I. INTRODUCTION

Enforcing the Foreign Corrupt Practices Act (“FCPA”) is, according to some, the Department of Justice’s top priority behind protecting the United States from terrorism. Yet, despite its status as a powerful regulator of business conduct, the statute’s key element is shrouded in mystery and only recently drew the attention of a federal circuit court for the first time. The explosion in FCPA enforcement since the second George W. Bush administration has transformed the FCPA from an afterthought to a “crown-jewel practice” for major law firms, as well as the subject of substantial media scrutiny. In the wake of the Watergate scandal, Congress passed the FCPA in 1977. The FCPA features two primary provisions. It mandates a series of bookkeeping measures designed to ensure a reasonable degree of oversight over a business entity’s outgoing payments. And, more significantly, the FCPA anti-bribery provisions grant the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) authority to bring criminal or civil charges against corporations and individuals who bribe a “foreign official” in order to obtain a business advantage. From 1977 until the early 2000s, DOJ and SEC brought just a few cases per year between them. However, during President George W. Bush’s second term, Alice Fisher, head of DOJ’s Criminal Division, established a unit devoted exclusively to FCPA enforcement. Staffed with only two prosecutors at its founding, the unit has grown tenfold in the few years since.

Despite the explosion of FCPA enforcement activity, there remains only one significant circuit court ruling interpreting the statute, and that ruling pertains to a single definitional issue regarding what constitutes a proscribed payment. The lack of judicial interpretation is a result

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5 See id.
6 Tor Krever, Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act, 33 N.C. J. INT’L L. & COM. REG. 83, 87 (2007) (“The FCPA was passed by the U.S. Congress in December 1977 as a response to the Watergate scandal and to a Securities and Exchange Commission (SEC) investigation that uncovered over $300 million of questionable payments by U.S. firms to foreign government officials. An SEC report listed some 527 companies which had disclosed such payments, including major U.S. corporations such as Exxon Mobil, Boeing, Northrop Grumman, Lockheed Martin, and Gulf Oil.”).
8 Id. § 78dd-l(a)(1).
9 See Priya Cherian Huskins, FCPA Prosecutions: Liability Trend to Watch, 60 STAN. L. REV. 1447, 1449 (2008) (“Between 1978 and 2000, the SEC and the DOJ together averaged only about three FCPA-related prosecutions a year.”).
10 See Palazzolo, supra note 2.
11 Id.
13 The FCPA stipulates that, for a bribe to be illegal, it must be for the purpose of “obtaining or retaining business.” 15 U.S.C. § 78dd-l(a)(1)(B) (2012). The Fifth Circuit, in United States v. Kay, interprets “obtain[] or retain[] business” broadly to incorporate a wide range of business advantages obtained via bribery, such as a reduction in import taxes. 359 F.3d. 738, 755 (5th Cir. 2004). Interestingly, this ruling preceded the ramped-up enforcement.
of corporations’ tremendous fright at challenging government charges at trial.\(^\text{14}\) Rather than go to trial, corporate defendants routinely settle, plead guilty, or enter into deferred prosecution agreements (“DPAs”) with the government,\(^\text{15}\) occasionally forking over tens, or even hundreds, of millions of dollars to the government in the process.\(^\text{16}\) Thus, in recent years, DOJ and SEC have had carte blanche to bring charges and obtain multimillion dollar settlements from corporations with little or no judicial oversight.

Since 2005, the government has been rather aggressive in its interpretations of the statute, particularly regarding who constitutes a “foreign official.” The statute defines “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”\(^\text{17}\) The government has defined “instrumentality” increasingly broadly, going so far as to say that a telecommunications company was an “instrumentality” of the Malaysian government because its Ministry of Finance owned 43% of the firm.\(^\text{18}\) Yet the judiciary has had no meaningful opportunity to weigh in on this type of interpretation. The question of what constitutes an “instrumentality” of a foreign government is difficult, even in isolation. Further, in a world where so much business is transacted across international borders, and where states are privatizing national corporations while retaining partial ownership, what constitutes an “instrumentality” becomes an even more difficult question.

This Note seeks to shed light on ways to interpret “instrumentality” under the Foreign Corrupt Practices Act. Currently, no appellate court has ruled on the question (the Eleventh Circuit will rule on it in United States v. Esquenazi;\(^\text{19}\) oral arguments took place on October 11, 2013) and only four district court cases have addressed the issue.\(^\text{20}\) Moreover, the academy has largely ignored the definitional issue of what constitutes an “instrumentality” of a foreign government, despite this question’s centrality to FCPA enforcement.\(^\text{21}\) Thus, this Note will serve as one of the first in-depth assessments of normative and positive frameworks for defining “instrumentality” since district courts began addressing the question. This is especially timely because the Eleventh

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15 See id. at 27. DPAs are tantamount to settlements for criminal charges. Under a DPA for a fraud case, a corporate defendant will often agree to pay a criminal fine, implement controls, and admit wrongdoing in exchange for the government’s promise to drop charges. Id. at 28.

16 See Palazzolo, supra note 4.


18 Deferred Prosecution Agreement at A-9, United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. filed Feb. 22, 2011). The government’s determination was also based on other critical factors, such as the Malaysian government’s authority to make “important operational decisions.” Id.

19 See supra note 3.


21 Until very recently, only one article in the literature offered a normative or prescriptive assessment of how “instrumentality” should be defined. See Joel M. Cohen, Michael P. Holland & Adam P. Wolf, Under the FCPA, Who is a Foreign Official Anyway?, 63 BUS. LAW. 1243, 1246 (2008). However, this article was written in 2008, before any of the four district court decisions emerged and contributed to the framework of how to define “instrumentality.”
Circuit, in coming months, will become the first appellate court to rule on the question, which could open the floodgates to additional trials and appeals.

This Note advances a decidedly stringent interpretation of the term “instrumentality” and does so for a few primary reasons. First, based on the statute’s history and purpose, the particular interpretation advanced herein is the most compelling one. In addition, this Note’s interpretation generates maximum clarity, which minimizes systemic costs and maximizes enforcement. (In fact, even the U.S. Chamber of Commerce advances a similarly stringent, yet clear, interpretation of what constitutes an “instrumentality.”) Finally, given national and international trends in bribery crackdowns, it is valuable to explore the outermost bounds of what could constitute an “instrumentality” under the FCPA. The federal government’s enforcement priorities and practices have changed dramatically since 2005. There is reason to believe that they will develop further, since other nations’ foreign bribery statutes, led by the U.K. Bribery Act, are noticeably tougher than the FCPA. In a world where the United States is falling behind its peers, it makes sense that the FCPA—and especially its ambiguous elements, like “instrumentality”—could be construed as prohibiting a wider range of corrupt conduct. Businesses are in a frenzy trying to avoid FCPA liability and the judiciary has yet to contribute much to the matter, so it behooves industries to contemplate what the most stringent reasonable interpretation of “instrumentality” could be. In certain respects, it matters very little what district court judges rule, since large corporations will never allow government enforcement actions to go to trial.

Part II places the FCPA in the appropriate context by delving into the history of its passage, amendment, and enforcement, and also illuminates the pertinent ambiguities and goals. Part III assesses the range of proposed methods of interpreting “instrumentality,” based upon interpretations of the term in other contexts: the government’s enforcement history; the only three relevant district court cases that reached a verdict; and the Organization for Economic Co-operation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Part IV critiques the extant interpretive methods. Part V offers suggestions for alternative interpretive methods and anticipates counterarguments. The suggestions aim to be true to the text of the statute and its goals, while accounting for the broader goal of deterring bribery at a minimum cost to industry. Specifically, Part V argues that a corporation qualifies as an “instrumentality” of its home state whenever the government makes an equity investment above a certain percentage threshold. Further, Part V contends that government contracting firms should constitute instrumentalities under some circumstances.


24 The Bribery Act is widely referred to as “the FCPA on steroids.” See Dionne Searcey, U.K. Law On Bribes Has Firms In a Sweat, WALL ST. J., Dec. 28, 2010, at B1. See also infra text accompanying notes 160, 162.