, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have included within their definition of “instrumentality” certain businesses that are fully or partially owned by foreign governments. As a result, personnel of these so-called “state-owned enterprises” (SOEs) qualify as foreign government officials. Indeed,


8 See infra Part III.

9 It is important to note that the term “state-owned enterprises” does not refer solely to companies that a government owns entirely. In addition to partially state-owned businesses,
criminal actions against bribers of SOE employees fueled the FCPA’s emergence as a prominent criminal statute in the early 21st century, permanently changing the way American companies conduct business abroad. Today, as much as 81% of FCPA prosecutions involve American businesses or individuals who have allegedly bribed personnel of companies fully or partially owned by foreign governments.\textsuperscript{11}

The DOJ and SEC’s expansive reading of “instrumentality” has been vehemently criticized\textsuperscript{12} and, until recently, unchallenged in court.\textsuperscript{13} Critics argue that by not providing concrete guidance about which SOEs qualify as “instrumentalities” (and therefore “foreign officials”), federal enforcement agencies place American businesses at a competitive disadvantage by forcing them to forgo business opportunities with non-foreign official

\begin{footnotesize}
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  \item Koehler, supra note 6 (noting that 81% of FCPA enforcement actions in 2011 involved SOEs, 60% in 2010, and 66% in 2009).
  \item See infra Part III.
  \item See infra Part IV.
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companies in fear of criminal prosecution. Critics are concerned that American businesses have to implement unnecessarily expensive compliance programs merely to determine the extent of a foreign government’s involvement in potential business partners. This concern is especially troublesome for companies doing business in countries where bribery is a common business practice, and government participation in businesses is pervasive.

To remedy this problem, critics suggest alternative, more concrete tests for determining whether an SOE is an instrumentality of a foreign government. For example, some believe that only SOEs that are majority-owned by a foreign government should be considered “instrumentalities” of that government. These commentators suggest adopting definitions similar to those used in the Foreign Sovereign Immunities Act or the Organization for Economic Cooperation and Development’s Anti-Bribery Convention. Adopting a more hardline rule based on majority ownership would clarify this admittedly ambiguous term and promote a more consistent meaning of “foreign official” in American law.


15 Koehler, surpa note 14, at 1003.


Last year for the first time, two courts in the Central District of California expressly affirmed the DOJ and SEC’s position that certain SOEs can be instrumentalities under the FCPA. In *United States v. Aguilar*\(^\text{19}\) and *United States v. Carson*,\(^\text{20}\) courts left the enforcement agencies’ broad interpretation of “instrumentality” largely intact. Indeed, the courts chose not to provide concrete guidance about which SOEs qualify as instrumentalities. Rather than adopting a strict majority-ownership rule, the courts offered a “not exclusive” list of “non-dispositive” factors juries should consider on a case-by-case basis to determine whether an SOE is a government instrumentality. The courts’ guidance and refusal to paint a black-and-white picture of the law has not lessened criticism of the FCPA’s vague standards; nor have the courts’ rulings hampered the DOJ and SEC’s aggressive enforcement.\(^\text{21}\)

Contrary to ongoing criticism, this Article is the first piece to defend the courts’ new standard for determining whether an SOE is considered an “instrumentality” for FCPA purposes. Rather than criticizing the courts’ definition of “instrumentality,” this Article welcomes the multi-factor standard and explains that the courts’ flexible interpretation is necessary when applying the FCPA worldwide—in over 190 countries, each with its own political–economic structure.

The global economy has transformed from a bi-polar world of totalitarian state-run markets on one end and liberal democracies with free market economies on the other, into a complex world with a bizarre merging of market economies, planned economies, and various

\(^{19}\) 783 F. Supp. 2d 1108 (C.D. Cal. 2011).


\(^{21}\) *See infra* Part V.
forms of state capitalism. The new variety of political–economic structures naturally creates more diverse and complex relationships between foreign businesses and their respective governments. Most relevant to the FCPA is the recent upsurge of state capitalist regimes, in which government involvement in business is pervasive but often hard to identify. In light of these global developments, this Article suggests that it is impractical to formulate a clear-cut rule to determine when a foreign business is a foreign government “instrumentality,” and that the courts’ multi-factor standard adequately accounts for the different ways state capitalist governments control businesses as government “instrumentalities.”

This Article proceeds as follows. Part I outlines the FCPA’s anti-bribery provisions and definitions of relevant terms. Part II briefly examines the DOJ and SEC’s interpretation of “foreign official,” citing examples of the agencies’ most expansive prosecutions. Part III surveys the ongoing criticism of the enforcement agencies’ interpretation, as well as critics’ interpretative suggestions. Part IV looks at two recent district court decisions that squarely addressed the issue of whether SOEs can constitute foreign officials under the FCPA. To date, these courts have provided the only substantive guidance on when SOEs will be considered “foreign officials” for FCPA purposes.

Part V defends the courts’ flexible standard by examining the diversity of political–economic structures and the recent emergence of various forms of state capitalism. By demonstrating how different governments exercise control over partially state-owned and allegedly private businesses, this Article argues that a flexible definition of instrumentality is necessary to encompass bribes paid to companies that foreign governments own or control. Part VI revisits the courts’ multi-factor standard to show how it adequately accounts for how governments actually control businesses. This Article concludes by encouraging the 11th Circuit
Court of Appeals to follow the Central District of California’s lead and adopt a similar multi-factor test to define when SOEs qualify as “foreign officials.” This is the first “foreign official” case in front of a federal court of appeals and will help determine the fate of the FCPA as the most influential foreign anti-bribery law of all time.

I. FCPA BASICS

In 1977, Congress passed the first-ever statute specifically enacted to prohibit bribery of foreign government officials in connection with interstate commerce. Passed largely in response to the “Watergate Affair” and an accompanying outpour of newly discovered questionable payments abroad, the FCPA was the only criminal prohibition of foreign bribery

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23 Mike Koehler, Rodriguez Seeks Release Pending Historic Appeal, FCPA PROFESSOR (Jan. 3, 2012), http://www.fcpaprofessor.com/rodriguez-seeks-release-pending-historic-appeal (“This will be the first time in the FCPA’s history that ‘foreign official’ will be squarely before a Circuit Court.”).


in the world for over 20 years. The FCPA was amended in 1988 and in 1998. The summary below provides a general overview of the current version.

corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries.”); Steven C. Perkins, Bibliography on the Foreign Corrupt Practices Act of 1977, 14 W. ST. U. L. REV. 491 (1987) (“The Act was created in light of the revelations of corporate bribery of foreign government officials . . . . [based on] information developed during the Watergate investigation.”); Carolyn Lindsey, More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act, 35 OHIO N.U. L. REV. 959, 961 (2009) (“The FCPA arose out of the Watergate scandal in the 1970s.”); but see Andrew Brady Spalding, Unwitting Sanctions: Understanding Anti-Bribery Legislation As Economic Sanctions Against Emerging Markets, 62 FLA. L. REV. 351, 357–58 (2010) (noting that the FCPA was partially motivated by the Cold War and America’s efforts to “build and preserve critical alliances”).


The FCPA takes a two-pronged approach for curbing overseas bribery by American companies. First, the Act requires publicly held companies to abide by certain recording and disclosure requirements. Second and most familiar, the Act makes corrupt payments to foreign officials illegal. This second prong of the FCPA is commonly referred to as the “anti-bribery provisions” and is the focus of this Article.

Generally, the FCPA’s anti-bribery provisions prohibit American companies and their personnel from corruptly bribing foreign officials to obtain or retain business. A violation requires the use of an instrumentality of interstate commerce to:

1. corruptly pay, offer, promise, or gift anything of value
2. to a foreign official
3. to obtain or retain business, or direct business to any person.

It is widely recognized that these three key elements of the FCPA remain ambiguous.

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30 Id.

The DOJ is the chief enforcement agency of the FCPA, with a secondary role played by the SEC. These agencies have pursued broad interpretations of the FCPA’s ambiguous terms. Because enforcement actions are almost always resolved out of court, one leading FCPA scholar has claimed that enforcement agencies have had free reign to interpret the Act’s ambiguous terms as they see fit. The extremely limited judicial scrutiny to which these elements are subjected results in little guidance for companies to judge their business practices ex ante. Considering the large penalties and severe criminal sentences associated with FCPA violations, it is no surprise that this vague statute is highly criticized.

Although the FCPA’s anti-bribery provisions contain many ambiguities, recent commentary has focused on whether particular actors are “foreign officials” for FCPA purposes. The FCPA defines “foreign official,” in pertinent part, as “any officer or employee of a foreign

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32 The Department of Justice enforces the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the provisions with respect to issuers. See U.S. Department of Justice, supra note 10.

33 See Koehler, supra note 14. (“[J]udicial scrutiny is virtually non-existent in the FCPA context given the frequency with which FCPA enforcement actions are resolved through DOJ non-prosecution agreements, deferred prosecution agreements, pleas, or SEC settlements.”).

34 Id. at 997.

35 Upon conviction, individuals who violate the FCPA can be fined up to $5 million and imprisoned for up to twenty years. Legal entities may be fined up to $25 million. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78ff(a) (2006).
government or any department, agency, or instrumentality thereof." The enforcement agencies’ interpretation of this definition is discussed in the following section.

II. DOJ AND SEC’S INTERPRETATION OF “INSTRUMENTALITY”

For the first twenty-five years after the FCPA was enacted, enforcement of the Act’s anti-bribery provisions was largely nonexistent. In fact, during this time the SEC and the DOJ typically prosecuted “just two or three cases a year.” At the turn of the 21st century, however, FCPA enforcement increased dramatically. To some degree, this increase was due to “the tendency of companies in the post-Sarbanes Oxley world to conduct internal investigations and


37 Michael B. Bixby, The Lion Awakens: The Foreign Corrupt Practices Act-1977 to 2010, 12 SAN DIEGO INT’L L.J. 89, 103 (2010) (“During the first quarter century of the FCPA’s history, enforcement of the law appears to have been minimal, at best.”); Laura E. Longobardi, Reviewing the Situation: What is to be Done with the Foreign Corrupt Practices Act?, 20 VAND. J. TRANSNAT’L L. 431, 476 (1987) (“[As of 1987], the DOJ and the SEC have brought comparatively few actions to enforce the antibribery provisions.”).

38 Westbrook, supra note 31, at 495.

‘self-report’ violations in hopes of gaining leniency from regulators.” 40 Yet increased prosecutions are also attributed to enforcement agencies adopting a more aggressive interpretation of the term “foreign official.” In addition, increased globalization and worldwide government “corporatization” created more opportunity for transactions between American businesses and foreign governments, thereby increasing the opportunities for government bribery. 41 Before 2002, the few enforcement suits that did occur were cases in which defendants allegedly bribed typical foreign government officials: prime ministers, members of parliament and other heads of state. Today, most FCPA enforcement actions “have absolutely nothing to do with typical foreign government officials.” 42 Instead, the DOJ and SEC principally prosecute bribes paid to employees of foreign SOEs. 43


41 Richard L. Cassin, ‘Instrumentalities’ and The New World Order, THE FCPA BLOG (Feb. 28, 2011), http://www.fcpablog.com/blog/2011/2/28/instrumentalities-and-the-new-world-order.html (“Sovereigns have corporatized and globalized and become the biggest financial players on the planet. It’s the governments themselves that have redefined their ‘instrumentalities’ -- the DOJ didn’t need to lift a finger.”).

42 Koehler, supra note 14, at 916.

43 Id.
SOEs are not explicitly listed as a type of “foreign official” in the FCPA. Since the early 21st century, enforcement agencies have argued that state-owned enterprises—even partially state-owned enterprises—fall within the definition of “foreign official.” According to the DOJ and SEC, SOEs are “instrumentalities” of foreign governments and, therefore, foreign officials. Moreover, if an SOE is considered an “instrumentality” of a foreign government, enforcement agencies view its personnel as “foreign officials” of that government as well, “regardless of rank or position.” Consequently, FCPA enforcement has reached an all-time high, with as much as 81% of FCPA prosecutions involving alleged bribes paid to SOEs. The two recent enforcement actions below illustrate the extent to which the DOJ and SEC’s have stretched their inclusion of SOEs as FCPA “foreign officials.”

In United States v. Kellogg, Brown & Root, LLC, the enforcement agencies considered employees of a Nigerian company “foreign officials,” despite the fact that the company was 51%


45 U.S. Department of Justice, supra note 10. There is a limited exception for bribing sufficiently low-level, ministerial positions for routine government governmental action. See Foreign Corrupt Practices Act of 1979, 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2006). This exception, however, is beyond the scope of this Article.

46 Witten, supra note 39 (noting that FCPA enforcement has reached “historically high levels.”).

owned by a variety of private, multi-national businesses.\(^{48}\) A separate entity—wholly owned by
the Nigerian government—controlled the remaining 49% of the business and appointed its board
members.\(^{49}\) This case demonstrates how the DOJ and SEC expanded the term “instrumentality”
to include an entity partially owned by an entity that is in turn directly owned by a foreign state.

In perhaps the most extreme example of the DOJ and SEC’s interpretation, the agencies
alleged that a telecommunications provider was a “foreign official” because the Malaysian
Ministry of Finance owned approximately 43% of the company’s shares.\(^{50}\) The Ministry also
had the power to veto major expenditures and make “important operational decisions.”\(^{51}\)
Controversially, the alleged “foreign official” was “one of Asia’s leading communications
companies, had approximately 25,000 employees, describe[d] itself as privatized, and had a
shareholder base of approximately 35,000 institutional and private/retail investors.”\(^{52}\) Even
though the majority of the company was privately owned, the DOJ and SEC pursued the action,
and unsurprisingly, the case settled out of court.


\(^{49}\) Complaint at 4, SEC v. Halliburton Co., No. 4:09-399 (S.D. Tex. Feb. 11, 2009), available at

\(^{50}\) Alcatel-Lucent, No. 1:10-CV-24620.

\(^{51}\) Id.

\(^{52}\) Koehler, supra note 47, at 117 (citing Telekom Malaysia Berhad, 2009 Annual Report,
The DOJ and SEC continue to apply their loose interpretation of “foreign official” in China, where the government is pervasive in nearly all areas of business, and bribery is a common business practice. For instance, because China has socialized medicine, the DOJ and SEC have considered doctors, nurses, and lab technicians “foreign officials” under the FCPA.

For each of these prosecutions, no court actually endorsed the agencies’ interpretation of “foreign officials.” Because the majority of FCPA cases either settle or end in some sort of out-of-court arrangement, the DOJ and SEC have been essentially free to interpret the statute as they see fit. It was not until the summer of 2011 that courts first squarely addressed the question of whether SOEs could ever be “foreign officials” under the FCPA. As will be discussed, the courts’ guidance did little to affect the agencies’ interpretation.


III. CRITICISM AND SUGGESTED ALTERNATIVES

The DOJ and SEC’s expansive interpretation of “foreign official” is highly controversial.56 One of the most common critiques is that the vague standard of what qualifies as a “foreign official” inevitably forces American businesses to over comply with the Statute and forego transacting with business partners that might be foreign officials, even if they are not.57 Critics suggest that current guidance “breeds inefficient overcompliance by risk-averse business actors fearful of enterprise-threatening liability.”58 One concern about overcompliance is that U.S. companies may decide not to transact with foreign business partners because the foreign company’s relations to the foreign government are unclear or unknown.

To illustrate, imagine an American construction company trying to secure a contract with a Malaysian company abroad. A high-ranking employee of the Malaysian company approaches the American company and suggests that the American company take him out to a lavish dinner

56 See, e.g., Stacy Williams, Grey Areas of FCPA Compliance, CURRENTS: INT’L TRADE L.J., Winter 2008, at 16 (“The meaning of the term ‘instrumentality’ is one of the most challenging aspects of FCPA compliance.”); Koheler, supra note 14, at 916 (“No element is more urgently in need of judicial scrutiny than the FCPA’s ‘foreign official’ element.”).

57 Cohen, supra note 14, at 1268 (“Companies subject to the FCPA therefore could face a risk that they will transact with a government-controlled customer or business partner that, even after reasonable due diligence, does not appear to [be an ‘instrumentality.’]”).

58 Koheler, supra note 14, at 1002 (noting that “[w]hen [a] statute with uncertain terms and defenses is a criminal statute, such as the FCPA, the risk of overcompliance is greatest”).
to discuss the American company’s proposal. If the Malaysian company were an
“instrumentality” of the Malaysian government, taking the employee to dinner might subject the
American company to FCPA criminal liability. If, however, the Malaysian company were
sufficiently private, taking the employee to dinner would certainly be permitted under the
Statute. Because of the vague standard to determine whether a business is an “instrumentality”
of a foreign government, the American company will have a hard time determining the
Malaysian company’s status under the FCPA. Even if the American company believes that the
foreign business partner is not a “foreign official,” the American company will likely forego the
dinner in fear that enforcement agencies or a jury would believe otherwise.

Critics further argue that by not knowing precisely which foreign companies qualify as
foreign officials, American businesses must “spend significant time and money investigating the
ownership structure of foreign customers and potential customers for any trace of foreign
government ownership or control.”59 Though most companies presumably “want to comply with
the law, . . . [they] lack sufficient guidance concerning what they are expected to learn about
their foreign business partners and customers.”60 This ambiguity inhibits the ability of “law-
abiding companies with serious anti-corruption policies and practices to transact business with
foreign counterparties without fear of prosecution.”61 Recent privatization efforts in developing
countries increase the potential costs for such compliance efforts, for government involvement in

59 Id. at 1003.

60 Cohen, supra note 14, at 1270.

61 Id.
such countries is often hard to identify,\textsuperscript{62} and “it remains unclear whether certain businesses are fully private or are still (at least to some extent) under the control of their respective governments.\textsuperscript{63}

Protesting the potential need for costly compliance programs, one leading critic argues that investigating a foreign business partner’s relationship to the foreign government is not motivated by the company’s desire to make improper payments to the foreign customer or potential customer to obtain or retain business should the investigation reveal no foreign

\textsuperscript{62} See Christopher F. Dugan & Vladimir Lechtman, \textit{Current Development: The FCPA in Russia and Other Former Communist Countries}, 91 Am. J. Int’l L. 378, 382-86 (1997); \textit{Middle East Embraces Privatisation}, BBC News, Nov. 15, 2002, http://news.bbc.co.uk/1/hi/business/2481369.stm (“For example, during the last decade, many of Russia’s major oil companies have been transformed from state-owned and operated entities to fully privatized entities and, recently, to entities owned by private investors but suspected to be under the control of the Russian government. For one example, see \textit{After Yukos: The Far-Reaching Legacy of the Yukos Affair}, The Economist, May 10, 2007, at 67, available at http://www.economist.com/business/displaystory.cfm?story_id=9167397 (detailing history of Yukos, a privately owned Russian oil company forced into bankruptcy by the Russian government and then sold to what were seemingly state-controlled entities).”)

\textsuperscript{63} E.g., China. \textit{See} Pedersen, \textit{supra} note 16, at 14 (noting that because of corruption and the fact that “the government still owns and manages the country’s largest companies, compliance with the [FCPA] can be exceptionally challenging for U.S. corporations that conduct business operations in China”).
government ownership or control. Rather, the costly investigation is often motivated for the simple reason that the company wants to treat these foreign customers the same as it treats its other customers. That means hosting such customers at corporate events in which some fun may take place (e.g., golf) or inviting such customers to an industry trade show--events that often take place in tourist locations. Companies fear providing such “things of value” to a “foreign official” (under the enforcement agencies’ interpretation), even though the company is legitimately and legally providing the exact same thing to its non-“foreign official” customers or potential customers.64

Thus, critics fear that American companies will also forgo common, seemingly legal business practices with foreign companies in fear of dealing with “foreign officials” and being subjected to FCPA criminal liability.

To clarify the FCPA’s meaning of “foreign official” as applied to SOEs, critics point to alternate uses of the term in other areas of law. Critics suggest that using other established definitions will be easier to administer and give American companies better notice about which of their business partners are covered by the statute.

One common suggestion is that the FCPA’s inclusion of SOEs should copy that of the Organization for Economic Cooperation and Development Convention of Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).65 In the OECD Convention, an SOE constitutes a “foreign official” if the SOE is a “public enterprise,”

64 Koheler, supra note 14, at 1001–02.

that is, “any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.” The OECD Convention’s commentaries elaborate that a government exercises dominant influence, *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.”

Other critics suggest the best definition of “foreign official” comes from the Foreign Sovereign Immunities Act (FSIA), passed only one year before the FCPA. The FSIA limits whether a foreign nation (or its political subdivisions, agencies, or *instrumentalities*) may be sued in U.S. courts. The statute defines an “agency or instrumentality of a foreign state” as an entity that is “an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”

Another critic suggests that corporate law can provide adequate guidance to determine when to treat state-owned enterprises as a government entity. According to this commentator,

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66 Id.

67 Id. at cmt. on art. 1.4.


69 E.g., Cohen, *supra* note 14, at 1268.


courts should imitate how corporate law determines “whether or not a person, or group of people, exercise “control” over a company . . . [by] applying corporate principles of control to include factors such as ownership percentages, voting rights, [and] participation in day-to-day management of the company.”\textsuperscript{72}

As the next section demonstrates, courts have so thus rejected critics’ suggestions in favor of a more flexible definition of instrumentality.

IV. COURTS’ RECENT GUIDANCE

For the first time last summer, defendants charged with FCPA violations challenged the DOJ and SEC’s expansive interpretation of the term “foreign official.” Two cases in the Central District of California presented the same question of whether an employee of a foreign state-owned company could ever be a “foreign official” for FCPA purposes.\textsuperscript{73} This Article does not rehash old arguments about why SOEs should, or should not, be considered “foreign officials.” Rather, this Article praises the courts’ use of a multi-faceted standard to determine an SOE’s status on a case-by-case basis.

In United States v. Aguilar, the government alleged that the defendants bribed “two high-ranking employees of the Comisión Federal de Electricidad (CFE), an electric utility company...

\textsuperscript{72} Id.

wholly-owned by the Mexican government.”

Unlike the SOEs described in Part III with more attenuated connections to their government owners, CFE was created and fully owned by the Mexican government. Furthermore, CFE’s governing board consisted of high-ranking government officials and the Mexican President appointed CFE’s director. CFE was described as a government “agency” on its website and provided electricity to all of Mexico with the exception of Mexico City. Also, the Mexican Constitution provided that the supply of electricity is solely a government function.

In arguably the “strongest challenge ever” to the government’s “foreign official” interpretation, the defendants argued that CFE employees were not “foreign officials,” because “under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government.” The defendants also argued that, at best, the term

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74 Aguilar, 783 F. Supp. 2d at 1109.

75 Id. at 1112.

76 Id.

77 Id.

78 Id.


80 Aguilar, 783 F. Supp. 2d at 1110.
“instrumentality” was too vague to provide adequate notice of its meaning, and that the rule of lenity and the void-for-vagueness doctrine required that the term not be applied to SOEs.\textsuperscript{81}

Judge Matz delivered a narrow holding, stating that “a state-owned corporation having the attributes of CFE may be an ‘instrumentality’ of a foreign government within the meaning of the FCPA, and that officers of such a state-owned corporation . . . may therefore be ‘foreign officials’ within the meaning of the FCPA.”\textsuperscript{82} Interpreting “instrumentality” in light of its surrounding terms “department” and “agency,” Judge Matz found that some SOEs can “share various qualities with both agencies and departments,” such as:

- 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 (\textit{i.e.}, governmental) functions.\textsuperscript{83}

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id. at 1115.
Considering this “non-exclusive list” of factors, Judge Matz concluded that SOEs cannot categorically be excluded from the meaning of “instrumentality.”\textsuperscript{84} A jury subsequently found the defendants guilty on May 10, 2011.\textsuperscript{85}

One month after the decision in \textit{Aguilar}, another court in the Central District of California was faced with a similar question. In \textit{United States v. Carson}, the defendants were charged with bribing—or conspiring to bribe—multiple state-owned power companies in China, Korea, Malaysia, and the United Arab Emirates.\textsuperscript{86} Like the defendants in \textit{Aguilar}, the \textit{Carson} defendants argued that, “employees of state-owned companies can never be ‘foreign officials’ under the FCPA.”\textsuperscript{87} The defendants also contended that even if the FCPA prohibited bribing employees of SOEs, the statute was unconstitutionally vague.\textsuperscript{88}

Judge Selna held that “the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact.”\textsuperscript{89} The court determined that even if an SOE is wholly owned by a foreign government, several factors that “bear on the question of whether a business entity constitutes a government instrumentality,” such as:

- The foreign state’s characterization of the entity and its employees;
- The foreign state’s degree of control over the entity;

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\textsuperscript{84} \textit{Id.}
\textsuperscript{85} The defendant’s conviction was later thrown out for unrelated reasons.
\textsuperscript{86} SACR 09-00077-JVS, 2011 WL 5101701 at *1 (C.D. Cal. May 18, 2011).
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.} at *3.
\end{flushleft}
• The purpose of the entity’s activities;
• The entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
• The circumstances surrounding the entity’s creation; and
• The foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

According to the court, this is a non-exhaustive list of factors, with no single factor being dispositive.”90 With respect to the defendant’s vagueness challenge, the court held that the meaning of “instrumentality” was sufficiently definite. The court, however, left open the possibility of future as-applied vagueness challenges, noting, “Were Defendants charged with bribing an attendant at the local CITGO gas station, they undoubtedly would have a strong as-applied challenge.”92 In the end, the issue of whether the SOEs in question qualified as

90 Id. at *3–4.
91 Id. at *4.
92 Id. at *11. CITCO is “a refiner and marketer of transportation fuels, lubricants, petrochemicals and other industrial products.” CITGO, Company History, http://www.citgo.com/AboutCITGO/ CompanyHistory.jsp (last visited May 4, 2012). CITGO is owned by PDV America, Inc., which is an indirect wholly owned subsidiary of Petróleos de Venezuela, S.A., the national oil company of Venezuela. Id.
“instrumentalities” of foreign governments was left to the jury. The courts in *Aguilar* and *Carson* rejected arguments that SOEs may never be “instrumentalities” under the FCPA. In future cases, juries will have to determine whether a business entity is sufficiently associated with a foreign government to constitute an “instrumentality” of that government. Yet it remains unclear how heavy the burden will be for the government to establish as a factual matter that a given entity is an “instrumentality” by the *Aguilar* and *Carson* standards. The facts in *Aguilar* made it easy for Judge Matz to view CFE as an “instrumentality” within the meaning of the FCPA. The government’s evidentiary burden in *Carson*, however, is likely greater; the SOEs are from a number of different countries, and their connections to foreign governments vary. With respect to the future of FCPA enforcement, these court decisions will do little to restrict the DOJ and SEC’s inclusive reading of the FCPA and their broad enforcement. Since this guidance, DOJ and SEC have not slowed prosecutions or changed enforcement techniques. In essence, these two courts have accepted enforcement

93 *Id.*

94 *See, e.g.*, ‘State-Owned Enterprises’ Under the FCPA, http://www.steptoe.com/publications-newsletter-pdf.html/pdf/?item_id=209 (“It seems unlikely that Lindsey and Carson will have an immediate impact. The criteria for distinguishing entities that constitute “instrumentalities” for FCPA purposes from those that do not are simply too indefinite.”).

95 For example, Johnson & Johnson recently paid $70 million to settle FCPA charges arising from allegations that the company made improper payments to foreign public healthcare providers. *See SEC v. Johnson & Johnson*, No. 1:11-cv-00686 (D.D.C. April 8, 2011).
agencies’ broad interpretation, without clarifying to what extent a foreign entity must be owned or associated with its government to qualify as an “instrumentality.”

V. CONSIDERING A DIVERSE POLITICAL–ECONOMIC WORLD

By exploring the complexity of different government–business relationships and examining several of the countless ways foreign governments control or influence businesses, this Article attempts to justify the courts’ flexible, multi-factor approach used to determine whether a business is an “instrumentality” of a foreign government. This section examines foreign governments’ relationships to business and how the former controls the latter.

The FCPA operates in over 190 countries, each with its own political–economic structure and unique relationship between government and business. The world today stands in stark contrast to the bipolar world pre-1970, in which there were largely two forms of political–economic systems: liberal free markets and authoritarian communist regimes. In the former existed a robust private market with little government interference; in the latter, business deals required transacting with an all-controlling authoritarian government. In the late 1970s, developing socialist countries began decentralizing their economies and moving away from the


97 Id. All governments play some role in their economies—even governments in liberal free-market societies still regulate companies. The difference is, governments in free-market societies generally do not control the market or make business decisions.
communist state-run model. 98 Despite increased efforts to liberalize markets and privatize businesses, developing states retained elements of their past state-run economies. 99 These half-hearted privatization efforts created an expansive middle ground of state capitalism, in which


99 Ian Bremmer, State Capitalism Comes of Age, 88 FOREIGN AFF. 40, 48 (2009) (“When they began to liberalize, these emerging-market countries only partially embraced free-market principles”); Yan-Leung Cheung et al., Helping Hand or Grabbing Hand? Central vs. Local Government Shareholders in Chinese Listed Firms, 14 REV. FIN. 669, 674 (2010) (“Prior to 1978, all Chinese firms were solely state-owned. Following the economic reform program, the state divested stakes in many firms, but retained shareholdings in most companies, and there were few outright privatizations.”); Peter Coy, China’s State Capitalism Trap, BLOOMBERG BUSINESSWEEK, Feb. 6 2012 (“Deng, however, never entirely surrendered power to the private sector . . . .”); David Lane, Emerging Varieties of Capitalism in Former State Socialist Societies, 9 COMPETITION & CHANGE 227, 245–46 (2005) (“Uzbekistan, Belarus and Turkmenistan . . . have preserved from state socialism high levels of state control and economic coordination.”); Nan Lin, Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future, 7 MANAGEMENT AND ORGANIZATION REV. 63, 72 (2010) (“Privatization . . . has gradually been implemented. . . . without blatant interference of the state . . . . Yet this marketization process is largely and carefully managed by the party-state.”).
private markets meld with elements of government control.\textsuperscript{100} State capitalism is still on the rise and in a variety of forms.\textsuperscript{101}

Not only have political–economic systems diversified; governments of state-capitalist countries have varied the ways they control or influence government-owned, partially-government-owned, and privately owned companies.\textsuperscript{102} Because of the many ways state capitalist governments exercise control over businesses, direct majority ownership over a company is no longer the only reliable indication of government control. Rather, governments of state-capitalist countries are controlling businesses through different forms of ownership such as

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\textsuperscript{100} Adrian Wooldridge, \textit{The Visible Hand}, Special Report on State Capitalism, \textit{The Economist}, Jan. 21, 2012, at 1; Bob Hancké, \textit{Varieties of Capitalism and Business}, \textit{The Oxford Handbook of Business and Government} 141 (2010) (“The state and governments therefore have an important part everywhere in contemporary advanced capitalism, but the roles they play vary along the different capitalist models.”).
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\textsuperscript{102} Wooldridge, \textit{supra} note 100, at 1 (“[N]ever before has [state capitalism] operated on such a scale and with such sophisticated tools.”); see also Bremmer, \textit{supra} note 99, at 40 (referring to State capitalism as a “large and complex phenomenon”); Vivien A. Schmidt, \textit{French Capitalism—Transformed, Yet Still a Third Variety of Capitalism}, 32 \textit{Econ. & Society} 526, 527 (2003) (describing different forms of political–economic relationships in the West and the rise of “‘state-enhanced capitalism’, in which the state, having played a highly directive role in the past, continues to exercise significant albeit less direct influence”).
\end{flushright}
indirectly owning companies through increasingly popular sovereign wealth funds (“SWFs”), sponsoring and providing benefits to so-called “national champion” companies, appointing directors and other officials in individual businesses, and influencing business decisions behind closed doors.

Though these methods of control are found in many state-capitalist countries, this Article examines these methods of control as used by China. China is an especially important example given its prominence in the global economy as a state-capitalist regime.103

Like many previous fully socialist countries, China reformed their economy from the late 1970s through the turn of the century. Under the leadership of Deng Xiaoping, the Chinese Communist Party (CCP) pursued free-market reforms, yet retained (and even strengthened) their political authority.104 Despite China’s apparent move toward a free market, the CCP maintains “an institutionalized, albeit undisclosed, presence” in Chinese businesses.105 Similar to other state-capitalist regimes, “China’s transition from a central planned economy to a market-oriented economy is characterized by the coexistence of market forces and government forces” in business decision-making.106

This new political–economic structure that exists in China, Brazil, Russia, and other countries muddles the line between government control and private control over business. Such

103 Wooldridge, supra note 100, at 1.


105 Id. at 49.

state-capitalist governments exercise significant and varying degrees of control over SOEs and non-state-owned enterprises, as well as multinational joint ventures and foreign businesses operating within their borders.\textsuperscript{107} As a result, direct government ownership cannot be the sole indicator of government control. Instead, government control may be assessed by examining direct and indirect ownership, and the ability to appoint and control company personnel.\textsuperscript{108}

\textbf{A. Ownership}

We have already seen the DOJ and SEC prosecute those who bribe personnel of businesses directly owned by foreign governments. Direct ownership, however, is not the only way foreign governments can effectively own or control businesses, and for state capitalist countries, it is not necessarily the most common.\textsuperscript{109} Today foreign governments “are becoming more sophisticated owners,” often acting as controlling shareholders.\textsuperscript{110} Foreign governments “increasingly [] prefer to dilute their shareholdings” in companies, without lessoning their

\begin{itemize}
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Lin, \textit{supra} note 99.
\item \textsuperscript{109} Adrian Wooldridge, \textit{New Masters of the Universe}, Special Report on State Capitalism, THE ECONOMIST, Jan. 21, 2012 at 4 (“Only a handful of SOEs [in state capitalist countries] are still reporting directly to government ministries.”).
\item \textsuperscript{110} Id. (“Most governments prefer to exercise control through their ownership of shares: they have become the most powerful shareholders across much of the developing world from China to Thailand and from Russia to Saudi Arabia.”).
\end{itemize}
Consequently, minority government shareholders in state capitalist countries can still retain control over businesses without direct or majority ownership.\textsuperscript{112}

Perhaps the fastest growing way governments are expanding their influence and ownership in business is through SWFs. Though there is no standard definition,\textsuperscript{113} an SWF is generally a “government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from official reserves of the monetary authorities.”\textsuperscript{114}

\textsuperscript{111} \textit{Id.} (“Some governments have mastered the art of controlling companies through minority stakes . . . .”).


\textsuperscript{114} U.S. Dep’t of the Treasury, Rep. to Cong. on Int’l Econ. & Exch. Rate Policies (Dec. 2007), \textit{available at} http://www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/Dec2007-Report.pdf. A more detailed definition is offered by the Sovereign Wealth Fund Institute: “A Sovereign Wealth Fund is a state-owned investment fund composed of financial assets such as stocks, bonds, real estate[,] or other financial instruments funded by foreign exchange assets. These assets can include: balance of payments surpluses, official
These state-owned investment portfolios “play an increasingly prominent role in global capital markets.”\(^{115}\) The number of SWFs has doubled since 2000.\(^{116}\) Currently, SWFs account for at least one-eighth of global investment.\(^{117}\) Because SWFs’ government owners often avoid disclosing investment details, it is unclear to what extent SWFs’ investments are influenced by their government investors.\(^{118}\)

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foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports. Sovereign Wealth Funds can be structured as a fund, pool, or corporation. The definition of sovereign wealth fund exclude [sic], among other things, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, state-owned enterprises (SOEs) in the traditional sense, government-employee pension funds, or assets managed for the benefit of individuals.” Sovereign Wealth Fund Inst., *What is a SWF?*, available at http://www.swfinstitute.org/what-is-a-swf/.


\(^{117}\) Bremmer, *supra* note 99.

\(^{118}\) *Id.*
Alternatively, some large companies in developing countries remain in private hands, yet are still subject to government control. Such businesses “rely on government patronage in the form of credit, contracts, and subsidies.”\textsuperscript{119} In Russia, “[t]he national champions are controlled by a small group of oligarchs who are personally in favor with the Kremlin.”\textsuperscript{120} In China, national champions have a “wider, less high-profile ownership base,” yet are “run by a small circle of well-connected businesspeople.”\textsuperscript{121} “Variations of the privately owned but government-favored national champions have occurred elsewhere, including in still relatively free-market economies,” such as Algeria, Brazil, India, Israel, Lebanon, and the Philippines.\textsuperscript{122}

Importantly, the DOJ and SEC have not yet determined whether companies wholly or partially owned by SWFs are “instrumentalities,” and their employees “foreign officials,” of the SWF’s government owner.\textsuperscript{123} Nor have enforcement agencies determined whether privately held national champions are similarly “instrumentalities” of foreign governments. What is clear is that “direct and indirect linkages [from government to businesses] allow the state and the party to exert control or influence on the strategies and execution of many private as well as public corporations’ activities in the marketplace.”\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item[119] Id. at 43.
\item[120] Id.
\item[121] Id.
\item[122] Id.
\item[123] Golumbic, supra note 115, at 46.
\item[124] Lin, supra note 99, at 77.
\end{enumerate}
\end{footnotesize}
B. Appointments and Control of Personnel

Other than direct and indirect ownership, foreign governments exercise control over businesses through the power to appoint and control company personnel. The power to appoint is not exclusively a characteristic of governments of formerly socialist countries, yet this form of government control is probably best exemplified in China. For example, board members of firms listed on China’s stock exchanges “are usually appointed by the state-owned controlling shareholder.” Even for companies that the Chinese government does not own, the government “would maintain the right to hire and fire the executives who managed them.” Though the Chinese Communist Party sometimes “take[s] a step back from detailed involvement in day-to-day business decisions, because the companies are far too complex to be micro-managed,” the Party’s “control over personnel appointments has been inviolate.”

In addition to the Chinese government controlling businesses through appointing executive and non-executive directors, the government also exercises tremendous control through general personnel supervision. The Central Organization Department (the

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125 David Lane, *From Chaotic to State-led Capitalism*, 13 NEW POL. ECON. 177, 181 (2008) (“France also appoints public officials to the boards of companies receiving government benefits.”).


127 *McGregor, supra* note 104.

128 *Id.* at 49–50.

129 *Id.* at 674.
“Department”) is one of the most powerful tools of the Chinese Communist Party.\textsuperscript{130} Since its establishment in 1924, the Department collects files of all members in the party and government, as well as judges, “employees of state-controlled or state-affiliated corporations and enterprises, mass media, universities, institutions, foundations, political consultative councils, and provincial and city leaders.”\textsuperscript{131} Yet the Department’s influence extends “beyond party-state controlled or affiliated organizations” to China’s relatively new “private enterprises,” in which the government places a party secretary and party office.\textsuperscript{132} Within these companies, the party secretary maintains personnel files for each employee.\textsuperscript{133}

The Department’s control over individual employees is expansive: “every urban working adult has a personnel file that contains detailed family background; education, marriage, work, and party histories; reviews and evaluations by supervisors; as well as criticism or ‘black mails’ – anonymous accusations of bad behaviour or conduct.”\textsuperscript{134} Employee files are not available to the employee and are “kept in the personnel office directly under the supervision of the party

\textsuperscript{130} Lin, \textit{supra} note 99, at 72.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} \textit{See also} Wooldridge, \textit{supra} note 101, at 6 (discussing how Chinese companies have a “link” to the party’s high command, and how “[t]he party has cells in most big companies—in the private as well as the state-owned sector—complete with their own offices and files on employees”).

\textsuperscript{133} Lin, \textit{supra} note 99, at 73.

\textsuperscript{134} \textit{Id.}
secretary.” Worker files are passed from employer to employer and “occasionally, though rarely, [a] personnel file may mysteriously disappear.” Without a file, fired workers will likely remain unemployed. The ramifications of a negative or “lost” personnel file naturally gives the party power over all workers in economic enterprises.

The party secretary in each business may be a member of the board of directors, a deputy CEO, or even the chairman of the board or CEO. Whatever the case, the secretary is often centrally involved in all critical business decisions. The party’s influence in private enterprises is illustrated by the following example:

Recently a private company, Mengniu Dairy, China’s largest milk producer, was involved in a scandal for selling contaminated milk. Its founder and owner, Niu Gensheng, and the company had previously been held up as a shining example of outstanding private enterprise. In 2002 it was hailed by the state as number one among the fastest-growing enterprises (‘not on the stock market and not controlled by the state’) in the country. In the wake of the scandal, in July 2009 Mengniu was forced to sell a 20 percent stake to a consortium led by state-owned China National Oils, Foodstuffs and Cereals Corp (Cofco), China’s largest importer and exporter of food. Thus the state became the single largest shareholder of the company. Cofco declared that it would not interfere with the management of the company. Two months later, in September 2009, a senior Cofco executive replaced Niu as chairman of Inner Monglia Mengniu, the main operating subsidiary of the company.

135 Id.
136 Id.
137 Id.
138 Id.
139 Id.
140 Id. at 74–75 (citing Jamil Anderlini, Beijing sidelines top dairy executive, Financial Times, Sept. 4, 2009, available at www.ft.com/cms/s/0/ad62c95a-98e9-11de-aa1b-00144feabdc0.html).
China’s power to appoint business officials and control personnel “[r]eveals the incentive (and punitive) structure that motivates and propels the top managers as well as the enterprises to respond to the demands and commands of the state.”

VI. DEFENDING THE COURTS’ STANDARD

Part V explained that the world has developed into a mix of different political–economic structures, and the upsurge of state capitalist regimes has diversified tactics governments use to control businesses. Any FCPA definition of “instrumentality” as applied to state controlled businesses must therefore contemplate the different ways governments control businesses. Thus, a rigid, albeit clearer definition of “instrumentality” based solely on majority ownership would arbitrarily limit the FCPA’s scope to only cover some foreign government-controlled companies.

Of course, Congress could amend the FCPA to explicitly make a narrower anti-foreign-bribery law that reaches only business that are majority owned by foreign governments (or for that matter, a law that does not reach businesses at all). Conversely, Congress could expand the FCPA to a broader, all-inclusive anti-foreign-bribery statute. Yet as written, the FCPA does not fully explain its scope and therefore requires interpretation. Critics’ concerns about ambiguity and the resulting need for costly compliance programs may indeed be valid, but without

\(^{141}\) *Id.* at 71.
legislative action, the FCPA must be interpreted to reflect the realistic relationships between foreign governments and businesses.\textsuperscript{142}

The first and only courts to squarely address the question of whether an SOE can be an instrumentality of a foreign state held in the affirmative, providing a “non-exhaustive” list of factors juries may consider on a case-by-case basis.\textsuperscript{143} Such factors include the following:

- The foreign state’s degree of control over the entity;\textsuperscript{144}
- Whether the entity’s directors or officials are, or are appointed by, government officials;\textsuperscript{145}

\textsuperscript{142} As discussed in Part II, a violation of the FCPA’s bribery provisions requires the use of an instrumentality of interstate commerce to (1) corruptly pay, offer, promise, or gift anything of value (2) to a foreign official (3) to obtain or retain business, or direct business to any person. Although this Article explores the ambiguities in defining only the second element of the offence (the term “foreign official”), the other two elements also contribute to critics’ discontent with the statute’s interpretation. Businesses would likely benefit from clarification of what type of conduct is prohibited under the statute, i.e., what constitutes a corrupt payment, offer, promise, or gift to obtain or retain business, or direct business to any person. These clarifications help law-abiding companies better understand how to comply with the FCPA, and maybe even alleviate businesses’ concerns about not knowing whether their foreign business partners are “foreign officials.” Such ambiguities, however, are beyond the scope of this article.

\textsuperscript{143} \textit{Aguilar}, 783 F. Supp. 2d at 1115; \textit{Carson}, 2011 WL 5101701 at *3–4.

\textsuperscript{144} \textit{Carson}, 2011 WL 5101701 at *3.

\textsuperscript{145} \textit{Aguilar}, 783 F. Supp. 2d at 1115.
• The extent to which the entity is owned or financially supported by the government (e.g., through appropriations, special tax treatment, licenses, or loans);\textsuperscript{146}

• The nature and extent of the entity’s activities;\textsuperscript{147}

• The entity’s obligations and privileges under the foreign state’s law, including whether the entity is vested with exclusive or controlling power to administer its designated functions;\textsuperscript{148}

• Whether the entity is widely perceived and understood to be performing official (i.e., governmental) functions;\textsuperscript{149}

• The circumstances surrounding the entity’s creation;\textsuperscript{150} and

\textsuperscript{146} Id. (“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.”); Carson, 2011 WL 5101701 at *4 (“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).”).

\textsuperscript{147} Aguilar, 783 F. Supp. 2d at 1115 (“The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction.”); Carson, 2011 WL 5101701 at *3 (“The purpose of the entity’s activities”).

\textsuperscript{148} Carson, 2011 WL 5101701 at *3 (“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”); Aguilar, 783 F. Supp. 2d at 1115 (“The entity is vested with and exercises exclusive or controlling power to administer its designated functions.”).

\textsuperscript{149} Aguilar, 783 F. Supp. 2d at 1115.
• The foreign state’s characterization of the entity and its employees.\textsuperscript{151}

Such a complex standard admittedly does not fully alleviate critics’ concerns; the court chose not to provide the clearest ex ante guidance for American businesses. Indeed, this multi-factor analysis will likely continue the need for American businesses to examine a potential foreign business partner’s status as a foreign official before engaging in any activity that could be perceived as “corrupt.” Considering the evidence presented in Part V, however, the FCPA requires a more flexible definition of “instrumentality.” Fortunately, the courts in the Central District of California intuited this—theyir new standard importantly accounts for the diverse political–economic world in which the FCPA operates.

\textbf{CONCLUSION}

The turn of the century brought an increase in number and dominance of state-capitalist regimes. State capitalism blurs the line between private and public companies and allows foreign governments to control businesses in a variety of illusive ways. This phenomenon may be troubling for American businesses trying to determine their foreign business partners’ statuses as “instrumentalities” of foreign governments. Yet for the FCPA to effectively prevent bribery of foreign government-controlled entities, courts’ must interpret the FCPA in light of how foreign governments actually control those entities. While tempting, a clearer rule based on

\textsuperscript{150} \textit{Carson}, 2011 WL 5101701 at *4.

\textsuperscript{151} \textit{Id.} at *3.
direct majority ownership would short-change the FCPA’s effectiveness and inherently permit more bribery of foreign government-controlled enterprises.

In the near future, the 11th Circuit Court of Appeals may become the first federal court of appeals to confront the question of whether and which foreign SOEs can be considered “instrumentalities” of foreign governments for FCPA purposes.152 Should the court of appeals choose to address these questions, it should follow the Central District of California’s lead by adopting a similar, if not identical multi-factor test to realistically define the term “instrumentality.”

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152 See Motion for Release Pending Appeal, United States v. Rodriguez, No. 11-15331-C (11th Cir. Dec. 29, 2011); Koehler, supra note 23.