United States v. Aguilar: District Court Attempts Clarification of the Foreign Corrupt Practices Act by Further Defining "Foreign Official"

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I. OVERVIEW

Those who work for a state-owned corporation may be considered more than just employees under the Foreign Corrupt Practices Act (FCPA).[1] The noted case stems from alleged bribes from the defendants to high-ranking employees of the Comisión Federal de Electricidad (CFE), an electric utility company owned by the Mexican government, in order to attain and retain contracts for the sale of electrical equipment.[2] The allegations state that the Lindsey Manufacturing Company (LMC), run by Keith E. Lindsey and Steve K. Lee, made payments to Grupo International (Grupo), directed by Enrique and Angela Aguilar, under the guise of commissions to their LMC representative in Mexico.[3] These payments were allegedly used to pay senior-level employees at the CFE in exchange for guaranteed contracts between the CFE and LMC.[4] The U.S. government asserted that these bribes violated the FCPA, which makes it a criminal act for an American company to bribe foreign officials for the purposes of obtaining or retaining business.[5] Under the FCPA, a "foreign official" includes "any officer or employee of a foreign

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1. United States v. Aguilar, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011).
2. *Id.* at 1109. In Mexico, the supply of electricity is solely a government function. Mexico's 1975 Public Service Act of Electricity created CFE. Under the act, the CFE is defined as a "decentralized public entity with legal personality and . . . patrimony." The governing board consists of members of the government, such as the Secretaries of Finance and Public Credit. On its Web site, the CFE is described as "a company created and owned by the Mexican government." *Id.* at 1112 (internal quotation marks omitted).
3. *Id.* at 1109, 1111. Grupo was LMC's sales representative in Mexico. *Id.* at 1111.
4. *Id.* Grupo allegedly received thirty percent of LMC's revenue from its current contracts with the CFE and this money was used to bribe CFE officials to maintain contracts with LMC. *Id.* at 1110-11.
5. *Id.* at 1109-12.

government or any department, agency, or instrumentality thereof, or of a public international organization."[6]

On October 21, 2010, the U.S. government filed a First Superseding Indictment (FSI) charging defendants Keith E. Lindsey, Steve K. Lee, and LMC (the Lindsey Defendants), and Enrique and Angela Aguilar with violating the FCPA and with conspiracy to violate the FCPA.[7] The Lindsey Defendants and Angela Aguilar moved to dismiss these charges.[8] They argued that officers or employees of state-owned corporations are not "foreign officials" for purposes of FCPA liability.[9] They insisted that statutory interpretation of the FCPA shows that a state-owned corporation is not a department, agency, or instrumentality of a foreign government.[10] More specifically, the defendants argued that any attributes that the CFE may have in common with a department, agency, or instrumentality of a foreign government are irrelevant because a state-owned corporation is not an entity that falls under FCPA liability.[11] The court denied the motion to dismiss because it found that a state-owned corporation, with the attributes of the CFE, may be an "instrumentality" of a foreign government under the FCPA.[12] The United States District Court for the Central District of California *held* that the officials whom the defendants allegedly bribed were foreign officials within the meaning of the FCPA. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011).

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6. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(h)(2)(A) (2006).
7. *Aguilar*, 783 F. Supp. 2d at 1109-11. Keith E. Lindsey was the President of LMC, while Steve K. Lee was Vice President of the company. LMC sells equipment used by electrical companies such as emergency restoration systems. Enrique Aguilar was the director of Grupo and was charged with obtaining contracts from the CFE while Angela Aguilar, also a director, managed Grupo's finances. *Id.* at 1111.
8. *Id.* at 1110.
9. *Id.*
10. *Id.* at 1110, 1113-18.
11. *Id.* at 1112-13.
12. *Id.* at 1110. The attributes of the CFE to which the court refers are:

- The entity provides a service to the . . . citizens of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, . . . in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties . . . .
- 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 . . . [governmental] functions.

Id. at 1115.

II. BACKGROUND

Discoveries concerning the widespread practice of bribing foreign officials by U.S. companies prompted Congress to enact the FCPA in 1977.[13] Congress was concerned with the domestic effects that these types of payments were having on U.S. companies as well as on foreign relations.[14] The FCPA was intended to reflect the U.S. policy that promoted development of democratic institutions and ethical behavior in business transactions abroad.[15] It required U.S. companies to be honest and transparent in their bookkeeping and to refrain from bribing public officials, political parties, or candidates for public office for the purpose of obtaining or retaining business abroad.[16]

The FCPA was amended in 1988 to clarify ambiguities in the types of payments that were and were not allowed under the Act.[17] The amendments included exceptions allowing payments to promote routine government actions, called "grease payments," and affirmative defenses allowing payments permitted by local laws or payments considered to be bona fide reasonable expenses relating to the promotion of goods and services or the execution of an existing contract with a foreign government.[18] These exceptions clarified that indirectly obtaining or retaining business through payments to foreign officials was not allowed.[19]

Due to concerns that U.S. companies were at a disadvantage amongst their foreign competitors, the FCPA was amended again in 1998.[20] These amendments conformed the FCPA to provisions of the Organisation for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[21] The OECD Convention criminalizes bribery of foreign officials "to obtain or retain business or

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13. United States v. Castle, 925 F.2d 831, 834 (5th Cir. 1991) (discussing H.R. REP. NO. 640, 95th Cong., 1st Sess. 4. (1997)).

14. *Id.*

15. The International Anti-Bribery Act of 1998, S. REP. NO. 105-277, at 1 (1998).

16. *Id.* at 1-2.

17. United States v. Kay (*Kay I*) , 359 F.3d 738, 750 (5th Cir. 2004) (discussing 15 U.S.C. §§ 78dd-1(b), (f)(3)(A)).

18. *Id.* "Routine governmental action . . . includes obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country, and scheduling inspections associated with contract performance or inspections related to transit of goods across country." *Id.* at 750-51 (internal quotation marks omitted).

19. *Id.* at 756.

20. International Anti-Bribery Act of 1998, *noted in* S. REP. No. 105-277, at 1-2.

21. *Id.* at 7. Thirty-three countries signed the OECD Convention in Paris in December 1997 and the United States subsequently signed it in 1998. *Id.* at 2.

other improper advantage in the conduct of international business" and thus the FCPA's scope expanded to include any improper advantage in business, not just those in obtaining or retaining business.[22] The OECD Convention also extends the definition of "public official" to include officials of public international organizations.[23]

The FCPA currently states:

> It shall be unlawful for any domestic concern . . . or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—
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> (1) any foreign official for purposes of—
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> (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
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> (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,
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> in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person . . . .[24]

It is important to note that the FCPA does not criminalize every payment to a foreign official, just those intended to influence an act or decision of an official in his official capacity, induce unlawful activity of the official, acquire an improper advantage, or obtain and retain business.[25] Penalties include fines of no more than $100,000, imprisonment of no more than five years, or both, for individual persons and $2,000,000 for organizations.[26] As mentioned, the FCPA has a broad definition of foreign official, which includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization."[27] It does not define "instrumentality," however, and this type of ambiguity in the FCPA's text has led to the confusion about its meaning seen in the noted case, where the defendants

22. *Id.* at 2.
23. *Id.* at 3.
24. Foreign Corrupt Practices Act, 15 U.S.C § 78dd-2(a)(1) (2006).
25. *Id.*
26. *Id.* at (g)(1)-(2)(A).
27. *Id.* at (h)(2)(A).

and the government debated Congress's intent as to whether a state-owned corporation is an instrumentality of the government.[28]

When analyzing the intent of Congress with regards to an act or statute that has international implications, courts have continuously relied on the Charming Betsy doctrine.[29] In *Murray v. Schooner Charming Betsy*, the United States Supreme Court made clear that, "an act of Congress ought never to be construed to violate the law of nations."[30] The Court stressed that this principle must be considered as a general rule of construction when analyzing a national act.[31] Under this rationale, the national policy behind the FCPA, as well as the FCPA itself, should not be construed to violate the law of nations.[32]

In a recent case involving statutory interpretation, an established method was reiterated by the United States Court of Appeals for the Ninth Circuit.[33] The court in *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.* stated that the first step in statutory interpretation was finding the plain meaning of a statutory provision, which is determined by the wording, structure, and policy of the statute; if this language is unambiguous, the plain meaning of the statutory provision is controlling.[34] The court continued by saying that if there is ambiguity in the language of a statute, then interpreting the legislative history of the statute can be the next step in finding its meaning.[35] This includes comparing the language of an amended statute to the previous language of the statute to aid in determining a statute's current meaning.[36]

The statutory analysis seen in *Levi* has previously been used to analyze Congress's intent in contested provisions of the FCPA. In *United States v. Kay* (*Kay I*), the United States Court of Appeals for the Fifth Circuit tackled the question of whether payments made to officials in order to reduce a company's customs duties and taxes fell within the FCPA's prohibition on making payments to foreign officials to "obtain or retain" business.[37] The Fifth Circuit found the language of the FCPA ambiguous and thus reviewed the FCPA's legislative history to find that the United States' signing of the OECD Convention implied that

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28. United States v. Aguilar, 783 F. Supp. 2d 1108, 1112, 1115-17 (C.D. Cal. 2011).
29. *Id.* at 1117.
30. 6 U.S. (2 Cranch) 64, 118 (1804).
31. *Id.*
32. *Id.*
33. Levi Strauss & Co. v. Abercrombie & Fitch Trading Co., 633 F.3d 1158, 1171 (9th Cir. 2011).
34. *Id.*
35. *Id.*
36. *Id.*
37. United States v. *Kay* (*Kay I*), 359 F.3d at 738, 740 (5th Cir. 2004).

Congress intended for the FCPA to apply broadly to any payments that lead to an unfair advantage, not just those that lead to obtaining or retaining business.[38] The court ultimately held that payments to reduce customs duties and taxes could fall under the "obtain or retain" business portion of the FCPA.[39]

Despite the fact that there is minimal case law prior to the noted case on whether employees of state-owned corporations are "foreign officials" under the FCPA, there have been a few settled cases where the term "foreign official" could be construed to include those working for state-owned entities or programs.[40] For example, in *United States v. Tyson Foods*, veterinarians belonging to a Mexican inspection program for meat-processing facilities were considered foreign officials because the government ran the program.[41] Tyson allegedly bribed the veterinarians to pass meat certification inspections and consequently agreed to settle the case for $4 million.[42] Another example included a case against a company, Faro Technologies, Inc., where the securities company settled an action for improper payments to a Chinese state-owned company in return for advantages over other companies.[43] A majority of FCPA actions settle.[44] Companies settle for fines, even if they dispute such fines, in order to avoid the reputational harm to the company, which would result from an indictment.[45] The statutory interpretation, and the ultimate decision of the noted case, are important in light of the lack of case law with regards to the meaning of "foreign official" under the FCPA.

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38. *Id.* at 755. The court looked at Congress's implementation of exceptions and affirmative defenses in order to narrowly define what types of payments were allowed, finding that this did not include payments that indirectly assisted in obtaining or retaining business abroad. The court also found strength in the adoption of the OECD convention as proof that any unfair advantage was not allowed. *Id.* at 755-56.

39. *Id.* at 756.

40. *See generally Foreign Officials:* United States v. Aguilar, LAW. BRIEF, Aug. 2011, at 14, 14.

41. *Tyson Foods Settles Bribery Case for $4 Million*, LAW. BRIEF, Aug. 2011, at 18, 18.

42. *Id.*

43. Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 427 (2011).

44. *A Tale of Two Laws: America's Anti-Corruption Law Deters Foreign Investment. Britain's Is Smarter*, ECONOMIST, Sept. 17, 2011, at 68 [hereinafter *A Tale of Two Laws*], *available at* http://www.economist.com/node/21529103.

45. Steve Frinsko, *Recent Trends in Foreign Corrupt Practices Act Enforcement*, 55 ADVOCATE 30, 31 (2012).

III. THE COURT'S DECISION

In the noted case, the United States District Court for the Central District of California relied in part on the method of statutory interpretation seen in *Levi*, which includes an analysis of the plain meaning of the words in the statute, its construction and its legislative history, and in part on a hypothetical, in order to determine Congress's intent to include state-owned corporations as entities that fall under the FCPA.[46] The court found that a state-owned corporation, created by statute, with a governing board comprised of high-ranking government officials, which described itself as a government agency and which performed a purely governmental function, may be an "instrumentality" of a foreign government under the FCPA.[47] The court thus ultimately held that officials working for such a state-owned entity, like the CFE officials whom the defendants allegedly bribed, could be foreign officials within the meaning of the FCPA and in the noted case were foreign officials within the meaning of the FCPA.[48]

The court carefully clarified the plain meaning of "instrumentality" of a government because the defendants in the noted case focused on the term "instrumentality" with regards to the "foreign official" definition in the FCPA.[49] The court used the method of statutory interpretation seen in *Levi*, by first determining if the plain meaning of instrumentality in the FCPA was unambiguous and thus controlling.[50] In doing so, the court adopted the defendant's dictionary definition of the word instrumentality as "an entity the government uses to accomplish its functions of setting forth and administering public policy or public affairs or exercising political authority."[51] With this definition in mind, the court responded to the defendants' argument, that entities considered to be an instrumentality of the government must share similarities between both agencies and departments of the government, by providing a nonexclusive list of such characteristics.[52] The characteristics in this list include:

- The entity provides a service to the citizens . . . of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.

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46. United States v. Aguilar, 783 F. Supp. 2d 1108, 1113-20 (C.D. Cal. 2011).
47. *Id.* at 1110.
48. *Id.*
49. *Id.* at 1113.
50. *Id.*
51. *Id.* at 1113-14.
52. *Id.* at 1115.

- The entity is financed, . . . in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties . . . .
- 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 . . . [governmental] functions.[53]

The court concluded that the CFE has all of these characteristics: it was created by statute as a public entity; the board was comprised of government officials; it described itself as a government agency on its Web site; and it performed the function of providing electricity, which the Mexican government regarded as a purely governmental function.[54] Therefore, under the plain meaning of the term "instrumentality," the CFE, as a state-owned corporation, could be an instrumentality of a foreign government and in this specific case was an instrumentality of the Mexican government.[55]

Even though the court had already decided that the CFE was an instrumentality of the Mexican government, the court continued to the next step of statutory interpretation seen in *Levi*.[56] It examined the structure of the statute, which included its object and policy, and more specifically, how the FCPA itself uses the term "instrumentality."[57] In responding to the defendants argument that the structure of the FCPA evidences a focus on government and politics, the court stated that resolving the dispute on its structure was unnecessary.[58] The court did, however, find the government's argument that the FCPA should be considered in light of the Charming Betsy doctrine persuasive.[59] Because an act of Congress should not be construed to conflict with international law, and since the United States adopted the OECD Convention, the FCPA must comply with it.[60] More specifically, the court found strength in the fact that the FCPA was meant to comply with the OECD Convention, which meant that the FCPA's definition of foreign official should match the OECD's definition of foreign official as "any person exercising a public function for a foreign country, including for a public agency or public enterprise [which] include[s] any enterprise, *regardless*

53. *Id.*
54. *Id.* at 1110.
55. *Id.* at 1115.
56. *Id.*
57. *Id.*
58. *Id.* at 1117.
59. *Id.*
60. *Id.* at 1116.

of its legal form, over which a government . . . may, directly or indirectly, exercise a dominant influence."[61] The court found that the OECD's definition should be used in this case despite Congress's failure to add "state-owned corporation" to the FCPA.[62]

The court continued to the final step of statutory interpretation seen in *Levi*, a legislative history analysis, which should be used only if ambiguity exists.[63] As mentioned, the court had already found that "instrumentality" by its plain meaning, structure, and policy, encompassed a state-owned corporation, like the CFE, as an instrumentality of the government and that the plain meaning was not ambiguous.[64] However, the court decided to summarize and respond to an analysis on the legislative history of the FCPA because it was central to the defendants' motion.[65] In the end, the court found that the legislative history of the FCPA was inconclusive as to whether Congress intended to include or exclude all state-owned corporations under the statute.[66]

Due to the fact that both the defendants and the government devoted much of their arguments on the legislative history of the FCPA, and because the court found it to be inconclusive in supporting either side, the court attempted to demonstrate Congress's intent by posing a hypothetical.[67] The hypothetical involved a state-owned oil exporting corporation in Mexico called Petróleos Mexicanos (PEMEX), whose governing board was made up of government officials and whose Web site stated that it was a government agency.[68] In this hypothetical, the Mexican government was solely responsible for exploiting and owning Mexico's natural resources and thus could create entities, like PEMEX, to manage and distribute oil.[69] Exxon and Occidental, two American petroleum companies, competed for a concession to drill in Mexican waters; Exxon bid $95 million and Occidental bid $100 million.[70] After

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61. *Id.* (internal quotation marks omitted) (alterations in original).
62. *Id.* at 1117.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1119. Defendants argued that when the United States adopted the OECD and amended the FCPA, it only added "public international organization" to the "foreign official" FCPA definition, and not the OECD's definition involving "public enterprise." The government countered that there is no reference to Congressional desire to exclude state-owned companies from the term instrumentality, and that Congress believed that the FCPA's term included state-owned corporations because it conformed to the OECD Convention's definition. *Id.* at 1118-19.
67. *Id.* at 1119-20.
68. *Id.* at 1119.
69. *Id.*
70. *Id.*

the bidding period was over, but prior to PEMEX announcing Occidental as the winner, Exxon's chairman offered the CEO of PEMEX a check for $10 million and thus PEMEX awarded the concession to Exxon.[71] The court stated that any reasonable congressional leader would find that Exxon violated the FCPA by bribing a foreign official in this hypothetical and would not consider prosecution to be beyond the boundaries of the FCPA simply because PEMEX was a state-owned corporation.[72] The court determined that the hypothetical, which had similar facts to the noted case, strengthened its decision that a state-owned corporation could be an instrumentality of the government and thus a "foreign official" could be an employee of a state-owned corporation for purposes of FCPA liability.[73]

IV. Analysis

The court in the noted case attempts to clarify the FCPA by extending the definition of "foreign official" to include employees of state-owned corporations.[74] This is not the first time that a court has had to decipher the meaning of the language in the statute, which indicates the general ambiguity and confusion resulting from the wording of the FCPA.[75] With the knowledge of this confusion and the minimal case law available, it seems strange that the court did not take the opportunity to provide a more finite clarification when extending an ambiguous term in the FCPA. The court merely stated that if a state-owned entity had "certain characteristics," laid out in the nonexclusive list that was provided, then it "may" be an instrumentality of a foreign government.[76] This begs the question as to what other characteristics would qualify a state-owned corporation as an instrumentality of a foreign government, and if one had the characteristics provided by the court in the noted case, when it would actually be an instrumentality of a foreign government.

As mentioned above, "instrumentality" is not defined under the FCPA; however, after the noted case, under certain circumstances a state-

71. *Id.* at 1119-20.
72. *Id.* at 1120.
73. *Id.* at 1110, 1120.
74. *Id.* at 1116.
75. *See* United States v. Kozeny, 493 F. Supp. 2d 693, 704 (S.D.N.Y. 2007) (discussing how "corruptly," and "willfully" are not defined by the FCPA, but that the United States Court of Appeals for the Second Circuit found "corruptly" to mean with "an intent to influence a foreign official to misuse his official position," and defined "willfully" by making an analogy (internal quotation marks omitted)); *see also* United States v. Kay (*Kay I*), 359 F.3d 738 (5th Cir. 2004) (discussing what is prohibited under "obtain or retain business").
76. *Aguilar*, 783 F. Supp. 2d at 1110, 1115.

owned company could be one.[77] This suggests that judges are to determine the status of such entities on a case-by-case basis. An American corporation, wondering whether its transactions with officials of a state-owned entity abroad might violate the FCPA, would not be able to use this decision for guidance because there is no clear definition of instrumentality, or set guidelines as to what level of ownership or control by the government qualifies an entity to be a governmental instrumentality. Due to a recent increase in FCPA actions, clear guidelines would be helpful to companies that are confused in determining when an employee of a state-owned corporation abroad is a "foreign official" under the FCPA.[78] Diminishing corporate confusion could decrease questionable behavior and eliminate excuses for such behavior at the same time.

Another concerning aspect of the noted case is the reasoning behind the court's analysis. The analysis was a response to all of the defendants' arguments: "the Court will respond to Defendants' invitation to 'look for defining similarities between agencies and departments'" and "[i]t is unnecessary to base this ruling upon the legislative history . . . [n]evertheless, because legislative history was so central to Defendants' motion, the Court will summarize the parties' contentions."[79] It was unnecessary for the court to analyze the FCPA under every step of statutory construction just to respond to the defendants' arguments, especially when the court had already decided after the first *Levi* prong of statutory construction that the plain meaning of the word "instrumentality" encompassed the CFE.[80] This suggests that the plain meaning was not unambiguous and the court was unsure in the strength of the plain meaning that they chose to define "instrumentality." Nonetheless, the court's extraneous analysis should have directly provided clear guidelines for when a state-owned corporation can be an instrumentality of a foreign government. Instead, the court admitted that the FCPA was ambiguous, acknowledged that "instrumentality" was not defined in the FCPA, and then posed a simple hypothetical with almost identical facts to the noted case to declare that when corporate actions

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77. *Id.* at 1110, 1112.

78. There were five FCPA actions in 2004, seventy-four in 2010 (the most in the history of the Act) and forty-eight in 2011. Most cases settle because litigating FCPA actions is so expensive and timely. *A Tale of Two Laws*, *supra* note 44, at 68; Patrick Ploeger et al., *United States: 2011 FCPA Enforcement Actions Reach Second-Highest Level*, MONDAQ (Feb. 1, 2012), http://www.mondaq.com/UnitedStates/x/162240/White+Collar+Crime+Fraud+2011+FCPA+Enforcement+Actions+Reach+SecondHighest+Level.

79. *Aguilar*, 783 F. Supp. 2d at 1115, 1117.

80. *Id.* at 1113-15.

with foreign officials appear to be illegal bribery, it probably is illegal bribery and thus violates the FCPA, whether the officials belong to state-owned corporations or not.[81]

In a way, the hypothetical proved the court's point well. The direct image of handing over a check to win a competition for a government contract illustrates that bribery of high-level employees of state-owned corporations is clearly illegal.[82] The hypothetical served as a warning and represents the court's desire for consistent enforcement of the FCPA, stating that if a corporation's actions with an employee of a state-owned corporation appear to be bribery, then they probably are according to the FCPA. The Fifth Circuit stated this clearly in *United States v. Kay* (*Kay II*), when it said that a man of common intelligence should know if he is "treading close to a reasonably-defined line of illegality" when bribing foreign officials.[83] The court in *Kay II* continued, saying that claiming that the FCPA is vague does not mean that one should take a risk when the line between legality and illegality is so close.[84] The court in the noted case seems to be making the same point; however, it fails to define what or where this line is. One solution could be to ask the Attorney General where the line is for one's own circumstances, which is possible under section 2(f) of the FCPA.[85] Under this section of the FCPA, the Attorney General is to establish a procedure to provide responses to individual inquiries concerning conformance with the FCPA, and after thirty days, he must issue an opinion based on this inquiry.[86] If an opinion is issued stating that the conduct in question conforms with the FCPA, a presumption of conformity with the FCPA in future enforcement actions exists.[87] An FCPA opinion will not bind another agency other than the DOJ, and it will not affect the company's obligations to any other agency.[88] The opinion is nonbinding; it is the Attorney General's opinion on whether the conduct in question would violate the FCPA, and such guidance to one company often has little value to another.[89] Although this seems like a precaution that could be taken, it seems doubtful that many companies would spend the time

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81. *Id.* at 1119-20.
82. *Id.*
83. United States v. Kay (*Kay II*), 513 F.3d 432, 442 (5th Cir. 2007).
84. *Id.*
85. Foreign Corrupt Practices Act, 15 U.S.C § 78dd-2(f)(1-2) (2006).
86. *Id.*
87. DEP'T OF JUSTICE, LAY PERSONS' GUIDE, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Apr. 8, 2012).
88. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE (1999), http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf.
89. *Id.*

asking and then waiting for an answer when conducting business because time is vital in business transactions and could open them up to further investigation.

Despite the apparent need for clarity, vagueness may be in the FCPA's best interest. Congress chose to enact the FCPA with some broad language, and by considering a state-owned corporation a potential instrumentality of the government, the court may effectively have been following the policy of prohibiting bribery of foreign officials to obtain or retain business. After the noted case, the definition of "foreign official" is stretched beyond traditional government employees; it is now broad enough to include not just main leaders, but also those officials who hold a variety of private and public positions, which is important since the lines in developing nations are blurred between privatization of state-owned enterprises and government agencies.[90] If the court in this case had excluded state-owned corporations, this would have led to continued bribery reaching those entities and officials that the FCPA was enacted to prevent.[91] The FCPA's vagueness is arguably necessary in order to include those sorts of entities, which could protect domestic corporations doing business abroad in countries with different systems and levels of government control. It is impressive that the court extended the definition of "foreign official" while still keeping it vague. It appears that the court realized that the best way to prevent the bribery of foreign officials is to maintain a broad definition of officials—one that is not finalized and thus able to adapt to changing environments. Despite this advantage, the United States will be at a disadvantage relative to foreign competitors that are allowed to bribe state-owned corporations with no repercussions, which is arguably the biggest consequence of the ruling in the noted case.[92]

Despite any arguments for or against the "foreign official" definition from the noted case, a recent U.S. House of Representatives subcommittee debate in June 2011 revealed the current concern in clarifying the term.[93] In the debate, it was mentioned that the Department of Justice (DOJ) tried to push the boundaries of the definition of "foreign official" in the noted case, and despite the clarification stating that a state-owned corporation can be an instrumentality of the government,

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90. Lillian V. Blageff, *The Foreign Corrupt Practices Act*, 2000 CORPORATE COUNSEL'S PRIMER SERIES 1, 2-3.

91. 15 U.S.C § 78dd-2(a).

92. *See* THE INTERNATIONAL ANTI-BRIBERY ACT OF 1998, S. REP. No. 105-277, at 1 (1998) (considering the relative disadvantage to U.S. companies under the FCPA).

93. Joshua Hochberg, Jason Silverman & Kevin Barnett, *Feature Comment: House Subcommittee Debates FCPA Amendments*, CONTRACTOR, June 29, 2011, ¶ 213.

private-sector witnesses at the hearing agreed that a clearer definition of "foreign official" should be added to the FCPA.[94] More specifically, the witnesses said that a clearer definition "would help corporations to train employees and ensure an appropriate level of scrutiny with regard to relationships and activities with foreign persons covered by the FCPA."[95] A DOJ representative at the debate objected to narrowing the definition of "foreign official" because that could overinclude officials in some parts of the world and underinclude them in others, due to the variety of government structures around the world.[96] However, the result of the debate suggests that legislation will be introduced to amend the FCPA.[97]

It is clear that the definition of "foreign official" is not satisfactory, even after the noted case. In fact, in February 2012, the U.S. Chamber of Commerce Institute for Legal Reform (ILR) requested guidance from the DOJ on several issues pertaining to the FCPA.[98] More specifically, the ILR asked for clarification on what types of entities are considered "instrumentalities" of a foreign government and requested that the DOJ, "identify the percentage ownership or level of control by a foreign government that ordinarily will qualify as an instrumentality, clarify that in order for a company to be considered an instrumentality it must perform governmental or quasi-governmental functions, and identify any exceptions to the foregoing general principles."[99] At the same time, two senators sent a letter to the DOJ asking for guidance on the definition of "instrumentality."[100] They argued that companies were spending too much money on FCPA compliance and that this produced negative effects "on product development, export promotion, and workforce expansion" and that clearer guidelines via the definition of "foreign official" in light of the term "instrumentality" would allow for more efficient FCPA compliance.[101] The DOJ guidance in response to these requests remains to be seen, but the attitude that the FCPA has become a tool to prosecute and threaten companies by hiding behind the vagueness

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94. *Id.* at 2.
95. *Id.*
96. *Id.*
97. *Id.*
98. Rebecca Worthington, *U.S. Chamber of Commerce Seeks Guidance Concerning the FCPA*, SQUIRE SANDERS' ANTICORRUPTION BLOG (Feb. 23, 2012), http://www.anticorruptionblog.com/us-chamber-of-commerce-seeks-guidance-concerning-the-fcpa/.
99. *Id.*
100. Letter from Senator Klobuchar and Senator Coons to Attorney General Eric Holder (Feb. 15, 2012), *available at* http://www.mainjustice.com/justanticorruption/wp-admin/documents-databases/265-2-judiciary_FCPA_02_16_12[1].pdf.
101. *Id.*

of the statute rather than focusing on clear violations has become widespread.[102]

In light of the recent passing of the United Kingdom's Bribery Act in July 2011, some are looking to it to find solutions for the FCPA.[103] The Bribery Act is modeled after the FCPA and contains a broad yet arguably clearer definition of "foreign official" than that in the FCPA.

> "Foreign public official" means an individual who—(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), (b) exercises a public function—(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organisation.[104]

It is probably too soon to tell, however, whether the Bribery Act will succeed because it has only recently issued its first conviction and guidance.[105] In the end, the noted case suggests that because the United States wants to encourage honest business practices, the court not only has to set an example of honest business practices by not allowing bribery of foreign officials from any type of government entity to attain or retain business, but it also cannot ignore such bribery and must consistently enforce the FCPA in these circumstances.

V. CONCLUSION

The conclusion in the noted case, that state-owned corporations could be instrumentalities of a foreign government and therefore those employees may be regarded as "foreign officials" under the FCPA, appears to be an attempt at clarifying the FCPA.[106] This extension of the

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102. *Justice's Bribery Racket, Courts Rebuke the Latest Prosecutorial Attack on Business*, WALL ST. J. (Feb. 16, 2012), http://online.wsj.com/article/SB10001424052970203711104577199412696071528.html.

103. *A Tale of Two Laws*, *supra* note 44.

104. Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 387 (2011).

105. *A Tale of Two Laws*, *supra* note 44. The first person convicted under the Bribery Act was a clerk working at a London court who accepted payments to drop charges. He also gave advice on how to avoid traffic penalties and would arrange bribes to drop them. *Bribe Conviction for Court Clerk Munir Patel UK-First*, BBC NEWS (Oct. 14, 2011, 10:07 PM), http://www.bbc.co.uk/news/uk-england-london-15310150; MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 GUIDANCE (2011), http://www.justice.gov/uk/downloads/legislation/bribery-act-2010-guidance.pdf.

106. United States v. Aguilar, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011).

definition, while still vague, is a smart move for the court because the court stays in ultimate control regarding the meaning on a case-by-case basis. Because the court answered the question of what instrumentality means in depth, despite having an answer already in mind, the court's explanation in the noted case was done with the purpose of proving a point rather than clarifying a term. This is clear due to the seemingly simple nature of the case, which is represented by the seemingly simple nature of the hypothetical posed by the court. Bribery is bribery, and a corporation financed by the government, run by government officials, and performing government acts according to that country, obviously is a corporation tied to the government enough to be an instrumentality of it. Because governments operate very differently around the world, it is clear that there cannot be one definition with fixed rules on what would constitute an instrumentality of a government.

It appears that the court is showing that it will strictly enforce the FCPA and a company will not succeed in arguing about the governmental status of an entity when it is obviously an instrumentality of the government. Its strong stance is to be commended but it may not be realistic. Enforcing the FCPA may prevent some bribery, but the problem may not be with the law and its level of enforcement. Bribery may just be human nature and corporations in other countries that allow it will be at an advantage. Nonetheless, an antibribery ideal is preferred, and since there is little case law on the FCPA itself, and penalties are so high, it appears that if a company is uncertain of its behavior with a state-owned corporation abroad and whether they are bribing a "foreign official," it should follow the court's advice in *Kay II* and not take the risk.

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Addendum

Since the holding in the noted case, the convictions of the Lindsey defendants, Keith E. Lindsey and Steve K. Lee, have been thrown out due to the government's withholding transcripts of FBI agents, as well as submission of false affidavits and falsehoods in the methods used to obtain both the search and the seizure warrants. The effect of this ruling on DOJ FCPA enforcement remains to be seen.[107]

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107. United States v. Aquilar, CR 10-01031 A-AHM, 2011 WL 6097144 (C.D. Cal. Dec. 1, 2011).