

# OIL, CORRUPTION, AND THE DEPARTMENT OF JUSTICE: FCPA ENFORCEMENT AND THE ENERGY INDUSTRY

WILL WHITE\*

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## I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA)<sup>1</sup> fundamentally stands for the proposition that regardless of local customs or business pressures to the contrary, American businesses should not bribe foreign officials.<sup>2</sup> The frequency of FCPA enforcement actions and severity of fines levied against American energy corporations significantly increased in the last decade.<sup>3</sup> This Note will first provide an overview of the FCPA. Second, the Note will explain how increased enforcement of the FCPA affects multinational energy companies. The Note will then describe problems with the interpretation of the FCPA as applied to energy companies by the United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC). The Note will explain how recent cases alleviate the problems raised by the DOJ's and SEC's position. Next, the Note will assess the claim made by critics of the FCPA that the FCPA puts American energy companies at a competitive disadvantage against foreign energy companies. Lastly, the Note will propose several solutions to ensure that FCPA enforcement against energy companies is more predictable, reasonable, and fair.

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\* Will White received his B.A. in Philosophy from Wake Forest University and will graduate from the University of Texas School of Law in May 2015. Will plans to return to Houston after graduation to work at the law firm of Vinson & Elkins. The author extends his deepest thanks to Professor Jay Westbrook and fellow law student Matt Usdin for their excellent editing, suggestions, and guidance on this Note, and also would like to thank the board of the Texas Journal of Oil, Gas, and Energy Law for accepting this Note for publication.

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-1 to -3, 78ff (2012)), *amended by* Foreign Corrupt Practices Act Amendments of 1988 (part of Omnibus Trade and Competitiveness Act of 1988), Pub. L. No. 100-418, 102 Stat. 1107, 1415 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff), *and* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff).

2. Priya C. Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1448 (2008).

3. Huskins, *supra* note 2, at 1449–51; Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 448–49 (2010); Lanny A. Breuer, Ass't Att'y Gen., Dep't of Justice, Address at the 24th National Conference on the Foreign Corrupt Practices Act, (Nov. 16, 2010) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>) (boasting that the DOJ's "FCPA enforcement is stronger than it's ever been—and getting stronger"); see Stuart Caplan, Orland Vidal & Clint Vance, *Complying with Energy and Natural Resources Regulations Leading Lawyers on US Energy Markets and Regulators' Attempts to Provide Oversight: What Invigorated FERC and FCPA Enforcement Activity Means for US Energy Companies*, 2014 WL 10387 1, 7 (Aspatore 2014).

## II. THE FCPA: AN OVERVIEW

### A. *The FCPA's Purpose*

The FCPA arose in the wake of two distinct corruption scandals.<sup>4</sup> The first involved Lockheed Corporation.<sup>5</sup> In 1971, Congress provided Lockheed with a \$250 million federal loan guarantee to prevent bankruptcy.<sup>6</sup> Soon afterwards, regulators discovered that Lockheed bribed several foreign governments, including Italy, Japan,<sup>7</sup> and the Netherlands.<sup>8</sup> These revelations caused embarrassing scandals in the United States and abroad.<sup>9</sup> The second scandal was Watergate, and as part of post-Watergate reforms, Congress sought to supplement domestic anti-bribery legislation with foreign anti-bribery legislation.<sup>10</sup> When signing the original bill into law President Carter proclaimed, "I share Congress' belief that bribery is ethically repugnant and competitively unnecessary."<sup>11</sup>

Although many countries have domestic anti-bribery laws, in passing the FCPA the United States became the first country to enact legislation prohibiting bribery of foreign officials.<sup>12</sup> In fact, overseas bribes were tax write-offs in several developed countries until recently.<sup>13</sup> Most other countries did not pass similar anti-bribery legislation until the late 1990s.<sup>14</sup>

After originally being adopted as an amendment to the 1934 Securities Exchange Act in 1977, the FCPA was subsequently amended in 1988 and 1998.<sup>15</sup> The provisions of the FCPA fall into two general categories: the

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4. Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354, 372 (2011) [hereinafter Spalding, *The Irony of International Business Law*].

5. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 307 (2012).

6. Spalding, *The Irony of International Business Law*, *supra* note 4, at 372.

7. *Id.*

8. Dutch Royal Prince Bernhard admitted to taking the one-million-dollar bribe shortly before his death in 2002. *Prince Bernhard 'Admitted' Taking Lockheed Bribe*, EXPATICA (Dec. 3, 2004), [http://www.expatica.com/nl/news/local\\_news/prince-bernhard-admitted-taking-lockheed-bribe-14673.html](http://www.expatica.com/nl/news/local_news/prince-bernhard-admitted-taking-lockheed-bribe-14673.html).

9. Spalding, *The Irony of International Business Law*, *supra* note 4, at 372.

10. *Id.*

11. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 913 (2010) (citing Jimmy Carter, *Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 into Law*, 2 Pub. Papers 2157 (Dec. 20, 1977), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=7036>).

12. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: the Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 501 (2011).

13. FRANCIS CHERUNILAM, *INTERNATIONAL BUSINESS: TEXT AND CASES* 653 (4th ed. 2007) (noting that France and Germany give tax write-offs for bribes given to foreign officials to secure business overseas); Westbrook, *supra* note 12, at 489 n.102.

14. See Westbrook, *supra* note 12, at 510-12.

15. See Nicholas M. McLean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1976 (2012) (describing the amendment's very few substantive changes to the Act); Westbrook, *supra* note 12, at 502 (describing the amendments).

anti-bribery provisions and the accounting provisions. The DOJ prosecutes criminal violations of the FCPA,<sup>16</sup> the SEC prosecutes civil violations of the FCPA,<sup>17</sup> and the Federal Bureau of Investigation (FBI) assists investigations.<sup>18</sup>

### B. *The Anti-Bribery Provision*

The FCPA bribery provision makes it a crime to:

(1) “willfully;” (2) “make use of the mails or any means or instrumentality of interstate commerce;” (3) “corruptly;” (4) “in furtherance of an offer, payment, promise to pay, or authorization of the payment of any more, or offer, gift, promise to give, or authorization of the giving of anything of value to;” (5) “any foreign official;” (6) “for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage;” (7) “in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.”<sup>19</sup>

The FCPA’s jurisdiction is extensive.<sup>20</sup> The provisions apply to any “issuer” that reports to the SEC or trades equity or debt on a U. S. exchange, any “domestic concern” (including U.S. citizens, nationals, and residents as well as any entity that is organized in the United States), and any “person” (including any organization), that does any act in furtherance of prohibited conduct while in the United States.<sup>21</sup>

Several elements of the above quoted statute require explanation. First, “willfully,” the primary scienter requirement, is not defined by the statute. In *United States v. Kay*, the Fifth Circuit analyzed the common law interpretation of the term “willfully” and determined that a violation of the FCPA by an individual requires that the defendant “knew that he was doing something generally ‘unlawful’ at the time of his action.”<sup>22</sup>

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16. Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *FORDHAM L. REV.* 775, 783–84 (2011).

17. Thomas, *supra* note 3, at 44 n.27 (“The SEC has typically been the safeguard of the accounting provisions, using civil actions such as injunctions to enforce the Act when the DOJ might not be able to bring criminal charges under the anti-bribery provisions.”).

18. Stevenson & Wagoner, *supra* note 16, at 784.

19. *United States v. Kay*, 513 F.3d 432, 439–40 (5th Cir. 2007) (alterations in original) (quoting 15 U.S.C. §§ 78dd-2, 78ff (2012)).

20. Anne H. Lippitt, *An Empirical Analysis of the Foreign Corrupt Practices Act*, 99 *VA. L. REV.* 1893, 1913 (2013) (finding that the DOJ’s interpretation of this extraterritorial jurisdictional grant of the FCPA is very broad and raises some very interesting questions). The author leaves most extraterritorial issues for another day and focuses on multinational energy companies, over which there is unquestionably jurisdiction through public securities offerings or a significant presence in the U.S. *Id.*

21. 15 U.S.C. §§ 78m(b)(2), 78dd-1(a) (2012).

22. *Kay*, 513 F.3d at 449–50.

Courts have made clear that the person does not have to know that the action is illegal under the FCPA at the time of performance.<sup>23</sup>

Second, the FCPA also does not define the term “corruptly,”<sup>24</sup> and defining corruption is notoriously difficult to do.<sup>25</sup> In *SEC v. Jackson*, a court thoroughly examined legislative history to help define the word “corruptly” as “an act done with an evil motive or wrongful purpose of influencing a foreign official to misuse his position.”<sup>26</sup>

Third, “anything of value” is also undefined, and the statutes and legislative history are not illuminating.<sup>27</sup> FCPA enforcement actions suggest that the enforcement agencies read this phrase literally.<sup>28</sup> Notably, there is no *de minimis* exception.<sup>29</sup>

Fourth, the meaning of “any foreign official” is controversial. The FCPA defines “foreign official” as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or 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.<sup>30</sup>

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23. *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003).

24. *Id.* at 181–82.

25. McLean, *supra* note 15, at 1972 n.1.

26. *SEC v. Jackson*, 908 F. Supp. 2d 834, 860 (S.D. Tex. 2012). See *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991) (approving the district court’s jury instruction that “corruptly” meant that “the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so,” and that “an act is corruptly done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”) (alteration in original) (internal quotation marks omitted).

27. Koehler, *supra* note 11, at 914.

28. See *Veraz Networks, Inc.* Litigation Release No. 21581, 2010 WL 2589812 (June 29, 2010) (enforcing the FCPA when \$4,500 in alleged improper gifts resulted in a \$300,000 penalty); *In re Dow Chem. Co.*, Exchange Act Release No. 55281, 2007 WL 460872 (Feb. 13, 2007) (noting that although certain improper payments “were in small amounts—well under \$100 per payment—the payments were numerous and frequent”); *Schering-Plough Corp.*, Litigation Release No. 18740, 82 SEC Docket 3732 (June 9, 2004); *In re Schering-Plough Corp.*, Exchange Act Release No. 2031, 82 SEC Docket 3644 (June 9, 2004) (suggesting that the SEC believes that bona fide charitable donations not directly involving a foreign official could violate the FCPA if made at the direction of a government employee to induce official action). In the 2010 settlement between the SEC and Veraz Networks, Inc., the type of gifts described by the SEC as “questionable” included “flowers for the wife of the CEO.” Richard Grime, Daniel Bookin & Matt Hipp, *SEC Levies \$300,000 FCPA Penalty for Misrecording Gifts and Entertainment* (July 13, 2010) (internal quotation marks omitted), <http://www.omm.com/sec-levies-fcpa-penalty-for-misrecording-gifts-and-entertainment/>. The DOJ has said that actions as trivial as paying for a taxi ride could be actionable, but asserts that it would “never” bring a case on those grounds. Alexander G. Hughes, *Drawing Sensible Borders for the Definition of “Foreign Official” Under the FCPA*, 40 AM. J. CRIM. L. 253, 261 (2013).

29. Westbrook, *supra* note 12, at 539.

30. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2012).

Although the FCPA does not explicitly list state-owned corporations as “instrumentalities,” courts and enforcement agencies apply the term to state-owned agencies.<sup>31</sup> Also, courts do not require the government to plead the name of the foreign official involved.<sup>32</sup>

Lastly, the anti-bribery provision prohibits both unlawful payments directly or indirectly to a foreign official through a third party.<sup>33</sup> Many enforcement cases involve indirect payments through agents, joint venture partners, subsidiaries, and other third parties.<sup>34</sup>

### C. Exceptions and Affirmative Defenses

The statute sets forth an exception and two affirmative defenses. First, the “routine governmental action” or “grease payment”<sup>35</sup> exception permits payments that are made for the purpose of expediting or securing performance of a “routine government action.”<sup>36</sup> The DOJ and SEC guidance manual provides examples of “routine governmental action,” such as processing papers and providing permits, licenses, police protection, mail or phone services, and power and water supply.<sup>37</sup> Significantly, such “routine” tasks should not involve the exercise of discretion by the foreign official.<sup>38</sup> No defendant has successfully defended an action in court using the “grease payment” exception,<sup>39</sup> and only one court has addressed the exception, albeit in dicta.<sup>40</sup>

Second, it is an affirmative defense if “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s . . . country.”<sup>41</sup> Defendants have invoked this defense by arguing that bribes are legal under the laws of other countries because they are common in doing business.<sup>42</sup> Courts

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31. See, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

32. *SEC v. Jackson*, 908 F. Supp. 2d 834, 854 (S.D. Tex. 2012).

33. See 15 U.S.C. § 78dd-2.

34. Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 52 (2013) (stating that “[a]lmost all FCPA corporate enforcement actions are based on principles of vicarious liability because firms can only act through their agents or employees”).

35. *United States v. Kay*, 513 F.3d 432, 443 (5th Cir. 2007).

36. 15 U.S.C. § 78dd-1(b).

37. Ivan Perkins, *Illuminating Corruption Pathways: Modifying the FCPA’s “Grease Payment” Exception to Galvanize Anti-Corruption Movements in Developing Nations*, 21 CARDOZO J. INT’L & COMP. L. 325, 331 (2013).

38. Emily N. Strauss, *“Easing Out” the FCPA Facilitation Payment Exception*, 93 B.U. L. REV. 235, 241 (2013).

39. See Perkins, *supra* note 37, at 342.

40. *Kay*, 513 F.3d at 761 (equating grease payments with “payments to foreign officials to cut through bureaucratic red tape and thereby facilitate matters”).

41. 15 U.S.C. § 78dd-1(c)(1).

42. See *United States v. Kozeny*, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008).

have soundly rejected this argument,<sup>43</sup> and some call this defense nothing more than a “hollow Hail Mary.”<sup>44</sup>

Third, it is an affirmative defense if the payment is made for a “bona fide expenditure.”<sup>45</sup> The FCPA expenditure must be related to “(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”<sup>46</sup>

#### D. FCPA Penalties

The FCPA is both a civil and criminal statute.<sup>47</sup> Criminal defendants can face up to five years in prison for violating the anti-bribery provision, and twenty years in prison for violating the FCPA’s accounting provision.<sup>48</sup> When sanctioning organizations rather than individuals, businesses can be fined up to \$2 million for violating the anti-bribery provisions and \$25 million for the accounting provision.<sup>49</sup> Often as part of settlements, companies have to disgorge the profits they received corruptly<sup>50</sup> and pay independent corporate counsel for several years.<sup>51</sup> The agencies also have the discretionary power to debar FCPA violators from contracting with the United States.<sup>52</sup> Additionally, there is no private right of action, but plaintiffs have brought RICO (Racketeer Influenced and Corrupt Organizations Act), derivative, and federal securities suits predicated on FCPA charges.<sup>53</sup> The combination of criminal liability, large civil fines, settlement costs, and related plaintiffs suits can exact high costs for violations of the FCPA.

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43. *Id.*

44. See Stevenson & Wagoner, *supra* note 16, at 792 (internal quotation marks omitted).

45. 15 U.S.C. § 78 dd-1(c)(2).

46. *Id.*

47. Koehler, *supra* note 11, at 923.

48. Stevenson & Wagoner, *supra* note 16, at 793–96.

49. *Id.* at 794.

50. Westbrook, *supra* note 12, at 556–57.

51. See, e.g., Press Release, Dep’t of Justice, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), available at <http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html>; see also Peter Jeydel, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 GEO. J. INT’L L. 523, 528 (2012) (observing that “the cost of these monitors is often multiplied by the fact that they may also look for other unrelated violations by the company”).

52. Federal Acquisition Regulation, 48 C.F.R. § 9.406-2(a) (2010); see also Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, 11-9 BRIEFING PAPERS 1, 9–17 (2011) (outlining the potential collateral consequences faced by contractors who violate the FCPA).

53. Eli Richardson, Ross Booher & Taylor Phillips, *Is That A Crime?*, 45-APR Tenn. B.J. 14, 18 (2009).

## III. LITIGATION AGAINST ENERGY COMPANIES

A. *Increasing Enforcement*

Enforcement of the FCPA has notably increased, a trend that has especially affected the energy industry. In the first two decades, the federal government averaged about three FCPA-related prosecutions a year.<sup>54</sup> Fines, when given, seldom exceeded \$1,000,000.<sup>55</sup>

Since 2000, FCPA enforcement has increased steadily.<sup>56</sup> In the last decade, the SEC and DOJ have brought about ten times more cases than in prior years.<sup>57</sup> The agencies have also substantially increased enforcement tactics and penalties.<sup>58</sup> The total amount of criminal and civil penalties for violations of the FCPA was \$1.782 billion in 2010, \$508.8 million in 2011, \$260.57 million in 2012,<sup>59</sup> and \$720 million in 2013.<sup>60</sup> In 2009, the SEC formed a special investigative unit focused solely on FCPA violations.<sup>61</sup> That same year, DOJ officials told the Los Angeles Times that enforcement of the FCPA is “second only to fighting terrorism in terms of priority.”<sup>62</sup>

Commentators have not formed a consensus explanation to account for the increased FCPA enforcement. Some have attributed increased FCPA enforcement to the government’s desire to generate revenue.<sup>63</sup> Others suggest that agencies enforce the FCPA to generate publicity for the government.<sup>64</sup> The oil and gas industry has the highest disapproval

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54. Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT’L BUS. & L. 351, 353 (2012).

55. Westbrook, *supra* note 12, at 495.

56. Lippitt, *supra* note 20, at 1903.

57. Westbrook, *supra* note 12, at 495–96.

58. Stuart Vincent Campbell, *Perception is Not Reality: The FCPA, Brazil, and the Mismeasurement of Corruption*, 22 MINN. J. INT’L L. 247, 255 (citing *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime and Drugs of the Comm. On the Judiciary*, 111<sup>th</sup> Cong. 1 (2010) (statement of Greg Andres, Acting Deputy Assistant, Att’y Gen. of the United States), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf>).

59. Lippitt, *supra* note 20, at 1907–08.

60. ARNOLD & PORTER LLP, GLOBAL ANTI-CORRUPTION INSIGHTS: UPDATE ON RECENT ENFORCEMENT, LITIGATION, AND COMPLIANCE DEVELOPMENTS 3 (Dec. 3, 2014), available at <http://www.arnoldporter.com/resources/documents/FcpaNewsletterWinter2014.pdf>.

61. Westbrook, *supra* note 12, at 559–60 (noting that the FBI formed a special FCPA investigative unit in 2007).

62. Don Lee, *Avery Dennison Case a Window on the Pitfalls U.S. Firms Face in China*, L.A. TIMES (Jan. 12, 2009), <http://articles.latimes.com/2009/jan/12/world/fg-avery12>.

63. See Andrew Brady Spalding, *Four Uncharted Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 676 (2012) [hereinafter Spalding, *Four Uncharted Corners*] (stating that “[s]everal interviewees described the U.S. enforcement process, and particularly the imposition of monetary penalties, as merely a means of padding the U.S. Treasury and offsetting the budget deficit.”); Westbrook, *supra* note 12, at 558.

64. See Westbrook, *supra* note 12, at 499–500.

rating of any industry in the United States,<sup>65</sup> making it an easy target for governmental action to boost the government's own tarnished image (the federal government has the second worst disapproval rating).<sup>66</sup> But the settlements do not go directly to the agencies themselves. A plausible reason for the increased enforcement is that such enforcement is the logical byproduct of the multinational nature of today's business.<sup>67</sup>

### B. Enforcement Against the Energy Industry

Increased enforcement of the FCPA has greatly impacted the energy industry. A large number of prosecutions under the FCPA resulted directly from an investigation connected with the United Nations Oil for Food Program.<sup>68</sup> Of the largest 20 FCPA settlements, 11 were against energy companies or arose out of energy transactions: KBR/Halliburton (\$579 million), Total S.A. (\$398 million), Eni S.p.A. (\$365 million), Technip (\$338 million), JGC Corporation (\$219 million), Pride International (\$56 million), Marubeni Corporation (\$54 million), Baker Hughes (\$44 million), Willbros (\$32 million), Chevron (\$30 million), and Tital (\$29 million).<sup>69</sup> The largest penalty in FCPA history (\$800 million against Siemens), also involved energy related payments.<sup>70</sup> In total, the energy industry has paid at least \$2.12 billion in fines under the statute, the highest of any industry by a significant margin.<sup>71</sup>

The energy industry has not just been affected by large settlements. Of the 173 total FCPA actions on a FCPA database, 46 were against companies involved in oil and gas production, 21 were against oil and gas refineries, and 34 were against other types of energy companies.<sup>72</sup> Those numbers do not include the engineering, freight forwarding, and other

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65. Frank Newport, *Americans Rate Computer Industry Best, Oil and Gas Worst*, GALLUP (August 16, 2012), <http://www.gallup.com/poll/156713/Americans-Rate-Computer-Industry-Best-Oil-Gas-Worst.aspx> (illustrating that the oil and gas industry is the least popular industrial sector in the United States: 61% of the country views the industry negatively).

66. *Id.*

67. Mike Koehler, *FCPA 101*, FCPA PROFESSOR BLOG (2014), <http://www.fcprofessor.com/fcpa-101#q19> (stating that "as more companies (large and small and across a variety of industry sectors) have moved into international markets, it is not surprising to see FCPA enforcement increase").

68. Westbrook, *supra* note 12, at 513.

69. BAKER & MCKENZIE LLP, *GLOBALIZATION OF THE SUPPLY CHAIN 6* (June 18, 2013), available at <http://www.bakermckenzie.com/files/webinars/wbtradefcpaantibriberytrendsjun13/Final%20Presentation%20-%20June%2018%202013.pdf>.

70. Press Release, SEC, SEC Charges Siemens AG with Engaging in Worldwide Bribery. (Dec. 15, 2008), available at <http://www.sec.gov/news/press/2008/2008-294.htm> (alleging that Siemens paid bribes to power plants in Israel, refineries in Mexico, and "paid kickbacks to Iraqi ministries in connection with sales of power stations and equipment to Iraq under the United Nations Oil for Food Program").

71. Clinton R. Long, *Navigating the FCPA's Ambiguous "Instrumentality" Provision: Lessons for the Energy Industry*, 12 RICH. J. GLOBAL L. & BUS. 393 (2013).

72. FCPA Database, SHEARMAN AND STERLING, [http://fcpa.shearman.com/?s=matter&mode=list&tab=list&tabmode=list&\\_so\\_list\\_from04ff1aad45ab4a779ced52eb51756690=20&\\_s\\_o\\_list\\_from04ff1aad45ab4a779ced52eb51756690\\_page=2](http://fcpa.shearman.com/?s=matter&mode=list&tab=list&tabmode=list&_so_list_from04ff1aad45ab4a779ced52eb51756690=20&_s_o_list_from04ff1aad45ab4a779ced52eb51756690_page=2) (last visited on Nov. 3, 2014).

service firms that exclusively cater to energy companies. The SEC has even acknowledged targeting the oil services industry.<sup>73</sup>

Though enforcement has increased against the energy industry, few published cases relate to energy matters because very few enforcement actions go to trial.<sup>74</sup> Almost all the published cases are against individual criminal defendants. In these cases, the DOJ and SEC have no qualms about targeting the highest-ranking members of energy companies.<sup>75</sup> For example, in *SEC v. Jackson*,<sup>76</sup> Mark Jackson—former CFO, President, and CEO of Nobel Energy Inc. (a public company)—was indicted under the FCPA for allegedly bribing Nigerian government officials, and disguising the payments as “procurement” and “special handling” payments in accounting documents.<sup>77</sup> Recently, the two former CEOs of PetroTiger Ltd. and the former general counsel were indicted in the fall of 2013 and spring of 2014.<sup>78</sup> The PetroTiger officers allegedly attempted to make payments to the bank account of a Columbian government official’s wife for consulting services she did not provide.<sup>79</sup> When this attempt failed, the defendants allegedly transferred \$333,500 dollars to a foreign official’s account in Columbia, purportedly to secure a \$39.6 million oil services contract.<sup>80</sup>

### C. *Reasons for Robust Enforcement Against the Energy Industry*

Dealing with corruption is a significant business reality for multinational energy firms doing business abroad. The table below shows the top twenty oil rich countries with their corresponding corruption ranking (out of 175 total):<sup>81</sup>

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73. Press Release, Dep’t of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigation 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>; Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-214.htm> (stating that, “[t]he FCPA Unit will continue to focus on industry-wide sweeps” (quoting Cheryl Scarboro, Chief, SEC FCPA Unit)).

74. Hughes, *supra* note 28, at 256.

75. *See, e.g.*, Lanny A. Breuer, Ass’t Att’y Gen., Dep’t of Justice, Address at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) (transcript available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>) (stating “the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations”).

76. *See SEC v. Jackson*, 908 F. Supp. 2d 834 (S.D. Tex. 2012).

77. *Id.* at 839–40.

78. Press Release, Dep’t of Justice, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), *available at* <http://www.justice.gov/opa/pr/2014/January/14-crm-007.html>.

79. *Id.*

80. *Id.*

81. Determining precise numerical estimates of petroleum reserves is a highly controversial exercise. *Oil and Gas*, COMMONWEALTH NETWORK, [http://www.commonwealthofnations.org/sectors/business/oil\\_and\\_gas/](http://www.commonwealthofnations.org/sectors/business/oil_and_gas/) (last visited Nov. 3, 2014) (noting that “[e]stimates of proven oil

<b>Proven Oil Reserves (in rough order of estimated recoverable reserves)</b>	<b>Corruption Index Rank<sup>82</sup></b>
Venezuela	160
Saudi Arabia	63
Canada	9
Iran	144
Iraq	171
Kuwait	69
United Arab Emirates	26
Russia	127
Libya	172
Nigeria	144
Kazakhstan	140
China	80
Qatar	28
United States	19
Brazil	72
Mexico	106
Algeria	94
Angola	153
India	94 (tied with Algeria above)
Ecuador	102
Azerbaijan	127

Notably, three of the top five countries with the most oil reserves are also among the bottom five percent most corrupt countries in the world: Venezuela, Iraq, and Libya.<sup>83</sup> Further, of the countries listed above, only three—Iraq,<sup>84</sup> Canada, and the United States—do not have a state-owned

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reserves are controversial and should be treated with caution; a variety of events affect future oil supplies”). To avoid such controversy, the author does not provide specific numbers for each country. Similarly, the corruption perceptions index can be somewhat controversial in academic circles. Mclean, *supra* note 15, at 2006. However, the CPI is the “best-known aggregate indicator of corruption.” Lippitt, *supra* note 20, at 1899 (internal quotation marks omitted).

82. *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2013/results> (last visited Nov. 3, 2014).

83. The link between corruption and petroleum reserves shown in the chart above is an example of the “natural resource curse.” Lippitt, *supra* note 20, at 1922. It is well documented that corporations involved in natural resource extraction invest in countries that have higher corruption scores. See Susan Rose-Ackerman & Sinéad Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 462 (2012). Empirical evidence suggests that FCPA actions are more likely to be brought in those countries with higher corruption. Lippitt, *supra* note 20, at 1897–98.

84. The state seems to own all oil reserves in Iraq, however. *Kurds Bypass Iraq Government, Build Oil Pipeline to Turkey*, NATIONAL PUBLIC RADIO (Feb. 19, 2014),

oil company.<sup>85</sup> Doing business in most countries requires dealings with the state oil company,<sup>86</sup> and therefore every employee of the company qualifies as a foreign official under the FCPA.<sup>87</sup> Even though state-owned companies have a constitutional right to produce the oil and gas under their borders, they often partner with U.S. companies for different aspects of the operations. Thus, by necessity most international petroleum business ventures in third world countries are covered by the FCPA.

Surveys indicate that energy companies doing business in corrupt countries may feel compelled to bribe. For example, a poll by Fulbright & Jaworski in 2008 of corporate law departments in the United States and the United Kingdom found that one-quarter of energy companies admit having made direct payments to foreign hosts in some circumstances.<sup>88</sup> Another study found that 67% of companies consider it impossible to conduct business in certain parts of the world without engaging in bribery and corruption.<sup>89</sup> A 2011 survey by the accounting firm KPMG found that more than 70% of corporate executives in the United States and United Kingdom agreed that “there are places in the world where business cannot be done without engaging in bribery and corruption.”<sup>90</sup> This places international energy companies in the difficult position of having to choose between conducting business in countries that are fraught with corruption and potential liability or not conducting business in such countries at all.

#### D. Foreign Policy Considerations and the Energy Industry

Energy policy is often inexorably intertwined with foreign policy.<sup>91</sup> Occasionally, foreign policy considerations have trumped the anti-

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<http://www.npr.org/2014/02/19/279405622/kurds-bypass-iraq-government-build-oil-pipeline-to-turkey>.

85. *Resource Governance Index: State-Owned Companies*, NATURAL RESOURCE GOVERNANCE INSTITUTE (2013), <http://www.resourcegovernance.org/rgi/soc>.

86. Long, *supra* note 71, at 400 (noting that in 2007 “77 percent of the world’s oil reserves [were] held by national oil companies with no private equity, and there [were] 13 state-owned oil companies with more reserves than ExxonMobil, the largest multinational oil company”) (internal quotation marks omitted).

87. Fernando Avelar, *FCPA Risks for U.S. Companies in Latin America, Renewable Energy Thrives in Brazil, and Mexico and the New PRI: Enrique Peña Nieto*, 18 L. & BUS. REV. AM. 605, 608 (2012) (providing an example that “the governments of Brazil, Colombia, Mexico and Venezuela wholly own the oil companies in their respective countries,” thus making it difficult to know when a U.S. company is more at risk for FCPA violations).

88. Lippitt, *supra* note 20, at 1897.

89. Jeydel, *supra* note 51, at 532.

90. Mike Koehler, *Survey Says*, FCPA PROFESSOR BLOG, (June 2, 2011, 5:25 AM), <http://fcpaprofessor.blogspot.com/2011/06/survey-says.html>.

91. See Nick Snow, *Witnesses Disagree on Keystone XL’s Potential US Security Impacts*, OIL & GAS JOURNAL (Mar. 15, 2014), <http://www.ogj.com/articles/2014/03/witnesses-disagree-on-keystone-xl-s-potential-us-security-impacts.html?cmpid=EnlDailyMarch172014>, for the debate over the Keystone Pipeline.

corruption purpose of the FCPA. The most apparent example is the prosecution of U.S. attorney James Giffen.<sup>92</sup> Giffen worked in Soviet Russia during the Cold War, concentrating on the area that became Kazakhstan.<sup>93</sup> After the Cold War, Giffen became a counselor to the President of Kazakhstan, “enabling him [Giffen] to become the go-to-guy for western companies seeking to obtain new contracts with the Kazakh government.”<sup>94</sup> Giffen allegedly made payments totaling approximately \$80 million to various Kazakh officials to obtain business for international oil companies.<sup>95</sup> After getting charged with violating the FCPA, Giffen sought production of documents to support a “public authority defense,”—i.e. that he acted on actual authority from the Central Intelligence Agency and other government agencies.<sup>96</sup> The court agreed that such a defense would immunize Giffen.<sup>97</sup> For several years a “substantial volume” of classified information was put under seal.<sup>98</sup> In a “mysterious turn” seven years later, the DOJ dropped the FCPA charges and let Giffen off with a minor tax charge.<sup>99</sup> After the fact, the court implied Giffen was a Cold War hero.<sup>100</sup>

Some have called the Giffen case an “embarrassment” and a “real harm. . . to the idea of the rule of law.”<sup>101</sup> But the case illustrates that sometimes national security efforts intersect with enforcement of the FCPA, especially in the energy industry. There are not any other publicized examples in the energy industry of foreign policy trumping the FCPA,<sup>102</sup> but perhaps the embarrassment from the case has deterred other DOJ and SEC efforts.

#### IV. THE DOJ AND SEC’S UNREASONABLE READING OF THE FCPA

The most pressing problem with the FCPA for the energy industry is that the DOJ and SEC do not provide a reasonable framework for interpreting the “foreign official” element.

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92. See *United States v. Giffen*, 379 F. Supp. 2d 337 (S.D.N.Y. 2004).

93. Spalding, *Four Uncharted Corners*, *supra* note 63, at 681–82.

94. *Id.*

95. *Id.*

96. See *Giffen*, 379 F. Supp. 2d at 342.

97. See *id.*

98. Spalding, *Four Uncharted Corners*, *supra* note 63, at 661, 682.

99. *Id.* at 681–82.

100. *Id.*

101. Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *IND. INT’L & COMP. L. REV.* 1, 19–20 (2013).

102. However, a similar situation emerged in Britain in the circumstances surrounding BAE Systems and its contacts with the government of Saudi Arabia. McLean, *supra* note 15, at 1985–86. The British government pressured the U.K. Serious Fraud Office to drop the case because of its potentially deleterious effects on British relations with Saudi Arabia. *Id.*

*A. Lack of a Clear Framework*

A fictitious hypothetical illustrates the central issues posed by the enforcement agencies' position on the meaning of foreign official under the FCPA. After Mexico passed energy reform,<sup>103</sup> several investors formed a company, called FrackMex, to profit from unconventional drilling in northern Mexico. Pemex owned 30% of FrackMex, and U.S. and Mexican private investors owned the other 70%. Pemex officials did not influence any decisions governing the operations of FrackMex. The CEO of FrackMex entered into a joint venture with an American company because Mexican engineers lacked the technical experience to fracture shale. One of the bidding companies, Tex Drilling, took the CEO of FrackMex to the rodeo in Houston while he was in town. FrackMex was impressed with Tex Drilling's equipment and management team, so FrackMex awarded it a contract. As routinely occurs in Mexico, Tex Drilling frequently had to pay relatively nominal sums to locals as a "toll" to secure passage to the drill sites.<sup>104</sup> Tex Drilling showed their gratitude after drilling was complete by sending the CEO a watch valued at \$500. The wells garnered about \$200 million in profit for FrackMex.

Did Tex Drillers violate the FCPA? Under the interpretation of the statute by the enforcement agencies, the answer is yes. The sole purpose of FrackMex is to make a profit and it plans to conduct business the way any other private enterprise would. However, it is still an "instrumentality" of Pemex,<sup>105</sup> so anyone employed by FrackMex is a foreign official. The CEO of FrackMex would be a foreign official even if he were a U.S. citizen and made business decisions without reporting to anyone in government. The locals who received nominal payments are foreign officials because "the FCPA applies to payments to *any* public official, regardless of rank or position."<sup>106</sup> Even though the net profit from the deal was close to \$200 million and the value of the watch, only \$500, the gift of the watch is a "valuable" improper payment.<sup>107</sup> The CEO of Tex Drilling could face jail time and Tex Drilling could potentially be liable for tens of millions of dollars.

The enforcement agencies' official position, if viewed literally, does not further the purpose of the FCPA. The government should not criminalize private business activities when the business interactions are

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103. See James Osborne, *Mexico Pitches Energy Reform*, DALLAS MORNING NEWS (Jan. 24, 2014), <http://www.dallasnews.com/business/energy/20140124-mexico-pitches-energy-reform.ece>.

104. See Joshua C. Wallenstein, *Bandits at the Well: FCPA Implications of Extortion at Well Sites in Mexico*, 6 TEX. J. OIL GAS & ENERGY L. 1, 2-5 (2011), for a fascinating first-hand account of this practice.

105. The FCPA defines "foreign official" to include "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof." 15 U.S.C. § 78dd-2(h)(2)(A) (2012) (emphasis added).

106. OECD, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION 69 (2003).

107. See *supra* note 28 and accompanying text.

neither nefarious nor corrupt, but instead are standard business practices. The FCPA was designed to combat corruption abroad and protect the United States from foreign policy embarrassment. Neither of these objectives are furthered by criminalizing standard business practices between businesses that function, for all intents and purposes, like private entities.

First, there is no dispute that foreign government leaders and employees of foreign governmental agencies are “foreign officials” under the FCPA.<sup>108</sup> For example, Gordon Brown, Angela Merkel, and Mahmoud Ahmadinejad are all unquestionably foreign officials.<sup>109</sup> The central problem posed by the definition of foreign official is whether the person in question is furthering an “instrumentality.”<sup>110</sup> “Instrumentality” is interpreted broadly and includes state-owned or state controlled entities, even when the government has only a minority stake.<sup>111</sup> The DOJ and SEC give little more guidance—indeed, the official guide spends only three out of one hundred twenty pages discussing the meaning of foreign official and instrumentality.<sup>112</sup> When asked, the agencies have declined to provide any other sensible limits to the definition.<sup>113</sup> The DOJ has admitted that under its interpretation, nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a product in a foreign country can involve a foreign official within the meaning of the FCPA.<sup>114</sup> At its discretion, the DOJ may consider any person who works for a company, from the chief executive to a mailroom clerk, to be a foreign official.<sup>115</sup> Such a position ignores the FCPA’s purpose of preventing bribery of actual public officials.

Numerous academics, practitioners, commentators, and even former U.S. Attorneys have criticized the “foreign official” element of the FCPA. Professor Mike Koehler, author and editor of the “FCPA Professor Blog” is one of the most vocal critics of the meaning of “foreign

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108. Koehler, *supra* note 11, at 91.

109. Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who is A Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1245 (2008).

110. Hughes, *supra* note 28, at 256 (stating that “the vast majority of controversy surrounding FCPA enforcement has been centered on the definition of instrumentality, and by extension, foreign official”).

111. Jeydel, *supra* note 51, at 532.

112. U.S. Dep’t of Justice, Criminal Div. & U.S. Sec. & Exch. Comm’n, Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 19–21 (2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

113. Hughes, *supra* note 28, at 257. The DOJ’s advisory opinions have elucidated only that “royal family members are not per se foreign officials as long as they do not hold an official post in the government or hold themselves out as governmental representatives.” *Id.*

114. See Juedes, *supra* note 34, at 37.

115. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

official.”<sup>116</sup> In Professor Koehler’s view, “no element is more urgently in need of judicial scrutiny than the FCPA’s ‘foreign official’ element.”<sup>117</sup> Professor Koehler bemoans the fact that “the ‘foreign official’ element simply means what the enforcement agencies say it means.”<sup>118</sup> The result is that every person in virtually every energy company is a foreign official. Some people “see no problem with this result, under the theory that commercial bribery should also be illegal.”<sup>119</sup> However, bribery as defined by the FCPA extends to business activities that are commonplace in the energy industry: development trips, thank you gifts, and payments to charities.<sup>120</sup> The justification for the stricter standard in the FCPA is that public officials should be subjected to a higher standard of conduct than private actors—a reasonable and persuasive justification. But if every employee of practically every energy company abroad is deemed a foreign official, then the result is that the higher bribery standard is applicable to standard business transactions in the energy business.

The attributes of state-owned oil companies—an independence, a profit-focus, and a worldwide footprint—make the energy industry different from other industries heavily influenced by the FCPA. For example, aerospace and defense companies are also particularly vulnerable to FCPA litigation.<sup>121</sup> The underlying purpose of the foreign official’s job in defense contracting is to further the country’s national security.<sup>122</sup> Few, if any, private commercial enterprises share this purpose of a sovereign defense department.<sup>123</sup> In contrast, a state oil company is similar in nature to many private or semi-private businesses. For instance, China’s national oil companies actually exert a high degree of independence from the Chinese government.<sup>124</sup>

Additionally, under the enforcement agencies’ interpretation of the statute, an American citizen could qualify as a foreign official. For

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116. See Koehler, *supra* note 11, at 1009. Professor Koehler feels so strongly about the issue, that he wrote a 152-page “declaration” in support of the defendants in the Carson case. Declaration of Professor Michael Koehler, United States v. Carson, No. 09-00077 (C.D. Cal. Feb. 21, 2011), available at <http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler>.

117. Koehler, *supra* note 11, at 915.

118. *Id.* at 916.

119. Jeydel, *supra* note 51, at 529.

120. *In re Schering-Plough Corp.*, Exchange Act Release No. 2032, 82 SEC Docket 3644 (June 9, 2004) (suggesting that the SEC believes that bona fide charitable donations not directly involving a foreign official could violate the FCPA if made to influence the foreign official).

121. *Understanding FCPA Enforcement Trends in the Aerospace and Defense Industry: A Launch Pad to Effective Management of Anticorruption Risks*, LATHAM AND WATKINS LLP 5 (Apr. 2013), <https://www.lw.com/thoughtLeadership/FCPA-enforcement-aerospace-defense-industry>.

122. See *id.* at 5, 8.

123. See *id.* at 5; Hughes, *supra* note 28 at 276.

124. Hughes, *supra* note 28, at 275–76.

example, a CITGO gas station attendant in Texas would be a foreign official of the government of Venezuela because CITGO is a wholly-owned subsidiary of the Venezuelan national oil company.<sup>125</sup> Under-the-table payments of low-level Americans fall outside the original purpose of the FCPA,<sup>126</sup> and yet such activity is technically covered under the legal standard adopted by the DOJ and SEC.<sup>127</sup> Further, by the DOJ's logic, employees of Bloomberg Media would be considered foreign officials because the company is 85% owned by Mayor Michael Bloomberg.<sup>128</sup>

The issues raised above illustrate that the enforcement agencies should provide a framework for energy companies to determine whether their business interactions abroad are covered by the FCPA. Even though the official position of the enforcement agencies provides no such boundaries, in practice, the enforcement agencies have mostly narrowed enforcement to high-level bribery prosecutions involving actual corrupt payments of hundreds of thousands to millions of dollars.<sup>129</sup> Thus, the real issue raised by the enforcement agencies' position is that energy companies need more explicit and clear boundaries to follow.

*B. The Cases Addressing the Foreign Official Element Provide a Welcome Framework*

The few courts that have addressed the foreign official element of the FCPA provide sensible boundaries for the definition of foreign official. Only one business entity has challenged a DOJ and SEC enforcement case through trial in the last twenty years.<sup>130</sup> Further, no Supreme Court decision has dealt with the application of the FCPA.<sup>131</sup> The process of seeking a DOJ opinion is rarely used and may just alert law enforcement to potential liability.<sup>132</sup> However, a few court opinions in the criminal docket address the ambiguity of "foreign official."<sup>133</sup> In some cases, the judge has summarily dismissed motions raising the issue.<sup>134</sup> But in 2011 several judges defined foreign official,<sup>135</sup> and in May 2014 an appellate court addressed the meaning of instrumentality under the FCPA.<sup>136</sup>

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125. Jeydel, *supra* note 51, at 540.

126. Hughes, *supra* note 28, at 269.

127. *See id.* at 269–70.

128. Jeydel, *supra* note 51, at 540.

129. Perkins, *supra* note 37, at 341.

130. Juedes, *supra* note 34, at 48; Koehler, *supra* note 11, at 927.

131. Hughes, *supra* note 28, at 256.

132. Juedes, *supra* note 34, at 51.

133. *See infra* note 135 and accompanying text.

134. *See* Order Denying Motion to Dismiss, *United States v. O'Shea*, No. 409-cr-00629 (S.D. Tex. Jan 3, 2012); Order Denying Motion to Dismiss for Mootness, *United States v. Nguyen*, No. 2:08-cr-00522-TJS (E.D. Pa. Dec. 2, 2009).

135. Hughes, *supra* note 28, at 256–57.

136. *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).

1. *United States v. Noriega et al.*

In *United States v. Noriega et al.*, two executives of Lindsey Manufacturing Company were convicted by a federal jury on May 11, 2011 for a scheme to pay bribes to Mexican government officials at the Comisión Federal de Electricidad (CFE), a state-owned utility company.<sup>137</sup> Notably, Lindsey Manufacturing Company was also criminally liable—the first FCPA-related conviction of a corporation by a jury.<sup>138</sup> During the course of trial, the defendants argued that that the CFE was not an instrumentality as a matter of law, and therefore employees of CFE were not foreign officials under the FCPA.<sup>139</sup> In an unpublished order, the court rejected the defendant's contention, listing the following factors that would qualify an entity as an instrumentality:

“[1] [t]he entity provides a service to the citizens . . . [or] inhabitants of the jurisdiction; [2] [t]he key officers and directors of the entity are, or are appointed by, government officials; [3] [t]he entity is financed . . . in large measure [by the government]; [4] [t]he entity is vested with and exercises exclusive or controlling power to administer its designated functions; and [5] [t]he entity is widely perceived and understood to be performing [governmental] functions.”<sup>140</sup>

The jury convicted the defendants of violating the FCPA, but the defendants were later acquitted because of prosecutorial misconduct unrelated to the foreign official element.<sup>141</sup> But by providing a list of reasonable, non-dispositive factors, the court provided a good framework for defining foreign official. The enforcement agencies should explicitly acknowledge these factors in future actions to provide guidance for energy companies doing business abroad.

2. *United States v. Carson*

In *Carson*, the DOJ charged employees of a valve manufacturing company—Control Components Inc.—with a conspiracy to bribe officials

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

138. *Id.*

139. Hughes, *supra* note 28, at 262.

140. *Id.* (alterations in original) (quoting Order Denying Motion to Dismiss at 9, *United States v. Noriega*, No. 2:10-cr-01031 (C.D. Cal. Apr. 20, 2011)).

141. See Order Granting Motion to Dismiss, *United States v. Noriega*, No. 2:10-cr-01031 (C.D. Cal. Dec. 1, 2011).

of state-owned utility companies.<sup>142</sup> The defendants argued that the companies at issue—Korea Hydro and Nuclear Power, PetroChina, China Petroleum Material & Equipment Corporation, China National Offshore Oil Corporation, National Petroleum Construction Company, Dongfang Electric Corporation, Guohua Electric Power, and Petronas—are not instrumentalities and therefore their employees do not qualify as foreign officials.<sup>143</sup> The court rejected the argument that, as a matter of law, state-owned enterprises are not instrumentalities.<sup>144</sup> The court reasoned that the following list of non-exhaustive factors “bear on the question of whether a business entity constitutes a government instrumentality:”<sup>145</sup>

- The foreign state’s characterization of the entity . . . ;
- 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.<sup>146</sup>

No one factor is dispositive.<sup>147</sup> The defendants pled guilty,<sup>148</sup> so a fact question remains as to whether each of the entities is an instrumentality. Again, the factors listed by the court help provide workable limitations on the meaning of foreign official.

At least one of the companies at issue in *Carson*, Petronas, should probably not be considered an “instrumentality.” Although Petronas is owned by the Malaysian government, the government does not exercise control over the company, and the company is ranked as the 8<sup>th</sup> most

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142. Order Denying Defendant’s Motion to Dismiss Counts 1 through 10 of the Indictment, *United States v. Carson*, No. SACR 09–00077–JVS, 2011 WL 5101701, at \*1 (C.D. Cal. May 18, 2011).

143. *See id.* at \*1–4.

144. *Id.* at \*5.

145. *Id.* at \*3.

146. *Id.* at \*3–4.

147. *Id.* at \*4.

148. Hughes, *supra* note 28, at 263.

profitable company in the world.<sup>149</sup> Petronas is a Fortune 500 energy company that competes with companies like Exxon, Shell, and Chevron in more than thirty countries.<sup>150</sup> In most respects, Petronas resembles those companies. Accordingly, bribery of employees of Petronas should be punished like private bribery in the commercial context, rather than under a public corruption statute like the FCPA.

### 3. *United States v. Esquenazi*

*United States v. Esquenazi* (the “Haiti Teleco” case) presented the first opportunity for an appellate court to review the foreign official element.<sup>151</sup> In *Haiti Teleco*, the DOJ charged Cinergy Telecommunications, Inc., Cinergy’s President and director, the president of Florida-based Telecom Consulting Services Corp., and two former Haitian officials with violations of the anti-bribery provisions of the FCPA, among other charges.<sup>152</sup> Although “no specific law” established Telecommunications D’Haiti, S.A.M. (Teleco) as a public entity, the national bank owned 97% of Teleco; the company’s director and board members were appointed by the Haitian president; and “government, officials, and everyone considered Teleco as a public administration.”<sup>153</sup> Several defendants facially challenged the foreign official element in a motion at the trial court.<sup>154</sup> The issue garnered high profile attention, including a letter by the Haitian Prime Minister, Jean-Max Bellerive, stating that Haiti Teleco was not a state enterprise.<sup>155</sup> The district court denied the foreign official challenge with little analysis.<sup>156</sup>

The Eleventh Circuit upheld the conviction of the defendants and affirmed the district court’s jury instructions on the meaning of

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149. 20 Most Profitable, FORTUNE, [http://archive.fortune.com/galleries/2008/fortune/0806/gallery.G500\\_biggest\\_profits.fortune/8.html](http://archive.fortune.com/galleries/2008/fortune/0806/gallery.G500_biggest_profits.fortune/8.html) (last updated July 9, 2008).

150. Koehler, *supra* note 11, at 962 (describing the 2009 enforcement action against Control Components, Inc., and the charging document in which the government claimed that Petronas was a “state-owned entit[y]” (quoting Carson Complaint at ¶ 5, *United States v. Control Components, Inc.*, No. SACR09-00162 (CD. Cal. July 22, 2009))); *see also* *United States v. Carson*, 2011 WL 5101701, at \*1.

151. *United States v. Esquenazi*, 752 F.3d 912, 922 (11th Cir. 2014); Richard L. Cassin, *U.S. v. Carson and ‘Foreign Officials,’ THE FCPA BLOG* (May 18, 2012, 12:28 AM), <http://www.fcpublog.com/blog/2012/5/18/us-v-carson-and-foreign-officials.html> (last visited March 25, 2014).

152. Press Release, Dep’t of Justice, Florida Telecommunications Company, Two Executives, an Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (July 13, 2011), *available at* <http://www.justice.gov/opa/pr/2011/July/11-crm-910.html>.

153. *Esquenazi*, 752 F.3d at 928–29 (internal quotation marks omitted).

154. Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, *United States v. Esquenazi*, No. 1:109-cr-2101-JEM (S.D. Fla. Nov. 2, 2010).

155. *See* Hughes, *supra* note 28, at 273–274.

156. Order Denying Without Prejudice Motion in Limine to Joel Esquenazi, No. 1:09-cr-21010-JEM (S.D. Fla. Nov. 16, 2010).

“instrumentality” under the FCPA.<sup>157</sup> The court then defined “instrumentality” under the FCPA as an entity that is (a) “controlled by the government of a foreign country” and that (b) “performs a function the controlling government treats as its own.”<sup>158</sup> The court provided a list of factors to determine whether a foreign government controls an entity, including:

[1] whether the government has a majority interest in the entity; [2] the government’s ability to hire and fire the entity’s principals; [3] the extent to which the entity profits, if any, go directly into the governmental fisc, and by the same token, the extent to which the government funds the entity if it fails to break even; and [4] the length of time these indicia have existed.<sup>159</sup>

The court also discussed the second element of its definition of an instrumentality: deciding if the entity performs a function the government treats as its own.<sup>160</sup> For this element, the court cited the Organization for Economic Co-Operation and Development (OECD) Anti-Bribery Convention and stated that:

[c]ourts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.<sup>161</sup>

On balance, energy companies have nothing to fear from these recent cases interpreting the FCPA. Indeed, defendants should be more willing to challenge FCPA actions in court. These decisions recognize that some state-owned enterprises may constitute instrumentalities. But the factors given by the court are more commercially reasonable than the DOJ and SEC’s official definition of instrumentality. For example, applying the factors from *Carson*, *Noriega*, and *Haiti Teleco* to the hypothetical presented above, FrackMex would have a strong argument that it is not an instrumentality of Mexico because (1) the government of Mexico was not involved with business decisions of FrackMex, (2) a majority of the company was owned by private investors, and (3) the business purpose of FrackMex is similar to a number of private businesses. Thus, judicial

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157. *Esquenazi*, 752 F.3d at 925.

158. *Id.*

159. *Id.*

160. *Id.* at 926.

161. *Id.*

oversight alleviates the effects of the DOJ and SEC's positions and courts will likely take a more active role in defining the parameters of "instrumentality" in the FCPA.

#### V. ARE AMERICAN ENERGY COMPANIES AT A COMPETITIVE DISADVANTAGE BECAUSE OF THE FCPA?

The primary criticism of the FCPA from media commentators has been that American companies are at a competitive disadvantage when doing business abroad.<sup>162</sup> This section will assess the validity of this claim as applied to American energy companies.

##### *A. Many Argue that American Companies are at a Competitive Disadvantage Because of the FCPA*

From the beginning of its enactment, many have argued that the FCPA hurts the competitiveness of American companies. In congressional hearings over the enactment of the FCPA in 1975, the CEO of Lockheed Martin suggested that penalizing firms for granting kickbacks would put U.S. firms at a competitive disadvantage.<sup>163</sup> A survey in the early 1980s of four hundred stockholders of publically held corporations and four hundred certified public accountants documented the belief that the anti-bribery provisions of the FCPA cause U.S. companies to lose business.<sup>164</sup>

The U.S. Chamber of Commerce says the FCPA has a "chilling effect" on U.S. businesses competing with foreign companies.<sup>165</sup> Corporations say that enforcement deters foreign investment.<sup>166</sup> During the Clinton Administration even the U.S. Government argued that the FCPA causes U.S. businesses to lose contracts abroad.<sup>167</sup> It makes intuitive sense that increased enforcement would adversely affect multinational companies' ability to compete; U.S. companies either will not enter corrupt markets, or they will enter corrupt markets, but not bribe, and in doing so lose contracts to foreign companies that engage in bribery without fear of penalty.<sup>168</sup> In such instances, foreign officials are still able to benefit from

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162. Paul V. Gerlach, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Testimony at the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, United States House of Representatives (Sept. 10, 1998) (concerning H.R. 4353, The International Ant-Bribery and Fair Competition Act of 1998), available at <http://www.sec.gov/news/testimony/testarchive/1998/tsty1198.txt>.

163. Lippitt, *supra* note 20, at 1893-94.

164. H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 409 n.5 (1999).

165. Ahmadi, *supra* note 54, at 367-68.

166. Spalding, *Four Unchartered Corners*, *supra* note 63, at 671.

167. Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290, 2290 (Nov. 10, 1998), reprinted in 1998 U.S.C.C.A.N. 77.

168. See Spalding, *The Irony of International Business Law*, *supra* note 4, at 391-95; (outlining China's approach to corporate bribery regulation and stating that "China has an interest in enforcing domestic prohibitions to project a more favorable image and attract foreign

corrupt practices, and American energy companies are hurt. These arguments are persuasive, but it is unclear if the actual effects on American energy competitiveness will be significant in the future.

*B. Evidence that the FCPA's Negative Effects on the Competitiveness of the American Energy Industry are Decreasing*

The academic literature on the FCPA's effect on business activity is "comprehensive[,] but has produced mixed results."<sup>169</sup> No empirical study has focused exclusively on the energy industry, so it is impossible to empirically validate the effect on American energy competitiveness.<sup>170</sup> However, several mitigating factors minimize the anti-competitive attributes of the FCPA on the energy industry.

1. The FCPA's Broad Jurisdiction

Many foreign multinational energy companies are also covered by the Act. For example, out of the IHS Energy Top 50 Companies,<sup>171</sup> thirty-one offer securities on a U.S. Stock Exchange—conferring automatic jurisdiction on those entities, although in some cases only subsidiaries are listed on the U.S. exchange.<sup>172</sup> Others likely have the minimum contacts necessary to be a "domestic concern" in the United States by having offices and a significant business presence in the United States.<sup>173</sup> For example, CITGO (owned by the national oil company of Venezuela) is a Delaware corporation, with headquarters in Houston.<sup>174</sup> Energy

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direct investment (FDI), while China's lack of meaningful overseas bribery prohibitions gives it a great competitive advantage").

169. Lippit, *supra* note 20, at 1898.

170. See COMM. ON INT'L. BUS. TRANSACTIONS, N.Y.C. BAR ASS'N TRANSACTIONS, THE FCPA AND ITS IMPACT ON INTERNATIONAL TRANSACTIONS: SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION? (Dec. 2011), available at <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf> (discussing the FCPA's impact on U.S. businesses engaging in overseas transactions without partitioning the analysis to assess the FCPA's impact on the energy industry alone); KROLL ADVISORY SOLUTIONS, 2012 FCPA BENCHMARKING REPORT: COMPLIANCE OFFICERS ASSESS BRIBERY RISK AT U.S. MULTINATIONALS (2012), <http://www.kroll.com/library/KrollAdvisorySolutionsFCPABenchmarkingReport.pdf> (same); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Economics of Foreign Bribery: Evidence from FCPA Enforcement Actions* (Working Paper, 2014), available at [https://www.stern.nyu.edu/sites/default/files/assets/documents/con\\_046060.pdf](https://www.stern.nyu.edu/sites/default/files/assets/documents/con_046060.pdf) (analyzing the effect of all DOJ and SEC enforcement actions brought under the FCPA).

171. The IHS Energy 50, formerly the PFC Energy 50, is the "definitive ranking" of the world's leading publicly traded energy companies by market capitalization. The report is available at IHS, IHS ENERGY 50: THE DEFINITIVE ANNUAL RANKING OF THE WORLD'S LARGEST LISTED ENERGY FIRMS (Jan. 2014), available at <http://cdn.ihs.com/www/energy50/IHS-Energy-50-Final-2014.pdf>.

172. See Brown, *supra* note 164, at 441–48 (describing how the SEC acquired jurisdiction over a company due to their trading of American Depository Receipts on the New York Stock Exchange).

173. 15 U.S.C. § 78dd-1(a) (2012).

174. *Company Operations*, CITGO, <http://www.citgo.com/AboutCITGO/CompanyOperations.jsp> (last visited Nov. 5, 2014).

companies that are technologically sophisticated enough to operate internationally tend to list on U.S. stock exchanges as a way to access capital or have a significant enough presence in the United States to be subject to the FCPA.<sup>175</sup> To the extent that foreign companies list on U.S. exchanges and do business in the United States, the sanctioning effect goes away: all companies become subject to the FCPA.<sup>176</sup>

International companies, especially those based in China, are increasingly listing on the U.S. capital markets.<sup>177</sup> Regulators seem to have few qualms about going after foreign companies listed on U.S. exchanges. Indeed, of the top ten largest monetary settlements in the history of the FCPA (as of January 2014), only two of the corporations are based in the United States.<sup>178</sup> Thus, as multinational companies become increasingly globalized and seek access to U.S. capital markets, the anti-competitive effect of the FCPA diminishes.

## 2. Corruption Enforcement in Other Countries

As foreign countries enact and enforce anti-bribery laws, the anti-competitive effects of the FCPA decrease. Many countries are adopting foreign anti-bribery legislation. The most attention-grabbing recent foreign anti-bribery statute is the U.K. Bribery Act,<sup>179</sup> which became effective on July 1, 2011.<sup>180</sup> Notably, the U.K. Bribery Act's extraterritorial jurisdiction is almost "endless;"<sup>181</sup> corporations that conduct "any part of a business" in the United Kingdom are covered, irrespective of whether there is any other jurisdictional nexus to the United Kingdom.<sup>182</sup> Because many multinational energy companies have offices in the U.K., or do at least some business there, they are subject to the U.K. Bribery Act's provisions.<sup>183</sup>

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175. EY, *THE BENEFITS OF LISTING ON US EXCHANGES* (2014), available at [http://www.ey.com/Publication/vwLUAssets/EY\\_-\\_The\\_benefits\\_of\\_listing\\_on\\_US\\_exchanges/\\$FILE/EY-The-benefits-of-listing-on-US-exchanges.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_The_benefits_of_listing_on_US_exchanges/$FILE/EY-The-benefits-of-listing-on-US-exchanges.pdf); CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE AND THE ENFORCEMENT DIVISION OF THE SEC, *A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT* (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

176. Spalding, *Four Uncharted Corners*, *supra* note 63, at 671.

177. *Id.* at 671–72.

178. Richard L. Cassin, *Alcoa Lands 5th on Our Top Ten List*, THE FCPA BLOG (Jan. 10, 2014, 1:08 AM), <http://www.fcpablog.com/blog/2014/1/10/alcoa-lands-5th-on-our-top-ten-list.html>.

179. Bribery Act, 2010, c. 23, § 7(5) (U.K.).

180. Press Release, Ministry of Justice, UK Clamps Down on Corruption with New Bribery Act (Mar. 30, 2011), available at <https://www.gov.uk/government/news/uk-clamps-down-on-corruption-with-new-bribery-act>.

181. See Jessica A. Lordi, *The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators*, 44 CASE W. RES. J. INT'L L. 892 (arguing that the U.K. Bribery Act reaches virtually any business that operates in the U.K. in any way, resulting in almost universal jurisdiction).

182. Bribery Act, 2010, c. 23, §§ 7, 12(5)–(6).

183. Long, *supra* note 71, at 413.

Many other countries are passing anti-bribery laws. The European Union is drafting corruption laws that make it illegal for oil and gas companies to bribe officials in resource-rich countries.<sup>184</sup> The Mexican Senate passed anti-bribery legislation in April 2012.<sup>185</sup> Brazil passed bribery legislation in 2014.<sup>186</sup> Forty countries have adopted the OECD bribery convention,<sup>187</sup> including Russia in 2012.<sup>188</sup> Signatories of the OECD Convention oblige themselves to criminalize bribery of foreign officials,<sup>189</sup> although the statutes in many member countries are not as strict as the FCPA.<sup>190</sup> Noticeably absent from the OECD bribery convention is China.

At first glance, the wide-ranging enactment of anti-bribery laws voids the “anti-competitive” argument altogether. However, according to Transparency International, only four countries—Germany, Norway, Switzerland, and the United States—are active enforcers of their anti-bribery laws.<sup>191</sup> So the net effect of the anti-bribery laws probably has not been significant to this point. However, the increasing amount of anti-bribery legislation internationally may have a greater affect in the future.

### 3. The Competitiveness of American Energy Companies

American energy companies are well positioned to succeed in the global market place, irrespective of the FCPA. A common complaint by American energy companies is that Chinese and Russian companies<sup>192</sup> “provid[e] corrupt governments . . . an attractive alternative” to U.S. companies.<sup>193</sup> The most common complaint pertains to Chinese oil companies in West Africa.<sup>194</sup> However, especially in deep offshore

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184. Gordon Kaiser, *Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations*, 34 ENERGY L.J. 193, 258 (2013).

185. *Id.*

186. Samuel Rubinfeld, *The Morning Risk Report: Brazil's Anti-Bribery Law Comes into Force*, WALL ST. J. (Jan. 29, 2014), <http://blogs.wsj.com/riskandcompliance/2014/01/29/the-morning-risk-report-brazils-anti-bribery-law-comes-into-force/>.

187. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business*, OECD, <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm> (last visited Sept. 28, 2014).

188. *Russia Joins OECD Anti-Bribery Convention*, OECD (Feb. 17, 2012), <http://www.oecd.org/russia/russiajoinsoecdanti-briberyconvention.htm>.

189. Perkins, *supra* note 37, at 345.

190. Marika Maris & Erika Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 594 (2006).

191. Jeydel, *supra* note 51, at 534.

192. Spalding, *Four Uncharted Corners*, *supra* note 63, at 667–68 (noting that these countries are sometimes called “black knights” because of their lack of concern for corruption).

193. See Elise Aiken, *Energy Justice: Achieving Stability in Oil-Producing African Nations*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 293, 303 (2011) (discussing the limitations of possible U.S. efforts to curb corruption and improve living standards in oil-producing African countries through negotiated trade conditions).

194. *Id.* Transparency within the oil and gas sector in Nigeria and Angola, Africa's largest producing countries, has historically been a problem. See ALIXPARTNERS, CORRUPTION RISK

drilling and unconventional hydrocarbon drilling on land, American energy companies (and companies on U.S. public exchanges like Statoil and BP) are unquestionably some of the most sophisticated and competitive in the world. Most Chinese officials and scholars admit that China's oil companies do not have a competitive advantage over other international oil companies in Africa, whether in technology or international operating experiences.<sup>195</sup>

The United States is in the midst of a domestic oil and gas "revolution," thanks to hydrocarbon production from "unconventional" resources, most notably shale rock.<sup>196</sup> The United States has surpassed Russia as the world's top natural gas producer,<sup>197</sup> and the United States will soon overtake Saudi Arabia as the largest oil producer.<sup>198</sup> This surge in U.S. hydrocarbon production would have seemed wildly improbable a decade ago<sup>199</sup> and can be explained by the fact that companies have learned to tap previously inaccessible oil and gas in shale and other impermeable (or "tight") rock formations.<sup>200</sup>

In recovering hydrocarbons from shale, American companies are unrivaled, largely thanks to two technological developments: directional drilling and hydraulic fracturing (or "fracking").<sup>201</sup> Horizontal wells and

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IN THE OIL AND GAS INDUSTRY (Dec. 2012), available at <http://www.alixpartners.com/en/LinkClick.aspx?fileticket=kEed2qOvmTU%3d&tabid=635>.

195. Luo Zhenxing, *Perspectives on China-Africa Oil Ties* (The Brookings Institute, Conference Paper No. 4, 2013), available at <http://www.brookings.edu/~media/Research/Files/Reports/2013/08/us%20africa%20china%20trilateral%20dialogue/All%20China%20Oil%20Papers.pdf>.

196. See Talia Buford, *Is Exporting Natural Gas a Problem?*, POLITICO (Feb. 13, 2013), <http://www.politico.com/story/2013/02/abundance-of-natural-gas-more-harm-than-good-87533.html> ("The U.S. is in the midst of a shale revolution, with fracking making accessible deposits of gas trapped deep in shale rock that a decade ago were unreachable."); see also Jennifer Hiller, *A 21st-Century Oil Boom in the Lone Star State*, SAN ANTONIO EXPRESS-NEWS (Feb. 25, 2013), <http://www.mysanantonio.com/business/article/A-21st-century-oil-boom-in-the-Lone-Star-State-4303192.php> (claiming shale production will propel oil production in the United States past some other OPEC countries); see also Jennifer Hiller, *Study: Shale Gas Boom Will Last Decades*, SAN ANTONIO EXPRESS-NEWS (Feb. 28, 2013), <http://www.mysanantonio.com/business/article/Study-Shale-gas-boom-will-last-decades-4318224.php>; see also Vicki Vaughan, *Texas is On its Way to Being 'Saudi Texas,'* SAN ANTONIO EXPRESS-NEWS (Feb. 16, 2013), <http://www.mysanantonio.com/default/article/Texas-is-on-its-way-to-being-Saudi-Texas-4284822.php> (noting the vast increase in oil production thanks to shale play).

197. BP, BP STATISTICAL REVIEW OF WORLD ENERGY (June 2013), available at [http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical\\_review\\_of\\_world\\_energy\\_2013.pdf](http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of_world_energy_2013.pdf) (reporting that U.S. production in 2012 was 681.4 billion cubic meters, compared with 592.3 for Russia).

198. INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2012 (Nov. 2012), available at [http://www.iea.org/publications/freepublications/publication/WEO2012\\_free.pdf](http://www.iea.org/publications/freepublications/publication/WEO2012_free.pdf).

199. Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 148 (2013) (discussing the impact of hydraulic fracturing technology on U.S. energy production, domestic industries, and global competitive position).

200. *Id.*

201. See Susan L. Sakmar, *The Global Shale Gas Initiative: Will the United States Be the Role Model for the Development of Shale Gas Around the World?*, 33 HOUS. J. INT'L L. 369, 370 (2011) (attributing the rapid growth in American shale gas production versus other global

fracking are used in 85% of shale deposits in the United States.<sup>202</sup> Small and midsized companies account for over 80% of U.S. shale gas production; most of the major international oil companies have shale assets, but only through purchase, not through their own development.<sup>203</sup> Chinese and Russian companies lack experience in shale, especially in fracking and directional drilling. Argentina, China,<sup>204</sup> the U.K., and possibly Poland<sup>205</sup> are “importing” American technology, equipment, and expertise.<sup>206</sup>

The competition against American energy companies in offshore drilling is relatively limited. Drilling offshore requires enormous operating capital unrivaled by perhaps any other industry. Offshore rigs can cost over \$500,000 per day to operate.<sup>207</sup> Offshore drilling also requires highly sophisticated and advanced technology.<sup>208</sup> Accordingly, few multinational energy companies can meet the capital requirements and have the sophistication necessary to drill offshore. Thus, the competition from energy firms without any U.S. ties is not especially robust.<sup>209</sup>

Some American firms continue to do business in countries perceived to be corrupt.<sup>210</sup> Often, American companies will isolate themselves from the corruption of a host country by maintaining corporate offices in self-

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producers to recent technological innovations which reduce the high costs of recovering shale gas).

202. Pu Jun and Huang Kaiqian, *China Shale Gas Goals Pipe Dreams, Experts Say*, MARKETWATCH (Aug. 26, 2013), <http://www.marketwatch.com/story/china-shale-gas-goals-pipe-dreams-experts-say-2013-08-26>.

203. Dallas Parker & John Furlow, *Is the U.S. Shale Revolution Replicable?*, HOUSTON BUSINESS JOURNAL (Aug. 21, 2013), <http://www.bizjournals.com/houston/blog/2013/08/is-the-us-shale-revolution.html?page=all>.

204. It took eleven months to drill the first horizontal shale well in China, whereas it usually takes two weeks in North America. Katie Hunt, *China Faces Steep Climb to Exploit Its Shale Riches*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/10/01/business/energy-environment/china-faces-steep-climb-to-exploit-its-shale-riches.html>.

205. See Meagan Clark, *Chevron Emerges as One of the Last Big Oil and Gas Companies Still Searching for Oil and Gas in Poland*, INTERNATIONAL BUSINESS TIMES (Mar. 31, 2014), <http://www.ibtimes.com/chevron-emerges-one-last-big-oil-gas-companies-still-searching-shale-gas-poland-1565222>.

206. See Reem Shamseddine & Olesya Astakhova, *Russia's Lukoil Hopeful of New Gas Deal in Saudi Empty Quarter*, REUTERS (Mar. 18, 2014), <http://www.reuters.com/article/2014/03/18/saudi-russia-gasidUSL6N0M602F20140318?feedType=RSS&feedName=rbssEnergyNews>.

207. Offshore Rig Day Rates, <http://www.rigzone.com/data/dayrates/>.

208. See *Offshore Drilling*, NATURALGAS (Sept. 22, 2013), <http://naturalgas.org/naturalgas/extraction-offshore/>.

209. Obliquely, the Chinese adopted this position: in 2006 a Chinese official stated that “in the field of energy, China and the United States are not competitors.” David H. Shinn, *Africa, China, and the United States, and Oil*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, <https://csis.org/story/africa-china-united-states-and-oil> (last visited Nov. 5, 2014).

210. Stevenson & Wagoner, *supra* note 16, at 803.

contained silos.<sup>211</sup> American firms do not seem to have “lost” all business to Chinese firms because of the FCPA in West Africa. In Nigeria, for example, 40% of oil exports still go to the United States.<sup>212</sup>

*C. The DOJ and SEC Deny FCPA Enforcement Harms the Competitiveness of American Companies*

Lastly, the DOJ and SEC deny that FCPA enforcement hurts the competitiveness of American companies. For example, Assistant Attorney General Lanny Breuer has said that the “bad for business” rhetoric is “exactly upside down.”<sup>213</sup> He argues that the FCPA is good for business because it creates a more fair and transparent business climate.<sup>214</sup> Regardless, the anti-competitive effects of the FCPA make intuitive sense but are likely declining because of the expanding scope of the statute’s jurisdiction, the proliferation of anti-foreign bribery legislation in other countries, and the increasing competitiveness of American energy companies,

## VI. THE WAY FORWARD?

The FCPA greatly impacts the energy industry. The literal interpretation of the FCPA by the enforcement agencies seems to be that a payment of any kind, even for development, given to any employee of a foreign energy company is covered by the Act. This view of the FCPA departs from the statute’s original purpose of combating corruption of public officials. Partly because the enforcement agencies do not seem to have abused their power in actual enforcement, providing a reasonable framework for the “foreign official” element would not negatively inhibit the enforcement agencies’ ability to combat foreign corruption. Further, providing a clearer framework would give energy companies more certainty when doing business abroad. This section will briefly outline three possible solutions: a threshold test, a balancing test, and an industry-wide exemption.

First, Congress could codify a precise list of factors defining foreign official and instrumentality.<sup>215</sup> Some propose a list of threshold factors defining an instrumentality, for example: (1) the foreign government owns more than 50% of the enterprise; (2) the entity performs traditional government functions related to health, safety, and welfare; (3) the foreign government has the sole power to appoint and remove upper-

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211. See Florian Stamm, *The Foreign Corrupt Practices Act: Keeping All Hands on the Table*, TRUST THE LEADERS, Spring 2006, at 4, available at [http://www.sgrlaw.com/resources/trust\\_the\\_leaders/leaders\\_issues/ttl15/836/](http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl15/836/).

212. Zhenxing, *supra* note 195, at 9.

213. Breuer, *supra* note 3 (internal quotation marks omitted).

214. *Id.*

215. See Long, *supra* note 71, at 408.

level officials; and (4) the entity cannot be publically traded.<sup>216</sup> In the author's view, however, a threshold list of factors to define the foreign official element would improve the clarity of the law but may unduly inhibit the enforcement agencies' ability to combat corruption abroad. For example, one can easily imagine a situation in which a company with 49% government ownership is still under the de facto control of a foreign government. Accordingly, the author prefers a non-dispositive list of factors, like the approach used by the courts in *Noriega* and *Carson*.

A multi-factored test that includes details about (1) the percentage ownership level of the government, (2) the degree of control by the foreign government, and (3) the nature of the business enterprise (i.e. whether it behaves like a private business in a competitive market), would address the problems caused by the enforcement agencies' lack of a clear position on the foreign official element. A balancing approach reflects that the distinction between public and private entities should not be subject to bright line rules. For example, the Federal Deposit Insurance Corporation and Export-Import Bank are independent corporations not directly controlled by the government, yet we would certainly consider bribery of one of their officers as official bribery. On the other hand, as described above, payments made to employees of Petronas, the Malaysian Fortune 500 energy company, seem more like commercial, private bribery. Also, a balancing test would not inhibit the enforcement agencies' ability to combat corruption because no one factor is dispositive.

Such a balancing test could be passed by Congress as an addition to the foreign official element, adopted by the judicial system, or promulgated by the enforcement agencies themselves in their guidance. All three options would be an improvement from the status quo for energy companies. Perhaps the most straightforward option is for the DOJ and SEC to clarify the foreign official element through more reasonable guidance. Instead of embracing the ambiguity of the term "foreign official," the DOJ and SEC should explicitly provide guidelines that take into account the practical realities of the international energy industry. Past interpretative guidance has been quite broad because the enforcement agencies do not want to commit themselves to an overly restrictive enforcement position and thereby limit their ability to combat corruption. But by interpreting the rules in a way that would allow for criminal prosecution for virtually any payment by any employee of an energy company based abroad, the enforcement agencies have cast too wide a net. One would think that the fact that most law students and academic commentators who have addressed the foreign official element

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216. See Hughes, *supra* note 28, at 273–76.

have criticized the enforcement agencies' position<sup>217</sup> (and thereby taken a pro-corporation position, an unusual viewpoint for academics and law students) would give the DOJ and SEC pause. The enforcement agencies should recognize that the purpose of the FCPA is deterring bribes of *public officials of government* instrumentalities. Private bribery, while undesirable, is inherently different than corruption of foreign officials. Providing parameters would help ensure that the enforcement agencies are focused on actual bribes of actual foreign officials. Further, the well-established principles behind the rule of lenity require a narrow interpretation of ambiguous criminal statutes like the FCPA.<sup>218</sup> Thus, a more refined view should be explicitly acknowledged.

A third possible solution to the issues raised by this Note is for Congress to draft an exception from the FCPA for the energy industry. No commentators have proposed an industry-wide exception and this solution likely goes too far. As recent events in Ukraine have made clear,<sup>219</sup> corruption in foreign countries can cause political and social instability. Foreign corruption hurts America's image, leads to market inefficiencies,<sup>220</sup> and harms the general populace of the foreign country where corruption takes place. Allowing foreign bribery also hurts American energy companies, partly because it leads to uncertainty and lawlessness. For example, if an official is willing to break the law by accepting a bribe in one instance, who is to say a competitor will not out-bribe the foreign official and cause the official to terminate the first agreement? Leaving foreign countries to deal with corruption themselves would increase worldwide corruption. Further, as this Note has argued, the anti-competitive aspects of the FCPA are probably declining, so there is less and less of a need for a broad exception. Energy companies, some of the most profitable businesses in the world, should not be allowed to bribe with impunity.

Some organizations are not in favor of revising the foreign official element. In 2011, the Open Society Foundations (OSF) directly responded to calls by the U.S. Chamber of Commerce in favor of amending the FCPA's foreign official element.<sup>221</sup> The OSF responded by "arguing such clarification would be both over and under inclusive, as

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217. While some commentators praise increasing FCPA enforcement generally, the author could not find a single instance of a published legal article defending the definition of "foreign official" under the FCPA.

218. See *United States v. Wright*, 607 F.3d 708, 716 (11th Cir. 2010).

219. Patrick Kingsley, *When Rebels Toured the Palace: How Does Ukraine's Presidential Compound Measure Up?*, THE GUARDIAN (Feb. 24, 2014), <http://www.theguardian.com/world/2014/feb/24/rebels-toured-palace-ukraine-presidential-compound-viktor-yanukovych> (detailing the "absurd luxury" of the home of Victor Yanukovych, Ukraine's then-recently toppled president).

220. Lippitt, *supra* note 20, at 1904.

221. Ahmadi, *supra* note 54, at 373.

public control over commercial enterprises is so diverse from country to country and in different contexts. Any clarification would run the risk of undermining the purposes of the FCPA—preventing bribery—as the rest of the world organizes public authority in a variety of ways.”<sup>222</sup> On balance, however, a clearer framework for determining whether a particular entity is an instrumentality of a foreign government and whether its employees qualify as foreign officials for the purposes of the FCPA is needed.

## VII. CONCLUSION

The new documentary, “Big Men,” produced by Brad Pitt, debuted in March 2014 and depicts corruption involving American financiers and oil companies doing business in Ghana.<sup>223</sup> Corruption in the energy industry may come under renewed scrutiny in the coming decade because of movies like *Big Men*. The word “corruption” may also take on a new meaning after President Obama’s recent claim that corruption is a “violation of basic human rights.”<sup>224</sup> The FCPA fights corruption by prohibiting bribery of foreign officials abroad, and the FCPA enforcement has a significant impact on the American energy industry. The FCPA’s foreign official element requires clearer boundaries than currently provided by the FCPA enforcement agencies. Several recent court decisions provide a sensible framework for analyzing the foreign official element. Another criticism of the FCPA is that it hurts the competitiveness of U.S. companies doing business abroad. The arguments in support of this criticism are persuasive, but the anti-competitive effects of the FCPA are decreasing.

Congress could better define the foreign official element. But a pure threshold list of factors defining foreign official may inhibit the enforcement agencies’ ability to combat foreign corruption. The more straightforward solution is for the DOJ and SEC to provide a clear list of non-dispositive factors to assist in analyzing the foreign official element.

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222. *Id.* at 374.

223. See Mark Jenkins, ‘*Big Men*’ Doing Business in Africa’s Oil Fields, NATIONAL PUBLIC RADIO (Mar. 13, 2014), <http://www.npr.org/2014/03/13/289018352/big-men-doing-big-business-in-africas-oil-fields>.

224. Spalding, *Four Uncharted Corners*, *supra* note 63, at 674 (internal quotation marks omitted).