Richmond Journal of Global Law & Business

Volume 12 | Issue 3 Article 3

2013

Navigating the FCPA's Ambiguous "Instrumentality" Provision: Lesons for the Energy Industry

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NAVIGATING THE FCPA'S AMBIGUOUS "INSTRUMENTALITY" PROVISION: LESSONS FOR THE ENERGY INDUSTRY

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I. INTRODUCTION

In the years since the Foreign Corrupt Practices Act ("FCPA") was enacted in 1977,[1] creating significant civil and criminal penalties for persons and corporations who offer or pay bribes to the officials of foreign governments,[2] the energy industry has paid $2.12 billion in fines under the statute.[3] This ranks as the highest of any industry by a significant margin, and represents nearly 50 percent of the $4.42 billion in total fines paid by all industries under the FCPA.[4] Not only are the fines significant, but the U.S. Department of Justice ("DOJ") has brought a larger number of FCPA enforcement actions against the energy industry than against any other industry.[5] Some even say that U.S. authorities are targeting the energy industry and are "using [it] to enforce United States corruption standards on the rest of the world."[6]

Regardless of the DOJ's motives for its enforcement practices, it is clear that there are significant FCPA risks in countries rich with energy resources.[7] Much of the world's energy resources are located in

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[1] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 1 (2010) [hereinafter RESTORING BALANCE].

[2] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

[3] *Where the Bribes Are: Penalties in U.S. Government FCPA Cases Since 1977*, JAMES MINTZ GROUP, http://fcpamap.com/ (last visited Dec. 13, 2012).

[4] *Id*.

[5] Bob Tippee, *Extractive Industries Are Top Target for Bribery Enforcement*, OIL & GAS J., Aug. 16, 2011, *available at* http://www.ogj.com/articles/2011/08/extractive-industries-are-top-target-for-bribery-enforcement.html (citing TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2011, at 9 (2011)).

[6] Reid Jonkers, *Recent Development: Recent Trends in FCPA Enforcement*, 4 ENVTL. & ENERGY L. & POL'Y J. 297, 297 (2009).

[7] *Id*.

countries where bribery is prevalent and customary.[8] Additionally, the energy industry provides significant opportunities for interaction with foreign government officials, the specific persons toward whom the FCPA prohibits bribes.[9] For example, in order to extract oil, natural gas, and other resources in a specific country, a company must obtain licenses and other documents directly from that country's government, which makes interaction with foreign officials frequent and consequently increases the temptation to pay bribes.[10]

Another significant FCPA challenge for energy companies is the presence of a wide variety of corporate structures in the industry, specifically including a number of state-owned enterprises ("SOEs").[11] The presence of SOEs in the energy industry is problematic for FCPA compliance because the statute prohibits bribes to "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof . . . ."[12] The statute does not define "instrumentality,"[13] but the DOJ has frequently considered SOEs to be instrumentalities of foreign governments and, consequently, their employees to be foreign officials.[14] This means that in the energy indus-

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[8] *See, e.g.*, *Azerbaijan and Oil: Too Much of a Good Thing*, ECONOMIST, Aug. 17, 2006, *available at* http://www.economist.com/node/7796434, *cited in* Robert Peachey, Comment, *Petroleum Investment Contracts After the Baku-Tblisi-Ceyhan (BTC) Pipeline*, 31 NW. J. INT'L L. & BUS. 739, 768 n.167 (2011).

[9] Jonkers, *supra* note 6, at 297.

[10] *See id*.

[11] It has been said that "[a]n array of state-owned entities . . . dominate the world's oil and gas industry." David G. Victor et al., *Introduction and Overview*, *in* OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY 3 (David G. Victor et al. eds., 2012). SOEs can be broadly defined as enterprises that are owned in whole or in part by a national or local government. *See* Timothy Kyepa, *Integrating the Proposed National Oil Company of Uganda into the Corporate Governance Discourse: Lessons from Norway*, 30 J. ENERGY & NAT. RESOURCES L. 75, 82 (2012). They are "sometimes also referred to as government corporations, government-linked companies, parastatals, public enterprises, or public sector enterprises — [and] are a diverse mix ranging from internationally competitive listed companies, large-scale public service providers, wholly owned manufacturing and financial firms, to small and medium enterprises." *Id*. (*quoting* WORLD BANK, HELD BY THE VISIBLE HAND: THE CHALLENGE OF SOE CORPORATE GOVERNANCE FOR EMERGING MARKETS 1 (2006), *available at* http://rru.worldbank.org/Documents/Other/CorpGovSOEs.pdf [hereinafter HELD BY THE VISIBLE HAND]).

[12] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012) (emphasis added).

[13] RESTORING BALANCE, supra note 1, at 24.

[14] U.S. DEP'T OF JUSTICE & SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20 (2012) [hereinafter RESOURCE GUIDE].

try, where there are SOEs literally from A (Albpetrol in Albania[15]) to Z (Zawia Oil Refining Company in Libya[16]), and in other industries, companies can encounter significant FCPA trouble when they pay bribes to employees of SOEs.[17]

The inclusion of SOEs into the "instrumentality" provision has not been popular with the private sector.[18] Some have called for a modification of the FCPA to "include a clear definition of 'instrumentality'" to combat the uncertainty surrounding the term's meaning.[19] Others have requested that the DOJ give additional guidance on the interpretation of the term,[20] which the DOJ recently provided.[21] However, neither of these proposed solutions can significantly help energy companies comply with the FCPA in their business ventures abroad. Determining whether an SOE should be considered an instrumentality for FCPA purposes is a fact-specific question requiring a case-by-case analysis.[22] Asking Congress or the DOJ for a change in the definition of instrumentality or additional guidance will not necessarily reduce FCPA risks because businesses would have a similarly difficult time determining whether a foreign enterprise fits into that interpretation, definition, or guidance.

The most effective way for energy companies to maneuver through the difficulties of the FCPA's instrumentality provision is to strengthen their compliance mechanisms to prohibit bribery to anyone—including officials of purely private enterprises.[23] This is the safest method of preventing FCPA liability and is necessary for energy companies due to the existence of the United Kingdom's Bribery Act 2010 ("Bribery Act"), which prohibits bribery of public and private offi-

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[15] *Company Overview of Albpetrol Sh.A.*, BLOOMBERG BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=10741109 (last visited Dec. 13, 2012).

[16] Zawia is a fully owned subsidiary of Libya's oil SOE (National Oil Corporation). *Fully Owned*, NATIONAL OIL CORPORATION, http://en.noclibya.com.ly/index.php?option=com_content&task=view&id=318&Itemid=0 (last visited Dec. 13, 2012).

[17] *See* RESOURCE GUIDE, *supra* note 14, at 20.

[18] *See, e.g.*, RESTORING BALANCE, *supra* note 1, at 25–27.

[19] *Id*. at 27.

[20] *E.g.*, Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 576 (2011).

[21] RESOURCE GUIDE, *supra* note 14, at iv.

[22] *Id*. at 20.

[23] Some companies have already begun doing so. *Concerns About the U.S. Chamber Institute of Legal Reform's Proposals for Amending the FCPA*, GLOBAL FIN. INTEGRITY 1, http://www.gfintegrity.org/storage/gfip/documents/Capitol_Hill/fcpa_response_to_us_chamber.pdf (last visited Dec. 14, 2012) [hereinafter GLOBAL FIN. INTEGRITY].

cials.[24] Energy companies thus have numerous incentives to treat all foreign entities as instrumentalities and completely avoid FCPA liability under the "instrumentality" provision.

This paper will first provide a background to the FCPA (including the energy industry's challenges in complying with the FCPA), and an analysis of the FCPA's "instrumentality" provision and how this provision affects energy companies. Following this section, there will be an analysis of the different interpretations of "instrumentality" held by the DOJ, industry groups, scholars, and U.S. federal courts. This paper will then propose that energy companies can avoid FCPA liability by strengthening their compliance mechanisms to treat all foreign entities as instrumentalities of foreign governments, or, in other words, by prohibiting bribery to any foreign person.[25]

II. BACKGROUND

A. The FCPA and the Energy Industry

The FCPA was enacted in 1977, after the fallout from the Watergate Scandal revealed that a number of U.S. companies had engaged in extensive bribery of foreign government officials in order to further their business interests.[26] The essence of the FCPA for the purposes of this paper can be stated as follows: no "issuer,"[27] "domestic concern,"[28] or other relevant party[29] can bribe[30] a foreign official[31] in

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[24] Bribery Act, 2010, c. 23, § 1. *See infra* Section IV ("Proposal").

[25] GLOBAL FIN. INTEGRITY, *supra* note 23, at 1 (while not proposing this for companies, this source recognizes that some companies are already strengthening their compliance programs for this purpose).

[26] James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L.REV. 825, 825–26 (2012).

[27] 15 U.S.C. § 78dd-1(a). The DOJ says that an issuer is "a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC." *Foreign Corrupt Practices Act: Antibribery Provisions*, U.S. DEP'T OF JUSTICE 4–5, *available at* http://klifesolutions.com/wp-content/uploads/2012/03/GUI_GOV_DOJ_FCPA_Lay-Persons-Guide.pdf (last visited Apr. 28, 2013) [hereinafter *Lay-Person's Guide*].

[28] 15 U.S.C. § 78dd-2(a). This is a broad term encompassing any "citizen, national, or resident of the United States" as well as "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of" any U.S. state, territory, or other possession. *Lay-Person's Guide*, *supra* note 27.

[29] 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (This includes anyone who does not fall into the issuer or domestic concern categories but nonetheless uses "the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of . . ." an FCPA violation. *Id*. § 78dd-3(a). Furthermore, no one can perform a prohibited action on behalf of any of these parties, and this includes any "officer,

order to acquire or retain any form of business.[32] Violations of the FCPA can result in significant civil and criminal penalties—including prison time and large fines—for individuals and corporations.[33] Also, it should be noted that parties subject to the FCPA can request an Opinion from the U.S. Attorney General in order to determine whether planned actions would violate the FCPA.[34] This opinion procedure has been used to ascertain whether a specific person could be considered a "foreign official."[35]

Energy companies have a long and checkered past with the FCPA. In the investigation after the Watergate Scandal, a number of oil companies were found to have made large payments to officials of

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director, employee, or agent of [any of these parties] or any stockholder thereof acting on behalf of [any of these parties]" to commit an FCPA violation.).

[30] *Id.* §§ 78dd-1(a)(1), -2(a)(1), -3(a)(1) (While the word "bribe" is not used in the description of these actions, the statute prohibits "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.").

[31] *Id.* §§ 78dd-1(a)(2), -2(a)(2), -3(a)(2). This also includes "any foreign political party or official thereof or any candidate for foreign political office." *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3). Also bribes cannot be paid to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to . . ." either of the other two prohibited groups. *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

[32] The statute says "in obtaining or retaining business for or with, or directing business to, any person" (1) in order to influence "any act or decision of such [recipient] in [his, her, or its] official capacity;" (2) in order to induce that recipient "to do or omit to do any act in violation of the lawful duty of such [recipient];" (3) in order to secure "any improper advantage;" or (4) in order to induce the recipient "to use [his, her, or its] influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality." *Id.* §§ 78dd-1(a)(1)(B)-(2), -2(a)(1) (B)-(2), -3(a)(1) (B)-(2).

[33] *Id.* §§ 1(a), -2(a), -3(a).

[34] Issuer or Domestic Concern, 28 C.F.R. § 80.4 (2012). This is not meant to be an opportunity for companies and persons to request opinions on hypothetical questions and facts; the transaction at issue "must be an actual—not a hypothetical—transaction but need not involve only prospective conduct." Transaction, 28 C.F.R. § 80.3 (2012).

[35] U.S. Dep't of Justice, Opinion Procedure Release, Foreign Corrupt Practices Act Review 1-2, 5 2, 6 (Sept. 18, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf (The issue was whether a member of a foreign government's royal family would be considered a foreign official. The DOJ found that the royal family member was not a foreign official: he has no official government title or position and had only worked for the government for a short period many years prior, does not act on behalf of the government or royal family, enjoys no governmental privileges due to his membership in the family, and does not interact in any way with those officials deciding on the transactions.).

foreign governments.[36] "Overseas payments," political contributions, and other questionable payments were found in the books of Citgo, Exxon, Gulf Oil, Mobil Oil, and others.[37] Since the enactment of the FCPA, the U.S. District Court for the Southern District of Texas—which includes Houston, where many oil and gas companies have offices[38]—has overseen a number of FCPA plea bargains[39] and deferred prosecution agreements.[40] Some of the largest fines in the history of the FCPA involve energy companies, such as Kellogg Brown & Root's $402 million fine (the second largest FCPA fine at the time) for bribing Nigerian officials in exchange for a contract to build natural gas facilities.[41]

The energy industry is susceptible to FCPA liability for a few reasons. First, among the countries with the world's largest reserves of energy resources are many countries with corrupt governments.[42] The following table, listing countries whose oil or natural gas reserves (or both) are among the highest fifteen amounts in the world, demonstrates this relationship. The table also shows each country's score from Transparency International's *2012 Corruption Perceptions Index* ("CPI"), which "measures the perceived levels of public sector corrup-

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[36] Lewis D. Solomon & Leslie G. Linville, *Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad*, 17 B.C. INDUS. & COM. L. REV. 303, 303–04 n.2 (1976).

[37] *Id.*, at 304.

[38] *E.g.*, *List of Oil and Gas Companies in Houston*, SUBSEA OIL & GAS DIRECTORY, http://www.subsea.org/company/allbycity.asp (last visited Dec. 14, 2012).

[39] *See, e.g.*, Plea Agreement at 1, U.S. v. Baker Hughes Serv. Int'l, No. 07-129 (S.D. Tx. Apr. 11, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf.

[40] *See, e.g.*, Deferred Prosecution Agreement at 1, U.S. v. Pride Int'l, No. 10-766 (S.D. Tx. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pride-intl/11-04-10pride-intl-dpa.pdf. "Deferred prosecution agreements are essentially contracts with the DOJ, whereby the DOJ agrees not to pursue the charges filed against the corporation so long as the corporation fulfills certain requirements contained in the agreement." John A. Gallagher, Note, *Legislation is Necessary for Deferred Prosecution of Corporate Crime,* 43 SUFFOLK U. L. REV. 447, 449 (2010) (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–22 (2007)).

[41] *Foreign Corrupt Practices Act Update Resource Center,* JENNER & BLOCK, Feb. 2009, (citing Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009)), *available at* http://jenner.com/resource_centers/update/691[hereinafter KBR Press Release].

[42] Jonkers, *supra* note 6, at 297.

tion in countries worldwide" on a scale of 0 to 100.[43] A lower score indicates a higher perception of corruption.[44] Each country's ranking is also listed in the CPI in comparison to all others (176 countries were ranked in 2012).[45]

Country	Oil Reserves Ranking[46]	Gas Reserves Ranking[47]	CPI Score[48]	CPI Ranking[49]
Saudi Arabia	2	6	44	66
Venezuela	3	9	19	165
Iran	5	3	28	133
Iraq	6	13	18	169
Kuwait	7	21	44	66
Russia	9	2	28	133
Libya	10	23	21	160
Nigeria	11	10	27	139
Kazakhstan	12	15	28	133
Brazil	13	34	39	80
China	17	14	43	69
Algeria	18	11	34	105

The CPI is admittedly selective, for example, it lists Canada as having the fourth largest amount of oil reserves in the world[50] and a corresponding CPI score of 84, placing it among the ten most transparent countries in the world;[51] however, this list of countries shows that there are many energy-rich countries that have significant corruption issues. When corruption is more prevalent in a foreign government, bribe requests and offers are more likely to occur and more difficult to

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[43] TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEX 2012, at 2 (2012), *available at* http://files.transparency.org/content/download/537/2229/file/2012_CPI_brochure_EN.pdf / [hereinafter CORRUPTION PERCEPTION INDEX 2012].
[44] *Id.*
[45] *Id.*
[46] Central Intelligence Agency, *Crude Oil - Proved Reserves*, WORLD FACTBOOK (2012), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2244rank.html [hereinafter *Crude Oil - Proved Reserves*].
[47] Central Intelligence Agency, *Natural Gas - Proved Reserves*, WORLD FACTBOOK (2012), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2253rank.html.
[48] CORRUPTION PERCEPTION INDEX 2012, *supra* note 43, at 3.
[49] *Id.*
[50] *Crude Oil - Proved Reserves*, *supra* note 46.
[51] CORRUPTION PERCEPTION INDEX 2012, *supra* note 43, at 3.

avoid.[52] This can create significant FCPA compliance issues for energy companies,[53] as the number of FCPA enforcement actions against the industry demonstrates.[54]

Second, energy companies have significant amounts of interaction with foreign governments.[55] There are numerous opportunities for regulatory interaction with officials such as customs agents[56] and through procedures for acquiring licenses and other documentation.[57] Furthermore, foreign governments own much of the world's energy resources: for example, as of 2007, "77 percent of the world's oil reserves are held by national oil companies with no private equity, and there are 13 state-owned oil companies with more reserves than ExxonMobil, the largest multinational oil company."[58] An energy company's direct client, therefore, might be a foreign government or a ministry, agency, or SOE that oversees that state's natural resources.[59] Interaction with the government is absolutely necessary in the energy industry on multiple fronts, and this can result in increased FCPA liability.[60]

Third, energy companies often use agents to acquire contracts.[61] The FCPA extends liability from agents' actions to their principals,[62] which means that companies in the energy industry must be especially careful about who they hire and what those agents do on

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[52] *See* WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 11 (1997), *available at* http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf (last visited Dec. 13, 2012).

[53] *See* Jonkers, *supra* note 6, at 297.

[54] *See* Tippee, *supra* note 5 (citing TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2011, at 9 (2011)).

[55] *See* Jonkers, *supra* note 6, at 297.

[56] *See, e.g.*, Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

[57] *See* Jonkers, *supra* note 6, at 297.

[58] Tina Rosenberg, *The Perils of Petrocracy*, N.Y. TIMES MAG., Nov. 4, 2007, *available at* http://www.nytimes.com/2007/11/04/magazine/04oil-t.html?_r=1&oref=slogin.

[59] *See, e.g.*, Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 3, 2012, at B1, *available at* http://www.nytimes.com/2012/09/04/business/global/bribery-settlements-under-us-law-are-mostly-with-foreign-countries.html?pagewanted=all.

[60] *See* Jonkers, *supra* note 6, at 297.

[61] *See, e.g.*, Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 795–96 (1992).

[62] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

their behalf.[63] These challenges mean that the energy industry is vulnerable to committing actions that the FCPA prohibits.[64]

B. The "Instrumentality" Provision

One of the more controversial aspects of the FCPA is the ambiguity surrounding the reference to a foreign government's "instrumentality."[65] This reference is found in the definition of "foreign official" in the statute:

> [A]ny officer or employee of a foreign government or any department, agency, or *instrumentality* thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[66]

Whether or not an entity is an "instrumentality" has significant implications: if an entity is considered an instrumentality of a foreign government, then its employees are considered foreign officials and therefore cannot be bribed.[67] This provision is important to a number of FCPA enforcement actions. In 2009, the DOJ completed nine enforcement actions against corporations, and six of them required an interpretation of whether employees of SOEs were "foreign officials."[68] The problem is that the statute does not define "instrumentality,"[69] and until recently, there was a shortage of guidance on its meaning.[70] The FCPA's legislative history is also inconclusive on the matter.[71] According to FCPA scholar Mike Koehler, nowhere in the FCPA's legislative history is there an "express statement or information" about what "instrumentality" means.[72]

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[63] Jonkers, *supra* note 6, at 297 (citing Palmina M. Fava et al., *Energy Sector Faces Greater FCPA Scrutiny*, OIL & GAS FIN. J., Sept. 1, 2008, *available at* http://www.ogfj.com/articles/print/volume-5/issue-9/features/energy-sector-faces-greater-fcpa-scrutiny.html).

[64] *See* Jonkers, *supra* note 6, at 297.

[65] *See, e.g.*, RESTORING BALANCE, *supra* note 1, at 24–27.

[66] 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (emphasis added).

[67] *See id.*

[68] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence,* 43 IND. L. REV. 389, 412 (2010).

[69] RESTORING BALANCE, *supra* note 1, at 24.

[70] The *Resource Guide* was released in November 2012 and dedicated two pages to the "instrumentality" provision. RESOURCE GUIDE, *supra* note 14, at iv, 20–21.

[71] Declaration of Professor Michael Koehler at 3, U.S. v. Carson, No. 09-77 (C.D. Ca. Feb. 21, 2011) [hereinafter Koehler Declaration].

[72] *Id.* at 4.

In the energy industry and others, it can be quite difficult to know what "instrumentality" means in practice.[73] One reason for this is that throughout the world there exists a wide variety of government involvement in many sectors of the world economy, and the lines between government agencies and private corporations are often unclear.[74] Specifically, it is not always apparent whether SOEs are instrumentalities of foreign governments.[75] The DOJ considers many SOEs to be instrumentalities,[76] but the statute does not indicate what level of government ownership or influence must be present.[77]

C. "Instrumentality" in the Energy Industry

While the ambiguity regarding the meaning of "instrumentality" can be dangerous for any industry, it is particularly so for energy companies. First, energy companies do business in a wide range of countries around the world, which inherently involves working with a number of different corporate structures with various levels of government ownership.[78] The industry is neither purely private nor public and state involvement is prevalent.[79]

On one end of the spectrum of corporate structures in the industry are companies that are completely owned and controlled by a foreign state and function like a government agency.[80] An excellent example is Petróleos de Venezuela, S.A. ("PDVSA") under Hugo Chávez, the late president of Venezuela. While it is unclear what will happen with PDVSA now that Chávez's presidency is over, PDVSA is currently owned entirely by the government of Venezuela.[81] The president of PDVSA—Rafael Ramírez—has also been the oil minister and

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[73] *See* RESTORING BALANCE, *supra* note 1, at 24–27.

[74] *See* HELD BY THE VISIBLE HAND, *supra* note 11, at 1 (SOEs "are a diverse mix ranging from internationally competitive listed companies, large-scale public service providers, wholly owned manufacturing and financial firms, to small and medium enterprises").

[75] *See* RESTORING BALANCE, *supra* note 1, at 24–27.

[76] Koehler Declaration, *supra* note 71, at 3.

[77] RESTORING BALANCE, *supra* note 1, at 25.

[78] *See* HELD BY THE VISIBLE HAND, *supra* note 11, at 1.

[79] Rosenberg, *supra* note 58 (Rosenberg offers some reasons as to why so many national energy companies and SOEs exist: "nationalized oil is the trend. . . . Oil- and gas-dependent countries are historically ill governed. Today their people are in rebellion against globalization, which promised much but has brought them little. They have been told their countries are rich, but they see they are poor. So someone must be stealing the profits. Most often, nationalization is a reaction to the idea that the thief is a foreign company.").

[80] *See* VICTOR ET AL., *supra* note 11, at 3.

[81] Stacy Rentner, Note, *Venezuela: How a Hydrocarbons Law Crippled an Oil Giant*, 27 HASTINGS INT'L & COMP. L. REV. 351, 355 (2004) (citing Uisdean R. Vass &

was a close political ally of President Chávez.[82] According to Ramírez, PDVSA did not employ people who were not supporters of Chávez during his presidency.[83] Chávez also fired 18,000 "antigovernment managers" in the midst of a strike at PDVSA and significant political turmoil around the country in 2003.[84] PDVSA had many characteristics of a privately held corporation before Chávez became president,[85] but clearly became an instrumentality of the Venezuelan government under the FCPA[86] or any other definition of the term while Chávez was in office.

On the other end of the spectrum are a number of entities that are partially owned by foreign governments and function far more like private enterprises.[87] For example, Eni is an Italian energy company that does business in over eighty countries, employs more people outside of Italy (45,516) than it does within the country (33,328), and has stock on exchanges in Italy and the United States.[88] Eni's Board of Directors selects the chief executive officer, and other aspects of the corporate structure are typical of Italian law and tradition.[89] In other words, at first glance, Eni looks very similar to a number of large international energy companies.

One distinguishing factor, however, is that the Italian government owns slightly more than 30 percent of Eni.[90] Additionally, the government possesses a "golden share" which permits it, among other things, to veto certain shareholder decisions despite its minority ownership.[91] The extent of this share is unclear because Italy has faced European Union law scrutiny and was recently threatened with an action at the European Court of Justice regarding its golden shares in multiple industries.[92] These developments led Italy to reduce the pow-

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Adriana Lezcano, *The New Venezuelan Legal Regime for Natural Gas: A Hopeful New Beginning?*, 36 TEX. INT'L L.J. 99, 103 (2001)).

[82] *A Tragedy Foretold: A Fatal Refinery Blast Will Not Help Hugo Chávez*, ECONOMIST, Sept. 1, 2012, *available at* http://www.economist.com/node/21561934.

[83] *See id.*

[84] Juan Forero, *Free-Spending Chavez Could Swing Vote His Way*, N.Y. TIMES, Aug. 14, 2004, at A3.

[85] Rosenberg, *supra* note 58.

[86] 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).

[87] *See* VICTOR ET AL., *supra* note 11, at 3.

[88] ENI, CORPORATE GOVERNANCE REPORT 2011 4 (2012), *available at* http://www.eni.com/en_IT/attachments/governance/publications/2012/Corporate_Governance_Report_2011.pdf.

[89] *Id.*

[90] *Id.* at 8.

[91] *Id.* at 9–10.

[92] *Italy Limits 'Golden Share' Rules to Avoid Hefty EU Fines*, EUBUSINESS, Mar. 9, 2012, http://www.eubusiness.com/news-eu/italy-regulate.fm1/.

ers of its golden shares in Eni and other companies.[93] It would be a difficult task to determine whether an international company such as Eni—with many appearances of a private enterprise but partially owned by a government whose golden share powers are ambiguous—is an instrumentality under the FCPA.

In between these two examples are many energy companies that are owned in part by foreign governments. There are also companies that are owned in whole or in part by other SOEs, which is the case with Nigeria Liquefied Natural Gas ("NLNG").[94] NLNG is a joint venture that came into existence to develop Nigeria's natural gas sector.[95] Three private companies own 51 percent of NLNG, and the remaining 49 percent is owned by Nigeria's state-owned petroleum company.[96] The DOJ considers NLNG to be an instrumentality of the Nigerian government,[97] but this might not be obvious to energy companies and others.[98] NLNG and these other examples show the variety of corporate structures in the energy industry and the consequent challenges that companies can face in interpreting the "instrumentality" provision.

The second reason why the "instrumentality" provision is difficult for energy companies to abide by is that many of the countries where energy companies do business have very little transparency.[99] This not only means that employees of SOEs and government agencies are more likely to request, accept, or require bribes,[100] but also that information about corporate structures might not be available.[101] This makes it challenging to learn about the extent of government involvement and control in these entities and carry out a useful "instrumentality" assessment. Performing due diligence on potential clients and FCPA liability is essential for effective compliance with the statute's provisions,[102] but a company will be without necessary knowledge (and susceptible to liability) when key information about the foreign entities they are working with is unavailable.

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[93] *Id.*

[94] *Our Company: Background*, NIGERIA LNG LTD., http://www.nlng.com/PageEngine.aspx?&id=35 (last visited Dec. 13, 2012).

[95] *Id.*

[96] *Our Company: Shareholders*, NIGERIA LNG LTD., http://www.nlng.com/PageEngine.aspx?&id=35 (last visited Dec. 13, 2012).

[97] KBR Press Release, *supra* note 41.

[98] *See* RESTORING BALANCE, *supra* note 1, at 26.

[99] *See supra* Section II ("Background"); Subsection A ("The FCPA and the Energy Industry").

[100] *See* WORLD BANK, *supra* note 52, at 11.

[101] *See* HELD BY THE VISIBLE HAND, *supra* note 11, at 19.

[102] *E.g.*, Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 776–77 (2011).

III. ANALYSIS

Because the FCPA offers no definition of "instrumentality,"[103] the DOJ, industry groups, scholars, and U.S. federal courts interpret it differently. Increasing guidance from U.S. courts and the DOJ makes it clear that each situation is fact-specific and the analysis must be done on a case-by-case basis.[104] However, this means that some level of uncertainty regarding the "instrumentality" provision remains prevalent.[105]

A. Perspective of the DOJ

The DOJ has produced two documents for the purpose of providing FCPA guidance: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("*Resource Guide*")[106] and the *Lay-Person's Guide to the FCPA* ("*Lay-Person's Guide*").[107] The *Lay-Person's Guide* does not explain what an "instrumentality" is, although it does briefly explain "foreign official."[108] On the other hand, the *Resource Guide* explains the DOJ's "instrumentality" analysis of SOEs,[109] which will surely be at least somewhat useful for energy companies.

In the *Resource Guide*, the DOJ emphasizes four factors that govern its "fact-specific analysis" of SOEs as potential instrumentalities: "ownership, control, status, and function."[110] In making this analysis, the DOJ also uses factors that district courts have approved in jury instructions and used in deciding cases. These factors include "whether key officers and directors of the entity are, or are appointed by, government officials," "the foreign state's characterization of the entity and its employees," and "whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government."[111] Companies are advised "no one factor is dispositive or necessarily more important than another."[112] An intriguing aspect of the *Resource Guide* is the DOJ's statement that "as a practical matter, an entity is unlikely to qualify as an instrumentality if a government

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[103] RESTORING BALANCE, supra note 1, at 24.
[104] RESOURCE GUIDE, *supra* note 14, at 20.
[105] *See* RESTORING BALANCE, *supra* note 1, at 27.
[106] RESOURCE GUIDE, *supra* note 14.
[107] *Lay-Person's Guide*, *supra* note 27.
[108] A foreign official can be "any public official, regardless of rank or position." *Id.* at 3.
[109] RESOURCE GUIDE, *supra* note 14, at 20.
[110] *Id.*
[111] *Id.* For the lists of factors from the district courts, *see infra* subsection C ("Federal Courts").
[112] *E.g.*, RESOURCE GUIDE, *supra* note 14, at 21.

does not own or control a majority of its shares."[113] However, this comes with the caveat that there are situations in which the DOJ would still consider that company to be an instrumentality: the presence of political appointments, veto power, and a golden share were enough to make a company an instrumentality in one case because the "government nevertheless had substantial control over the company."[114]

The DOJ says in the *Resource Guide* that there should be a broad interpretation of "instrumentality,"[115] and it has implemented this view in practice.[116] Some of these interpretations are less controversial than others. For example, a company almost wholly owned (97 percent) and completely controlled by the government of Haiti is certainly an instrumentality.[117] However, even in more ambiguous situations, such as minority government ownership ("over one third") in a company, the DOJ has still viewed the company at issue as an instrumentality.[118] Another example is the NLNG situation previously mentioned.[119] In that enforcement action against KBR,[120] the DOJ found NLNG to be an instrumentality of Nigeria because its largest shareholder is the Nigerian National Petroleum Corporation,[121] which is owned entirely by the Nigerian government.[122] KBR clearly violated the FCPA by paying a number of other bribes to executive branch officials, but the DOJ's characterization of NLGN as an instrumentality with that corporate structure at least raises some question marks.[123]

The *Resource Guide* answers a number of questions, yet it is unlikely that the DOJ can offer more definitive guidance on the "instrumentality" provision because of the fact-specific nature of each situation.[124] Only time will tell if the *Resource Guide* succeeds in

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[113] *Id.*

[114] *Id.*

[115] *E.g.*, *id.* at 20.

[116] RESTORING BALANCE, *supra* note 1, at 25.

[117] RESOURCE GUIDE, *supra* note 14, at 21.

[118] Non-Prosecution Agreement at 3, U.S. v. Comverse Tech., Inc., (Apr. 6, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-npa.pdf.

[119] See *supra* section II ("Background'), subsection C ("'Instrumentality' in the Energy Industry").

[120] KBR Press Release, *supra* note 41.

[121] The Nigerian National Petroleum Corporation owned 49% when the events in question occurred. *Id.*

[122] *Id.*; *Oil and Gas in Nigeria*, *Overview*, MBENDI INFO. SERV., http://www.mbendi.com/indy/oilg/af/ng/p0005.htm (last visited Dec. 13, 2012).

[123] *See* RESTORING BALANCE, *supra* note 1, at 26.

[124] *See* RESOURCE GUIDE, *supra* note 14, at 20.

assuaging the complaints of industry groups and scholars discussed in the next subsection.

B. Industry Groups and Scholars

On the other side of the spectrum from the DOJ are commentators that find the DOJ's interpretation of "instrumentality" far too broad.[125] One of the most prominent complaints about the DOJ's interpretation is that there is no guidance on the level of ownership that a government must have in order for the relevant company to be considered an instrumentality.[126] The Chamber of Commerce argues that the DOJ's interpretation "effectively sweeps in entities that are only tangentially related to a foreign government."[127] Using the DOJ's logic, the Chamber of Commerce references two U.S. examples to prove its point: General Motors ("GM") and American International Group ("AIG").[128] In 2009, the U.S. government acquired 60 percent of GM's shares as part of a bailout to help the company survive bankruptcy.[129] In 2008, the U.S. government purchased 79.9 percent of AIG in a similar bailout.[130] The Chamber of Commerce analogizes that under the DOJ's reasoning, both AIG and GM would have been considered instrumentalities of the U.S. government at the time when the U.S. was their majority shareholder.[131] Had this occurred in a foreign country, AIG and GM employees would therefore have been considered foreign officials, which the Chamber of Commerce calls "absurd."[132]

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[125] RESTORING BALANCE, *supra* note 1, at 25.

[126] *Id.* at 27.

[127] *Id.*

[128] *Id.*

[129] David E. Sanger et al., *G.M. to Bankruptcy and a New Start*, N.Y. TIMES, Jun. 1, 2009, at A1, *available at* http://www.nytimes.com/2009/06/01/business/01auto.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fA%2fAutomobiles&_r=0. The U.S. government has since sold its majority but still owns 26.5 percent of the shares. Jeff Bennett & Sharon Terlep, *U.S. Balks at GM Plan: Government Is Reluctant to Sell Auto Stake at a Huge Loss*, WALL ST. J., Sept. 17, 2012, at A1, *available at* http://online.wsj.com/article/SB10000872396390443995604578000754035510658.html.

[130] Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 16, 2008, at A1, *available at* http://online.wsj.com/article/SB122156561931242905.html. As with GM, the government has since sold a significant number of shares, putting its current ownership level at around 15 percent. Leslie Scism et al., *Treasury Sells Chunk of AIG: Deal Marks End of U.S. Majority Ownership of Insurer, Earns Profit for Taxpayers*, WALL ST. J., Sept. 11, 2012, at C3, *available at* http://online.wsj.com/article/SB10000872396390444554704577644311101081138.html.

[131] RESTORING BALANCE, *supra* note 1, at 27.

[132] *Id.*

Alluding to another broad view of the "instrumentality" provision, the Chamber of Commerce discusses the Baker Hughes enforcement action, in which the DOJ found an entity "controlled by officials of the Government of Kazakhstan" to be an instrumentality.[133] Again analogizing to an example in the U.S., the Chamber of Commerce referenced New York City Mayor Michael Bloomberg.[134] Mayor Bloomberg owns 88 percent of Bloomberg LP.[135] According to the DOJ's logic in the Baker Hughes enforcement action, the Chamber of Commerce argues that Bloomberg LP can be considered an instrumentality (and its employees therefore foreign officials) because it is controlled by a government official in the U.S.[136] These results present significant challenges for U.S. businesses in their efforts to do business abroad.[137]

Another complaint is that there is nothing in the legislative history that suggests that Congress intended SOEs to be included in the definition of "instrumentality."[138] Mike Koehler, for example, submitted a declaration in the *U.S. v. Carson* case rejecting the DOJ's broad interpretation of the "instrumentality" provision.[139] In his declaration, he analyzed a number of bills, reports, amendments, and hearing transcripts encompassing over thirty years of legislative history.[140] His conclusion was that Congress never explicitly said that SOEs were to be interpreted as instrumentalities, and that there is a considerable amount of evidence indicating that Congress "did not intend the 'foreign official' definition to include employees of SOEs."[141]

Some suggest that there should be a new definition of these terms,[142] while others suggest specific clarifications of the "instrumentality" provision by having it "apply to foreign companies that are ma-

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[133] *Id.* (citing Plea Agreement at 6, U.S. v. Baker Hughes Serv. Int'l, No. 07-129 (S.D. Tx. Apr. 11, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf).

[134] RESTORING BALANCE, *supra* note 1, at 27.

[135] *#8 Michael Bloomberg*, FORBES.COM, http://www.forbes.com/lists/2008/54/400list08_Michael-Bloomberg_C610.html (last visited Dec. 13, 2012).

[136] *See* RESTORING BALANCE, *supra* note 1, at 27.

[137] *Id.*

[138] *See, e.g.*, Koehler Declaration, *supra* note 71, at 4.

[139] *Id.* at 10–144. Witness testimony, such as Professor Koehler's in *U.S. v. Carson*, can often be given through a sworn declaration, which is "a succinct written statement of the direct testimony which that witness would be prepared to give if questions were propounded in the usual fashion at trial." Union State Bank v. Geller, 170 B.R. 183, 184 (S.D. Fla. 1994).

[140] Koehler Declaration, *supra* note 71, at 10–144.

[141] *Id.* at 4.

[142] *See, e.g.*, RESTORING BALANCE, *supra* note 1, at 27.

jority-owned or controlled by their respective governments."[143] Others agree that by using a majority ownership test "and by delineating other elements of 'dominant influence' such as majority voting rights and the ability to appoint the majority of directors and senior managers, Congress or the courts will permit U.S. companies to make rational assessments of their FCPA exposure."[144] In any case, the private sector does not agree with the DOJ's broad interpretation of this provision.[145]

C. Federal Courts

U.S. federal courts have begun addressing the "instrumentality" provision in recent years, which represents a new trend in FCPA enforcement.[146] Additional case law on the subject should be coming in the near future, including the first case on this provision to reach the U.S. Court of Appeals.[147] A few recent district court cases provide some useful guidance on a number of issues regarding SOEs and instrumentalities.

Two cases from the U.S. District Court for the Central District of California list specific factors that companies and the DOJ can use to help assess whether an SOE should be considered an instrumentality under the FCPA.[148] In *U.S. v. Carson*, the court gave a non-exhaustive set of factors for making this determination:

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[143] Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1246 (2008).

[144] 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, 51 (2011).

[145] RESTORING BALANCE, *supra* note 1, at 25.

[146] *See, e.g.*, Steptoe & Johnson LLP,*"State-Owned Enterprises" Under the FCPA* 1 (June 3, 2011), *available at* http://www.steptoe.com/publications-newsletter-pdf.html/pdf/?item_id=209 [hereinafter *State-Owned Enterprises*].

[147] Michael P. Tremoglie, *11th Circuit Given Question of FCPA 'Instrumentality' Definition*, LEGAL NEWSLINE LEGAL J. (Aug. 27, 2012) http://legalnewsline.com/in-the-spotlight/237130-11th-circuit-given-question-of-fcpa-instrumentality-definition. This case involves a jury instruction that the defendants found to be incorrect: "[the] instructions broadly defined 'instrumentality' as 'a means or agency through which a function of the foreign government is accomplished,' and then permitted the jury to find Teleco an 'instrumentality' of the government if, among other things, it: (1) provided [undefined] 'services' to the citizens of Haiti; (2) was owned by the Haitian government; or (3) 'was widely perceived and understood' to be performing official or governmental functions." Reply Brief of Defendant at 37–38, U.S. v. Esquenazi, No. 11-15331 (11th Cir. Oct. 4, 2012).

[148] U.S. v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Ca. 2011); Order Denying Defendants' Motion to Dismiss Counts 1 though [sic] 10 of the Indictment, U.S. v. Carson, No. 09-77, (C.D. Ca. May 18, 2011) [hereinafter Carson Order].

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- 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).[149]

In *U.S. v. Aguilar*, this same district court used a slightly different approach in creating additional factors.[150] The court looked at a number of characteristics of government "departments" and "agencies," the two words that precede "instrumentality" in the FCPA's definition of "foreign official,"[151] to determine that the SOE in question exhibited similar traits and was therefore an instrumentality of a foreign government:

- The entity provides a service to the citizens — indeed, in many cases to all the inhabitants — of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.[152]

These factors give companies specific characteristics to look at as they try to determine whether a potential client would be consid-

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[149] *Carson Order, supra note 148,* at 5.

[150] U.S. v. Aguilar, 783 F. Supp. 2d at 1115.

[151] The definition of foreign official says "any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . ." Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).

[152] U.S. v. Aguilar, 783 F. Supp. 2d at 1115.

ered an instrumentality of a foreign government. The district court also mentioned that "this is a fact-specific question that depends on the nature and characteristics of the business entity."[153] Furthermore, it should be noted that none of these factors are dispositive in this analysis.[154] In fact, in *Carson*, the court said that even complete ownership is insufficient on its own to make an entity an instrumentality for FCPA purposes.[155] The court added that the DOJ's burden to prove that an SOE is an instrumentality is a "substantial evidentiary burden."[156]

From these cases, it is clear that the "instrumentality" provision can be interpreted to include SOEs, meaning an SOE's employees can be considered foreign officials under the FCPA.[157] This certainly does not mean that all entities with state ownership will be considered instrumentalities, as these opinions have made clear.[158] However, because every case is fact-specific, and the courts have looked at each on a case-by-case basis,[159] there is still a significant amount of uncertainty on the subject.[160]

IV. PROPOSAL

Finding problems with the FCPA's "instrumentality" provision and the DOJ's interpretation is far easier than offering workable solutions. For example, one prevalent proposal is that Congress should amend the FCPA again to further define "foreign official" or "instrumentality."[161] However, this proposal ignores the fact that Congress is the source of the current text of the statute, and any amendments could make these terms even more confusing. Another proposal is that Congress or the DOJ should specifically state what percentage of government ownership or control is required for an entity to be considered an instrumentality.[162] This is unworkable in practice and would not be beneficial for the DOJ or U.S. industries. As the *Resource Guide* and U.S. courts have said, ownership and control are not the only relevant factors in this analysis.[163] For example, setting the standard at over 50 percent of government ownership would mean that the DOJ's en-

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[153] Carson Order, *supra* note 148, at 12.
[154] *Id.* at 5.
[155] *Id.*
[156] *Id.* at 16.
[157] *See* 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).
[158] U.S. v. Aguilar, 783 F. Supp. 2d at 1115; Carson Order, *supra* note 148, at 13.
[159] *E.g.*, Carson Order, *supra* note 148, at 12.
[160] *E.g.*, *State-Owned Enterprises*, *supra* note 146 at 4.
[161] *E.g.*, RESTORING BALANCE, *supra* note 1, at 27.
[162] *Id.*
[163] RESOURCE GUIDE, *supra* note 14, at 20.

forcement efforts would be frustrated where a government's level of ownership is below that number even if there is significant government control.[164] On the other hand, a company whose government ownership exceeds 50 percent but by all other indicators appears to function outside of government influence and control could be an instrumentality and result in FCPA liability for companies that are not careful.

These proposals also lack an understanding of the fact-specific nature of the analysis, which has been emphasized by both the DOJ[165] and the courts.[166] Even with useful additional guidance, such as the *Resource Guide*, it must still be applied to the facts of each case. U.S. companies would likely have an equally difficult time figuring out whether those new definitions and guidelines apply to the entity with which they are doing business.

Congress could eliminate this confusion by prohibiting all forms of foreign bribery and not just bribery of foreign officials.[167] By making it illegal to bribe anyone, U.S. law would no longer require the DOJ, federal courts, or U.S. companies to determine what an instrumentality is because every employee of every foreign entity would be covered. In the meantime, U.S. companies must deal with the ambiguity of the "instrumentality" provision. Energy companies in particular will continue to face difficulties due to the number of SOEs, the large variety of corporate structures, and pervasive government ownership and control in the industry.[168] However, energy companies do not need Congress to act to prevent FCPA liability under these provisions. They can take actions to protect themselves from FCPA liability arising out of ambiguous scenarios involving SOEs and their employees. This can be done through rigorous corporate compliance programs that prohibit any form of bribery.[169] In essence, energy companies should treat all foreign companies as if they were instrumentalities of foreign governments and all foreign colleagues as if they were foreign officials.[170]

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[164] The DOJ specifically referred to such an example in its recently published guidance. *Id.* at 21.

[165] *See id.* at 20.

[166] Carson Order, *supra* note 148, at 12.

[167] Some have proposed this as an action that the U.S. should take. *E.g.,* Peter Jeydel, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 GEO. J. INT'L L. 523, 529 n.29 (2012) (citing GLOBAL FIN. INTEGRITY, *supra* note 23, at 1).

[168] *See supra* Section II ("Background"), Subsection C ("'Instrumentality' in the Energy Industry").

[169] Some companies have already created compliance programs to do so. GLOBAL FIN. INTEGRITY, *supra* note 23, at 1.

[170] Companies have begun doing so to specifically avoid trouble under the "foreign official" provision. *Id.*

Such a compliance program might appear excessive, but it is the safest way to ensure that no FCPA liability arises under these provisions.

This type of compliance program should not be difficult to create, considering the impact of other statutes on energy companies. The Bribery Act became effective in the United Kingdom ("UK") in 2011,[171] and the statute clearly has already had a significant influence on energy companies and their anti-bribery compliance programs.[172] The Bribery Act criminalizes bribery of foreign public officials[173] *and* anyone else.[174] This means that any form of bribery is a criminal act under the Bribery Act.[175] A company is also liable for failing to prevent bribery committed by persons associated with the company.[176] The jurisdictional reach of the Bribery Act is significant: in addition to any relevant act or omission that occurs within the UK,[177] jurisdiction also exists for violations occurring outside of the UK made by a person with a "close connection" to the UK."[178] Furthermore, regarding a company's failure to prevent bribery, jurisdiction exists for any corporation or partnership "which carries on a business, or part of a business, in any part of the United Kingdom."[179] There is jurisdiction regardless of where the corporation or partnership is incorporated or formed,[180] and also regardless of where the act in question occurs.[181]

Therefore, because most, if not all, energy companies have offices in the UK or do at least some business there,[182] they are subject

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[171] Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89, 96 (2012).

[172] *See, e.g.*, ANGLO AMERICAN PLC ET AL., PRINCIPLES FOR AN ANTI-CORRUPTION PROGRAMME UNDER THE UK BRIBERY ACT 2012 IN THE ENERGY & EXTRACTIVES SECTOR (2011), *available at* http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/e_s_assets/e_s_assets_2010/downloads_pdfs/Principles_for_an_AntiCorruption_Programme.pdf (last visited Dec. 14, 2012).

[173] Bribery Act, 2010, c. 23, § 6 (Among other factors, the statute generally says: "A person ('P') who bribes a foreign public official ('F') is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.").

[174] *Id.* § 1 ("A person ('P') is guilty of an offence if . . . P offers, promises or gives a financial or other advantage *to another person* . . ." in exchange for the stated business advantages. (emphasis added)).

[175] *E.g.*, Jordan, *supra* note 171, at 96.

[176] Bribery Act, 2010, c. 23, § 7.

[177] *Id.* § 12(1).

[178] *Id.* § 12(2)–(3). This includes British citizens, companies incorporated in the UK, and primary residents of the UK, among others. *See id.* § 12(4).

[179] *Id.* § 7(5).

[180] *Id.*

[181] *Id.* § 12(5).

[182] *E.g.*, *United Kingdom: Contact Us*, CHEVRON, http://www.chevron.com/countries/unitedkingdom/contactus/ (last visited Dec. 13, 2012); *Contact Us*, SHELL,

to the Bribery Act's provisions.[183] As a consequence, these companies should already have mechanisms in place to prevent bribery of all foreign persons, including employees of entities that the DOJ considers to be instrumentalities under the FCPA.[184] Knowing that most, if not all, of the world's energy companies face the same legal constraints should provide some comfort to U.S. energy companies who are concerned about losing business as a result of such a substantial upgrade to their compliance programs.[185] Furthermore, the DOJ warns in the *Resource Guide* that "whether an entity is an instrumentality of a foreign government or a private entity, commercial (i.e., private-to-private) bribery may still violate the FCPA's accounting provisions, the Travel Act, anti-money laundering laws, and other federal . . . laws."[186] In sum, in the face of potential liability under the FCPA, other U.S. laws, and the Bribery Act, energy companies have plenty of incentives to strengthen their enforcement mechanisms to prevent all forms of bribery to employees of any foreign entity.

V. CONCLUSION

The DOJ is closely watching the energy industry and bringing a number of actions against companies that violate the FCPA.[187] The "instrumentality" provision of the FCPA is particularly ambiguous for the energy industry due the number of SOEs and range of corporate structures in the industry.[188] However, the provision has significant implications because employees of instrumentalities are considered foreign officials under the FCPA, which means that they cannot be bribed.[189] The DOJ has interpreted "instrumentality" to include

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http://www.shell.co.uk/home/content/gbr/footer/contact_us/ (last visited Dec. 13, 2012); *Cutting Edge Technology in the UK*, PETROBRAS, http://www.petrobras.com/en/countries/united-kingdom/united-kingdom.htm (last visited Dec. 13, 2012).

[183] Bribery Act, 2010, c. 23, § 7(5).

[184] *E.g.*, Jordan, *supra* note 171, at 89.

[185] A common complaint from U.S. companies of all industries is that the FCPA causes them to lose business to companies that do not have similar laws in their countries. *E.g.*, Jessica A. Lordi, Note, *The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators*, 44 CASE W. RES. J. INT'L L. 955, 984–85 (2012). One estimate listed the annual amount of lost export revenue at $1 billion. RESTORING BALANCE, *supra* note 1, at 6 (citing MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL30079, FOREIGN CORRUPT PRACTICES ACT 2 (1999)).

[186] RESOURCE GUIDE, *supra* note 14, at 21.

[187] Tippee, *supra* note 5 (citing TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2011 9 (2011)).

[188] *See supra* Section II ("Background"), Subsection C ("'Instrumentality' in the Energy Industry").

[189] *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).

SOEs,[190] and federal courts thus far have largely agreed with the DOJ.[191] Industry groups and scholars have disagreed with these interpretations, and many have asked for more guidance.[192] The DOJ has responded with factors that industries can use in assessing whether an entity is an instrumentality.[193] However, energy companies must still exercise caution because the analysis is very fact-specific and performed on a case-by-case basis.[194]

Because of the ambiguities surrounding the "instrumentality" provision,[195] and the DOJ's broad interpretation of it,[196] it is not advisable for energy companies to attempt to maneuver through these provisions and risk FCPA liability. Instead, it would be best for companies to strengthen their compliance programs in order to treat any foreign entity as if it were an instrumentality of a foreign government.[197] While this may appear to be a severe measure, the Bribery Act and other statutes make such compliance programs necessary.[198] Most importantly, it is the most effective method that companies can use to prevent FCPA liability when working with foreign energy companies.

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[190] RESOURCE GUIDE, *supra* note 14, at 20.
[191] *See, e.g.*, Carson Order, *supra* note 148, at 12.
[192] *E.g.*, Westbrook, *supra* note 20, at 576.
[193] RESOURCE GUIDE, *supra* note 14, at 20–21.
[194] *See, e.g.*, *id.* at 20.
[195] RESTORING BALANCE, *supra* note 1, at 24.
[196] *Id.*
[197] Some companies have already begun doing so. GLOBAL FIN. INTEGRITY, *supra* note 23, at 1.
[198] *E.g.*, Jordan, *supra* note 171, at 89.