CRAFTING A CLEARER DEFINITION OF "INSTRUMENTALITY" AFTER *UNITED STATES V. ESQUENAZI*

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ABSTRACT

The Foreign Corrupt Practices Act (FCPA) is the cornerstone of the global fight against corruption, and it has served as the inspiration for many of the anti-bribery frameworks in other countries. In a global economy where state-owned enterprises play an increasingly important role, the FCPA notably lacks a definition for what it means to be an "instrumentality of a foreign government." The Eleventh Circuit addressed this question in United States v. Esquenazi, *752 F.3d 912 (11th Cir. 2014), and the fact-based inquiry that the court produced has become the federal government's go-to rule for determining which entities qualify as an "instrumentality of a foreign government." However, ambiguity remains around what attributes will make an entity an "instrumentality."*

This Note attempts to improve upon the Esquenazi *court's "instrumentality" test. The Note discusses the present test for which entities qualify as an "instrumentality." It then compares the FCPA approach to comparable anti-bribery frameworks. Based on the Australian Criminal Code's approach to defining "public entities" for purposes of foreign bribery, the Note proposes a categorical test for determining which entities qualify as an "instrumentality of a foreign government."*

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INTRODUCTION

The Foreign Corrupt Practices Act (FCPA)[1] was enacted in response to Congress' discovery that United States businesses were devoting large sums of money to bribing officials of foreign governments.[2] Since its inception, the FCPA has become one of the leading enforcement mechanisms used to prosecute the supply-side of foreign bribery.[3] The FCPA criminalizes paying a bribe to a "foreign official" in order to obtain a business advantage.[4] Brought by both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), FCPA enforcement actions have embroiled massive corporations and resulted in immense monetary sanctions.[5]

The early 2010s saw a large increase in the number of FCPA enforcement actions initiated by the DOJ and SEC.[6] Notwithstanding the increased volume of FCPA enforcement actions and the high risk of large penalties, judicial opinions interpreting the FCPA remain rare.[7] This is largely the result of corporate defendants either settling, pleading guilty, or entering into deferred prosecution agreements (DPAs) with the government.[8] The meaning of the term "instrumentality" within the "foreign official" definition has received a relatively large amount of the FCPA's limited judicial scrutiny.[9] In *United States v. Esquenazi*, the Eleventh Circuit provided its own interpretation of what the term means—the first and only

1. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3.

2. STAFF OF S. COMM. ON BANKING, HOUS. AND URB. AFFS., 94TH CONG., REP. OF THE SEC. AND EXCH. COMM'N ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1–2 (Comm. Print 1976), *as reprinted in* Sec. Reg. & L. Rep. No. 353 (May 19, 1976).

3. *See, e.g.*, Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522 (2011).

4. *See* 15 U.S.C. § 78dd-1(a)(1). The FCPA also contains a books and records accounting provision, which is not discussed in this Note. *See id.* § 78m(b)(2).

5. *See, e.g.*, *Case Information:* United States v. Odebrecht S.A., Summarized on *Foreign Corrupt Practices Act Clearinghouse a Collaboration with Sullivan & Cromwell LLP*, STAN. L. SCH., https://fcpa.stanford.edu/enforcement-action.html?id=821 (last visited Nov. 18, 2024) ($2.6 billion penalty); *Case Information:* United States v. The Goldman Sachs Group, Summarized on *Foreign Corrupt Practices Act Clearinghouse a Collaboration with Sullivan & Cromwell LLP*, STAN. L. SCH., https://fcpa.stanford.edu/enforcement-action.html?id=821 (last visited Nov. 18, 2024) ($2.9 billion penalty).

6. *See, e.g.*, Westbrook, *supra* note 3, at 522.

7. *See* Morgan Knudtsen, *Conspiracy Liability and the FCPA: The Second Circuit's Rare Interpretation of the FCPA in* United States v. Hoskins *and Its Potential Implications*, 11 WM. & MARY. BUS. L. REV. 771, 773 (2020); Justin Epner, *Settling on an Interpretation of "Instrumentality" in the FCPA*, 2013 COLUM. BUS. L. REV. 854, 858 (2013).

8. *Id.*

9. *See, e.g.*, United States v. Esquenazi, 752 F.3d 912, 917–20 (11th Cir. 2014); *see generally* United States v. Carson, No. 09-00077-JVS, 2011 WL 5101701, at *1 (C.D. Cal. May 18, 2011) (focusing on whether state-owned companies were instrumentalities); United States v. Aguilar, 783 F. Supp. 2d 1108, 1100 (C.D. Cal. 2011) (same).

appellate court to do so.[10] Since *Esquenazi*, no other appellate court has taken up the question, and the *Esquenazi* definition has become the DOJ and SEC's go-to rule for interpreting what qualifies as an "instrumentality."[11]

This Note attempts to improve upon the definition of "instrumentality" that the *Esquenazi* court produced. Part I of this Note explains the ambiguity surrounding the meaning of "instrumentality" and why it matters for effective FCPA enforcement. Part II introduces the *Esquenazi* definition and discusses its reception by enforcement agencies, businesses, and scholars. Part III examines how comparable anti-bribery enforcement regimes define terms like "instrumentality." Finally, Part IV discusses previous proposals for refining the definition of "instrumentality" and attempts to craft a more workable model, largely influenced by the approach of the Australian Criminal Code.

I. WHY AMBIGUITY IN THE FOREIGN OFFICIAL DEFINITION MATTERS

The FCPA makes it illegal for a United States issuer, individual, domestic concern, or other covered person to offer money, gifts, or anything of value to a "foreign official" for the purpose of obtaining or retaining business.[12] The FCPA defines a "foreign official" as:

> any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or *instrumentality*, or for or on behalf of any such public international organization.[13]

While it is easy to see that a head of state, a government minister, or an employee of a state health agency, for example, would fall within this definition,[14] it is less clear what it means to be an "instrumentality" of a foreign government. Although the FCPA provides a separate statutory definition for the term "public international organization," it provides no such guidance for the term "instrumentality."[15]

In the absence of a clear statutory definition for "instrumentality," the DOJ and SEC have interpreted the term broadly.[16] According to the DOJ and SEC, state-owned or state-controlled entities (SOEs) can be instrumentalities of a foreign

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10. *See Esquenazi*, 752 F.3d at 920, 925.

11. *See* U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20 (2d ed. 2020) [hereinafter FCPA RESOURCE GUIDE 2D ED.]; Jon Jordan, U.S. v. Esquenazi: *U.S. Appellate Court Defines "Instrumentality" Under the Foreign Corrupt Practices Act for the First Time*, 6 WM. & MARY BUS. L. REV. 663, 682 (2015).

12. 15 U.S.C. §§ 78dd-1 to -3.

13. 15 U.S.C. § 78dd-1(f)(1)(A) (emphasis added).

14. Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAWS. 1243, 1245 (2008).

15. *See* 15 U.S.C. § 78dd-1(f)(1)(B).

16. FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 20.

government, although that may not always be the case.[17] Given the prevalence of SOEs in the global economy, whether their officers and employees count as foreign officials for purposes of the FCPA greatly influences the scope of the law and its use as an enforcement mechanism.[18]

Fighting corruption within SOEs is an important component of the global fight against corruption. SOEs operate in a wide range of industries, including "aerospace and defense manufacturing, banking and finance, healthcare and life science, energy and extractive industries, telecommunications, and transportation."[19] Many of these industries are more susceptible to corruption, which is compounded by the proximity of SOEs to public power.[20] A broad interpretation of what constitutes an "instrumentality" of a foreign government allows the DOJ and SEC to combat corruption and account for the varying ways that foreign governments operate in the global marketplace.[21] The DOJ and SEC have used their increasingly expansive interpretation of "instrumentality" to justify probes into new industries that were not traditionally the target of FCPA investigations.[22]

However, an expansive and ambiguous understanding of "instrumentality" also bears risk. Companies looking to do business in foreign markets crave predictability, particularly in light of the massive financial and reputational risks posed by FCPA prosecution.[23] Whether an entity qualifies as an "instrumentality" of a foreign government can be seen as a "moving target," especially as states privatize and nationalize different corporations.[24] In countries like China, where the government is "inextricably intertwined with all levels of the economy," it can be difficult to determine if a company is state-owned, state-controlled, or truly private.[25] Ambiguity can create a chilling effect on legitimate business activities, as more risk-averse players choose to avoid doing business in certain countries altogether.[26] The meaning of "instrumentality" under the FCPA should be clarified to provide more predictability to potential targets of FCPA enforcement, while also

17. *Id.*

18. *See* OECD, GUIDELINES ON ANTI-CORRUPTION AND INTEGRITY IN STATE-OWNED ENTERPRISES 3 (2019), https://web-archive.oecd.org/2021-03-08/524399-Guidelines-Anti-Corruption-Integrity-State-Owned-Enterprises.pdf. In 2019, "102 of the world's largest 500 enterprises [were] state-owned." *Id.*

19. FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 20.

20. OECD, STATE-OWNED ENTERPRISES AND CORRUPTION: WHAT ARE THE RISKS AND WHAT CAN BE DONE? 11–12 (2018), https://read.oecd-ilibrary.org/governance/state-owned-enterprises-and-corruption_9789264303058-en#page1.

21. FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 20.

22. *See* Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1, 26–27 (2011).

23. *See id.* at 27–28.

24. *See* Epner, *supra* note 7, at 888–89.

25. Matthew W. Muma, Note, *Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act*, 112 MICH. L. REV. 1337, 1342–43 (2014).

26. *See* Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L.J. 641, 663 (2017).

maintaining the DOJ and SEC's ability to prosecute corrupt bribes paid to those who wield public power.

II. THE *ESQUENAZI* COURT'S DEFINITION OF "INSTRUMENTALITY"

The definition of "instrumentality" has taken different forms over the life of the FCPA. In the "dormant" period of FCPA enforcement, the term received little attention, as most enforcement actions were targeted at relatively straightforward instances of foreign bribery involving payments to employees of government agencies.[27] As the DOJ and SEC ramped up enforcement actions in the beginning of the twenty-first century, the meaning of "instrumentality" under the FCPA—and the government's expansive interpretation of the term—has come under additional judicial scrutiny.[28] In *United States v. Esquenazi*, the Eleventh Circuit's framework embraced the government's broad understanding of "instrumentality."[29]

A. United States v. Esquenazi

As the DOJ and SEC expanded their enforcement of the FCPA based on a broad interpretation of which entities qualify as an "instrumentality" of a foreign government, several district courts addressed challenges to that broad interpretation.[30] All of these courts accepted some version of the government's broad definition.[31] These courts largely found that the "instrumentality" question was one of fact, not law.[32] The courts produced varying lists of factors to aid in making the factual determination of whether an entity qualified as an "instrumentality" of a foreign government.[33] The Eleventh Circuit followed a similar approach to form its own definition of "instrumentality."

In *United States v. Esquenazi*, the Eleventh Circuit heard the appeal of two American businessmen who were convicted under the FCPA for paying bribes to employees of a Haitian telecommunications company.[34] The appellants argued that the bribes did not violate the FCPA because the telecommunications company, Telecommunications D'Haiti, S.A.M. ("Teleco"), was not an "instrumentality" of the Haitian government.[35] When Teleco was formed in 1968, the Haitian government granted it a monopoly on the country's telecommunication services, as well

27. Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT'L L. 143, 171 (2016).

28. *See, e.g.*, United States v. Esquenazi, 752 F.3d 912, 917 (11th Cir. 2014); United States v. Carson, No. 09-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011); United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

29. Jordan, *supra* note 11, at 682.

30. *See* Kayla Feld, Comment, *Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a "Foreign Official" in the Foreign Corrupt Practices Act*, 88 WASH. L. REV. 245, 261–65 (2013).

31. *Id.* at 265.

32. *Id.*

33. *Id.* at 262–65.

34. United States v. Esquenazi, 752 F.3d 912, 917–19 (11th Cir. 2014).

35. *Id.* at 920.

as significant tax advantages.[36] At trial, an expert witness testified for the prosecution that Teleco was owned by the central bank of Haiti, belonged "totally to the state," and "was considered a public entity."[37]

Given the nature of Teleco, the court believed that the company "would qualify as a Haitian instrumentality under almost any definition [the court] could craft."[38] However, the court recognized the challenges inherent in the ill-defined meaning of "instrumentality," and it set about crafting a rule to give "both corporations and the government . . . *ex ante* direction about what an instrumentality is."[39] Based on its own statutory interpretation, the Eleventh Circuit defined instrumentality, for purposes of the FCPA, as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[40] The two-pronged control/function test is a question of fact, not law.[41] Relying on a combination of the Organization for Economic Co-operation and Development (OECD) Convention's definition of "public enterprise" and U.S. Supreme Court case law, the *Esquenazi* court produced a non-exhaustive, non-dispositive list of factors useful for considering the two elements of its new test.[42]

When deciding the first element—if a foreign government "controls" the entity—courts and juries should consider:

> [(i)] the foreign government's formal designation of that entity; [(ii)] whether the government has a majority interest in the entity; [(iii)] the government's ability to hire and fire the entity's principals; [(iv)] the extent to which the entity's profits, if any, go directly into the governmental fisc, and, [(v)] by the same token, the extent to which the government funds the entity if it fails to break even; and [(vi)] the length of time these indicia have existed.[43]

To analyze the second element—if the entity "performs a function that the foreign government treats as its own"—courts and juries should consider:

> [(i)] whether the entity has a monopoly over the function it exists to carry out; [(ii)] whether the government subsidizes the costs associated with the entity providing services; [(iii)] whether the entity provides services to the public at large in the foreign country; [(iv)] and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.[44]

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36. *Id.* at 917.
37. *Id.* at 918.
38. *Id.* at 925.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 925–26.
43. *Id.* at 925.
44. *Id.* at 926.

While the Eleventh Circuit was the first appellate court to address the instrumentality question, its reasoning and new rule closely mirrored the decisions of the district courts that addressed similar challenges to the government's broad understanding of "instrumentality."[45] Since *Esquenazi*, no other circuit court has substantively addressed the definition of "instrumentality" of a foreign government.[46] The *Esquenazi* rule and accompanying factors have thus become the dominant method used by the DOJ and SEC for interpreting the instrumentality question under the FCPA.[47]

B. The DOJ-SEC Resource Guide to the FCPA

In its Phase Three Report on Implementing the Anti-Bribery Convention, the OECD Working Group on Bribery recommended that the United States "consolidate and summarize publicly available information on the application of the FCPA in relevant sources" to improve the effectiveness of combating foreign bribery.[48] Out of that recommendation came "A Resource Guide to the FCPA" ("FCPA Resource Guide"), a joint publication by the DOJ and SEC that summarizes the government's views on FCPA enforcement.[49] The FCPA Resource Guide was originally published in 2012—prior to the decision in *Esquenazi*—and was updated in a second edition published in 2020.[50] The DOJ and SEC's incorporation of the *Esquenazi* rule and factors into the second edition of the FCPA Resource Guide is illustrative of the agencies' endorsement of the new rule.[51]

The first edition of the FCPA Resource Guide states that "the term 'instrumentality' is broad and can include state-owned or state-controlled entities."[52] It lists eleven factors to consider in analyzing whether an entity is an instrumentality, and states that "an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares."[53] However, it does not provide

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45. Karl Boedecker, *When Does an Entity Amount to an "Instrumentality of a Foreign Government" Under the Foreign Corrupt Practices Act?: Emerging Judicial Guidelines*, 21 J.L. BUS. & ETHICS 1, 19 (2015); *see also* United States v. Aguilar, 783 F. Supp. 2d 1108, 1113, 1118 (C.D. Cal. 2011) (following a similar line of reasoning as *Esquenazi* to analyze whether an SOE was an instrumentality); United States v. Carson, No. 09-00077-JVS, 2011 WL 5101701, at *3–4 (C.D. Cal. May 18, 2011) (noting that instrumentality should be determined as a question of fact by evaluating a list of non-exclusive, non-dispositive factors).

46. Mike Koehler, *"Foreign Official" Rewind—Part 2*, FCPA PROFESSOR (May 16, 2024), https://fcpaprofessor.com/foreign-official-rewind-2/.

47. Jordan, *supra* note 11, at 682–83.

48. OECD, UNITED STATES: PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION 62–63 (2010), https://www.oecd.org/en/publications/implementing-the-oecd-anti-bribery-convention-phase-3-report-united-states_78851371-en.html.

49. FCPA RESOURCE GUIDE 2D ED., *supra* note 11; U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (1st ed. 2012) [hereinafter FCPA RESOURCE GUIDE 1ST ED.].

50. FCPA RESOURCE GUIDE 2D ED., *supra* note 11.

51. *See id.* at 20.

52. FCPA RESOURCE GUIDE 1ST ED., *supra* note 49, at 20.

53. *Id.* at 20–21.

further guidance on how to interpret any other factors.[54] Although the publication of the FCPA Resource Guide was celebrated as an overall improvement to the relative lack of public guidance in the FCPA enforcement space,[55] the first edition did little to alleviate the ambiguity around which entities qualify as an "instrumentality."[56]

The second edition of the FCPA Resource Guide maintains the DOJ and SEC's broad interpretation of which entities qualify as an "instrumentality" of a foreign government, and it incorporates the exact language of the *Esquenazi* control/function test and factors.[57] This verbatim incorporation into the FCPA Resource Guide confirms that the *Esquenazi* opinion marked a vindication of the DOJ and SEC's aggressive position on the meaning of instrumentality.[58] It also shows that the new *Esquenazi* test is not far removed from the 2012 instrumentality analysis because many factors resemble those included in the first edition.[59]

The similarities between the definitions and tests in the first and second editions of the FCPA Resource Guide demonstrate *Esquenazi's* limited impact on DOJ and SEC interpretation of "instrumentality." In both the first and second editions, the DOJ and SEC caveat "an entity is unlikely to qualify as an instrumentality if a government does not own a majority of its shares" with the example of Alcatel-Lucent France, S.A., a French conglomerate that was convicted of paying bribes to a Malaysian telecommunications company.[60] The Malaysian government held a 43% ownership stake in the telecommunications company, had veto power over all major expenditures by the company, and made important operational decisions for the company.[61] Additionally, most of the senior officers of the company were political appointees.[62] The DOJ alleged that the telecommunications company was an "instrumentality," and the defendant company accepted that classification as part of its DPA, despite the fact that the Malaysian government did not own a majority stake in the telecommunication company.[63] Thus, the FCPA Resource Guide further shows that after *Esquenazi*, the DOJ and SEC continue to interpret instrumentality

54. *See id.*

55. OECD, UNITED STATES: PHASE 4 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION 57–58 (2020), https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/09/implementing-the-oecd-anti-bribery-convention-phase-4-report-united-states_501faf3a/0cd34e9f-en.pdf ("At the time of its release, the FCPA Resource Guide was welcomed by the business community and other non-governmental stakeholders, which had unanimously been demanding compiled guidance.").

56. Muma, *supra* note 25, at 1343–44.

57. FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 20.

58. *See* Boedecker, *supra* note 45, at 22 ("The [*Esquenazi*] court opinion vindicates the aggressive approach taken by the SEC and DOJ to FCPA enforcement over the past decade.").

59. *See* FCPA RESOURCE GUIDE 1ST ED., *supra* note 49, at 21.

60. *See* FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 21; FCPA RESOURCE GUIDE 1ST ED., *supra* note 49, at 21.

61. Criminal Information at 10, United States v. Alcatel-Lucent France, S.A., No. 1:10-cr-20906-JEM (S.D. Fla. Dec. 27, 2010).

62. *Id.*

63. Plea Agreement at 1–2, United States v. Alcatel-Lucent France, S.A., No. 1:10-cr-20906-MGC (S.D. Fla. Feb. 22, 2011).

broadly. While this broad interpretation has allowed the two agencies to prosecute a wider range of illicit bribery in foreign nations, it has elicited mixed reactions from the legal and business communities.

C. Reactions to the Esquenazi *Rule and Factors*

Before the Eleventh Circuit handed down its opinion in *Esquenazi*, the meaning of "instrumentality" under the FCPA was considered vague and caused confusion within both the legal and business communities.[64] There was a significant need for clarity and improved predictability for the "instrumentality" analysis.[65] Although some have praised *Esquenazi* for producing a clear set of guidelines, others argue that the court's test failed to clarify the unwieldy and indeterminate "instrumentality" analysis.[66]

The *Esquenazi* opinion is criticized for affirming a flexible standard that perpetuates unpredictability when categorizing which entities qualify as instrumentalities of a foreign government.[67] Scholars argue that the fact-intensive nature of the *Esquenazi* court's approach favors accuracy in immediate cases over predictability in future scenarios.[68] Some predict that the flexible standards of the *Esquenazi* rule would prove "unwieldy for courts and businesses alike."[69] Scholars argue that, particularly in countries where the line between private businesses and the government apparatus is blurred, courts and businesses will struggle to fully ascertain if an entity is controlled by a foreign government.[70] A concern among critics is that determining if an entity performs a function of a foreign government will be a more challenging endeavor for juries than the *Esquenazi* court anticipated.[71]

One of the potential benefits of the fact-intensive approach taken by the *Esquenazi* court is the ability for subsequent courts to tweak and refine the nonexhaustive list of factors that influence the control/function analysis.[72] However, that benefit is diminished because the vast majority of FCPA matters settle, thus depriving courts of the opportunity to further clarify which entities qualify as an "instrumentality" of a foreign government.[73]

Some practitioners argue that gathering the information necessary to determine whether the two prongs of the *Esquenazi* test are met is overly time-consuming

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64. *See, e.g.*, Westbrook, *supra* note 3, at 532.

65. *See, e.g.*, Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 916 (2010).

66. *See* Recent Cases, United States v. Esquenazi, *752 F.3d 912 (11th Cir. 2014)*, cert. denied, *135 S. Ct. 293 (2014)*, 128 HARV. L. REV. 1500, 1504 (2015) [hereinafter Recent Cases].

67. *See, e.g.*, Salbu, *supra* note 26, at 659; Amy Lynn Soto, Note, United States v. Esquenazi: *Injecting Clarity or Confusion into the Foreign Corrupt Practices Act*, 47 U. MIA. INTER-AM. L. REV. 383, 414 (2016); Recent Cases, *supra* note 66, at 1505.

68. Recent Cases, *supra* note 66, at 1505.

69. *Id.*

70. *Id.* at 1505–06.

71. *Id.* at 1506.

72. *See id.*

73. *See* Muma, *supra* note 25, at 1344.

and expensive.[74] The entity's jurisdiction may "lack transparency and sufficient, objective sources of information" to fully determine if it is controlled by a foreign government and performs a function that the government views as its own.[75] This view is not held by all practitioners, at least three of whom consider the meaning of "instrumentality" to not be vague when viewed "from a practical, real-world perspective."[76] According to the experience of these three practitioners, the information necessary to determine if a Chinese entity is an instrumentality of the Chinese government is available—one need only ask the entity.[77] Critics of the FCPA's alleged vagueness, in general, tend to view statutory ambiguity as causing companies to "bear the significant risks of FCPA prosecution without sufficient regard to their costly efforts to comply with the anti-bribery provisions."[78]

The DOJ and SEC have adopted the *Esquenazi* court's interpretation of "instrumentality" within their own external guidance.[79] However, it is not only prosecutors who see the *Esquenazi* control/function rule in a positive light. One scholar praised the *Esquenazi* court for improving upon the fact-intensive inquiries used in earlier district court opinions.[80] Others recognize the nature of the *Esquenazi* analysis matches the on-the-ground reality of businesses in foreign countries.[81] They argue that the question of whether a state-owned enterprise is in fact an "instrumentality" of a foreign government requires a nuanced approach, rather than a bright-line rule.[82]

Whether *Esquenazi* settled the question of which entities qualify as an "instrumentality" of a foreign government remains another area of debate. The government views the question as answered in favor of its broad interpretation.[83] The Supreme Court denied the appellants' petition for certiorari after the Eleventh Circuit affirmed the convictions in *Esquenazi* and no cases addressing the issue have made it to appellate review,[84] so further guidance from the Court is unlikely at this time. No other circuit court has taken up the question of which entities

74. *See* Jordan, *supra* note 11, at 682; Tara K. Giunta, Nathaniel Edmonds, Mor Wetzler & Ian Herbert, *Appellate Court Clarifies FCPA "Instrumentality" Definition*, PAUL HASTINGS LLP 5 (May 2014), https://webstorage.paulhastings.com/Documents/PDFs/stay-current-esquenazi-client-alert.pdf.

75. Giunta et al., *supra* note 74, at 5.

76. Philip Urofsky, Hee Won (Marina) Moon & Jennifer Rimm, *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken— The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1167 (2012).

77. *Id.* The practitioners also note that many businesses sidestep the instrumentality question altogether and "take the position that they are not going to pay bribes to officials of a public *or* private entity, full stop." *Id.*

78. *See, e.g.*, Irina Sivachenko, Note, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 395 (2013).

79. *See* Jordan, *supra* note 11, at 680; David I. Salem & Derek J. Ettinger, *The Foreign Corrupt Practices Act: Continued Progress in the Fight Against Corruption*, 70 DEP'T OF JUST. J. FED. L. & PRAC. 59, 68–69 (2022).

80. *See* Boedecker, *supra* note 45, at 20–21.

81. *See* H. Lowell Brown, *Emerging Issues in Compliance with the Foreign Corrupt Practices Act: A Case of Arrested Development*, 14 SANTA CLARA J. INT'L L. 203, 229 (2016).

82. *See id.*

83. *See* FCPA RESOURCE GUIDE 2D ED., *supra* note 11.

84. *See* United States v. Esquenazi, 135 S. Ct. 293 (2014).

qualify as an "instrumentality" of a foreign government.[85] Although the debate about what is an "instrumentality" seems to have subsided, the possibility remains that other FCPA defendants will challenge the DOJ's broad interpretation of "instrumentality" and that another federal court will disagree with the approach taken in *Esquenazi*.[86] Despite the Eleventh Circuit's guidance on what the term means, considerable ambiguity remains.[87] While practitioners and companies should address the *Esquenazi* factors in their current compliance programs,[88] it is worthwhile to explore other possible methods for analyzing which entities qualify as an "instrumentality" of a foreign government.

III. Approaches in Comparable Enforcement Regimes

Although the FCPA has long been considered the flagship of foreign anti-bribery enforcement regimes, other countries have begun to implement robust foreign anti-bribery laws in line with their commitments to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention").[89] These laws, as well as the text of the OECD Convention itself, offer a useful reference point for attempting to craft a more workable definition of "instrumentality" under the FCPA.

A. The OECD Convention

Beginning in the late 1990s, the OECD Convention has been considered a key part of the movement to globalize the FCPA.[90] The OECD Convention provides "the international framework for the global prosecution of cross-border corruption," including paying a bribe to a foreign public official.[91] The OECD Convention defines a "foreign public official" as: "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or *public enterprise*; and any official or agent of a public international organisation."[92] Unlike the missing "instrumentality" definition in the FCPA, the Commentaries on the OECD Convention go on to define a "public enterprise" as:

> any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a *dominant influence*. This is

85. Mike Koehler, *"Foreign Official" Rewind—Part 2*, FCPA Professor (May 16, 2024), https://fcpaprofessor.com/foreign-official-rewind-2/.

86. *Id.*

87. Salbu, *supra* note 26, at 659.

88. Jordan, *supra* note 11, at 683.

89. *See, e.g.*, Golumbic & Adams, *supra* note 22, at 25 ("[M]any nations, including those which are signatories to the OECD Convention, are in the process of establishing anti-bribery or anti-corruption laws, or strengthening their existing regimes.").

90. *See* Urofsky et al., *supra* note 76, at 1156–57.

91. *Id.* at 1157.

92. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, ¶ 4(a), Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention] (emphasis added).

> deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.[93]

The term "public enterprise" in the OECD Convention is considered to be equivalent to "instrumentality" under the FCPA.[94] Following the ratification of the OECD Convention in 1997, Congress amended the FCPA in 1998 to implement the Convention's mandates.[95] The sole change to the "public official" definition in the 1998 amendment was the addition of "public international organization."[96] Before the ruling in *Esquenazi*, the 1998 amendment's omission of state-owned enterprises from the definition of "foreign official" was seen as evidence that Congress did not intend to criminalize payments to state-owned corporations.[97] The *Esquenazi* court dispatched with this argument and interpreted the 1998 amendment to mean that Congress considered the inclusion of "instrumentality" in the definition of "public official" to already cover the OECD Convention's proscription against bribing employees of "public enterprises."[98] The OECD Working Group has acknowledged that "instrumentality" as written in the FCPA correlates to the "public enterprise" definition in the Convention, although it has also acknowledged that the lack of an explicit "instrumentality" definition creates potential uncertainty.[99]

The *Esquenazi* court further linked the OECD Convention's definition of "public enterprise" to its definition of "instrumentality" under the FCPA.[100] The court noted that if it—as the appellant argued—construed the meaning of "instrumentality" to be limited to entities that perform only traditional, core government functions, it "would put the United States out of compliance with its international obligations" under the OECD Convention.[101] The court also relied on the Commentaries from the OECD Convention to inform the non-exhaustive list of factors that it provided for the control/function analysis.[102]

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93. *Id.* at Commentaries ¶ 14 (emphasis added).

94. *See* United States v. Esquenazi, 752 F.3d 912, 923 (11th Cir. 2014).

95. *See* Pub. L. No. 105-366, 112 Stat. 3302; *see also id.* (referencing the 1998 amendments).

96. *Esquenazi*, 752 F.3d at 923.

97. *See* Soto, *supra* note 67, at 400–01; Golumbic & Adams, *supra* note 22, at 12–14.

98. *See Esquenazi*, 752 F.3d at 923–24.

99. *See, e.g.*, OECD, UNITED STATES: PHASE 2 REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 32 (2002), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/05/07/oecd-Phase-2-report.pdf.

100. *See Esquenazi*, 752 F.3d at 924–25.

101. *Id.* at 924.

102. *Id.* at 925–26.

Inclusion of SOEs in the instrumentalities test demonstrates the OECD Convention's influence on the *Esquenazi* court. However, the court did not fully embrace the Convention's categorical approach and instead adopted what amounts to a malleable totality of the circumstances approach.[103] The OECD Convention employs what has been called the "dominant influence test" to determine which entities qualify as a "public enterprise."[104] A government exercises a dominant influence over an entity if it: (1) holds the majority of the entity's subscribed capital; (2) controls the majority of votes attaching to shares issued by the entity; or (3) can appoint a majority of the entity's board.[105] Although this list of triggers is not the exclusive means by which a government may be found to exercise a dominant influence, a finding that any one of the three triggers has been satisfied is sufficient to declare an entity a "public enterprise."[106] Thus, the dominant influence test provides a degree of clarity and predictability that the *Esquenazi* approach lacks, particularly given that the *Esquenazi* court did not comment on the relative weight of the different factors it promulgated.[107]

Along with its clear definition of which entities qualify as a public enterprise, the Commentaries on the OECD Convention further defined "public function" as "[a]n official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges."[108] The *Esquenazi* court incorporated this meaning into the factors that it listed for the function prong of its test.[109] However, the *Esquenazi* test falls short of providing the same level of clarity as the OECD Convention. It is clear from the OECD Convention that an official of a public enterprise performs a public function if the enterprise receives "preferential subsidies or other privileges," or if it does not "operate on a normal commercial basis."[110] Conversely, no single factor in the *Esquenazi* test is dispositive.[111]

Although the *Esquenazi* court found that the current FCPA complies with the OECD Convention, its own formulation of the "instrumentality" definition is lacking when compared to the clarity in the OECD Convention's approach to public enterprises and public functions.

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103. *See id.*

104. *See* OECD Convention, *supra* note 92, at Commentaries ¶ 14; Golumbic & Adams, *supra* note 22, at 49.

105. OECD Convention, *supra* note 92, at Commentaries ¶ 14.

106. *See id.*

107. *See* Jordan, *supra* note 11, at 681 ("[S]ome felt that the court did not do enough to elaborate on the application or relative weight that should be rendered to the factors, and whether any one particular factor should be accorded greater weight than another when conducting an analysis.").

108. OECD Convention, *supra* note 92, at Commentaries ¶ 15.

109. *See* United States v. Esquenazi, 752 F.3d 912, 926 (11th Cir. 2014).

110. OECD Convention, *supra* note 92, at Commentaries ¶ 15.

111. *See Esquenazi*, 752 F.3d at 925–26.

B. United Kingdom Bribery Act

The U.K. Bribery Act (the UKBA), referred to by one U.S. expert as the "FCPA on steroids,"[112] was enacted in 2010. The UKBA criminalizes both public bribery—meaning bribing a foreign public official—and private bribery.[113] Section 6 of the UKBA criminalizes bribery of a foreign public official, and its terminology largely mirrors that of the OECD Convention.[114] The UKBA's definition of a "foreign public official" includes an individual who exercises a public function "for any public agency or *public enterprise* of [a foreign country]."[115] While the terminology of the UKBA mirrors that of the OECD Convention, the UKBA does not include further explanation of what constitutes a public enterprise in either its text or accompanying guidance.[116]

It is difficult to determine how the UK enforcement agencies interpret "public enterprises," given the lack of cases brought under Section 6. As of 2021, two agencies charged with enforcing the UKBA, the Serious Fraud Office and Crown Prosecution Service, have not formally prosecuted any entities under Section 6.[117] This lack of formal prosecution is likely due to the substantial overlap between foreign official offenses under Section 6 and the general bribery offenses under Section 1.[118] Given that Section 6 uses the same terminology as the OECD Convention, practitioners and businesses can at least draw a more direct line between the UKBA and the OECD Convention's definition of "public enterprise." If the FCPA used the term "public enterprise" instead of "instrumentality," the *Esquenazi* court may have felt obliged to adhere more closely to the OECD definition, rather than merely being influenced by it.

C. Australian Criminal Code

In Australia, bribery of foreign public officials is criminalized under Division 70 of the Criminal Code Act 1995.[119] In its definition of a "foreign government body," the Criminal Code includes "foreign public enterprise[s]."[120] The Criminal Code goes on to define "foreign public enterprise" using a list of attributes.[121] If a company, body, or association has any one of the respectively listed attributes in

112. Golumbic & Adams, *supra* note 22, at 25.

113. Bribery Act 2010, c. 23 §§ 1, 2, 6 (U.K.).

114. *Compare id.* § 6 (defining "foreign public official" as an individual who exercises a public function "for or on behalf of a country or territory outside the United Kingdom"), *with* OECD Convention, *supra* note 92, at art. 1 (defining "foreign public official" as "any person exercising a public function for a foreign country").

115. Bribery Act 2010, c. 23 § 6(5)(b)(ii) (U.K.) (emphasis added).

116. *See id.* § 6; MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE, 2011, at 11 (U.K.).

117. Alice Lepeuple & Frederick Saugman, *Bribery Act 2010: Ten Years On*, WILMERHALE (May 21, 2021), https://www.wilmerhale.com/en/insights/blogs/wilmerhale-w-i-r-e-uk/20210521-bribery-act-2010-ten-years-on.

118. *Id.*; *see also* Feld, *supra* note 30, at 274 (describing how "foreign public official" is defined under the UKBA).

119. *Criminal Code Act 1995* (Cth) div 70 (Austl.).

120. *Id.* s 70.1.

121. *Id.*

definitional Parts A or B, and additionally qualifies under definitional Part C, it is deemed a "foreign public enterprise," and therefore, a "foreign government body."[122] In the case of a company, which falls under Part A, the attributes are:

> (i) the government of a foreign country or of part of a foreign country holds more than 50% of the issued share capital of the company; (ii) the government of a foreign country or of part of a foreign country holds more than 50% of the voting power in the company; (iii) the government of a foreign country or of part of a foreign country is in a position to appoint more than 50% of the company's board of directors; (iv) the directors (however described) of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country; (v) the government of a foreign country or of part of a foreign country is in a position to exercise control over the company.[123]

Pursuant to Part B, any association or body that is not a company is a "public enterprise" if either:

> (i) the members of the executive committee (however described) of the body or association are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country; [or] (ii) the government of a foreign country or of part of a foreign country is in a position to exercise control over the body or association.[124]

Additionally, to qualify as a "public enterprise," the company, body, or association in question must, pursuant to Part C:

> (i) enjoy[] special legal rights or a special legal status under a law of a foreign country or of part of a foreign country; or (ii) enjoy[] special benefits or privileges under a law of a foreign country or of part of a foreign country; because of the relationship of the company, body or association with the government of the foreign country or of the part of the foreign country, as the case may be.[125]

Australia's foreign bribery offense thus captures the wide range of possible situations that would make an entity a "foreign public enterprise." The OECD has praised Australia for the "detailed and comprehensive" nature of the legislation.[126] The language of the Criminal Code provides clear guidance on which attributes

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. OECD AUSTRALIA: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 44 (2006), https://www.oecd.org/en/publications/report-on-the-application-of-the-convention-on-combating-bribery-of-foreign-public-officials-in-international-business-transactions-and-the-1997-recommendation-on-combating-bribery-in-international-business-transactions-phase-2-report-au_8c3570d3-en.html.

will permit an entity to be considered part of a foreign government. Unlike the *Esquenazi* court's indeterminate approach to defining "instrumentality," the Australian Criminal Code provides a broad statutory definition of "foreign public enterprise," which accommodates the fact that foreign governments and industries can be organized in many different ways.[127] The Act also maintains clarity and predictability, thanks to the long list of attributes and the singular sufficiency of any one attribute in determining an entity to be a "foreign public enterprise."[128]

IV. CRAFTING A CLEARER DEFINITION OF "INSTRUMENTALITY"

Although the *Esquenazi* court's interpretation of "instrumentality" is the prevailing rule of law,[129] there is still room to provide more clarity to the definition. There are many previously proposed changes to the "instrumentality" definition which are useful to consider. The new definition should be both broad—to avoid curtailing legitimate prosecution of foreign corruption—and predictable—so practitioners and businesses can accurately assess the risks posed from doing business with different entities. The Australian Criminal Code achieves both of those goals, and it can serve as a model for a new "instrumentality" definition.[130]

A. Previous Proposals

Both before and after the *Esquenazi* court handed down its definition of "instrumentality" under the FCPA, scholars advocated for new meanings of the term. Most of these proposals recognize that the lack of a clear statutory definition for "instrumentality," combined with broad enforcement of the FCPA, creates a lack of the predictability and fair notice that should be present in a criminal statute.[131]

Many of the proposals for a new "instrumentality" definition acknowledge that the OECD Convention definition for "public enterprise" and the accompanying "dominant influence test" provide a clearer and more workable method for analyzing entities.[132] At least one scholar considered the legislation of other OECD nations as useful guidance for crafting a new definition.[133] Some advocate that

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127. *Compare* United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014) (defining "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own"), *with Criminal Code Act 1995* (Cth) div 70, s 70.1 (Austl.) (providing a broad statutory definition of "foreign public enterprise," which accommodates the fact that foreign governments and industries can be organized in many different ways).

128. *See* Cohen et al., *supra* note 14, at 1262–63 ("The anti-corruption standards offered by the OECD and statutes enacted by [Australia] in its aftermath reveal that it is possible to provide a more precise definition of 'foreign official' than the DOJ and SEC have provided with respect to the FCPA.").

129. *See* Salem & Ettinger, *supra* note 79, at 69–70.

130. *See supra* Part III.C.

131. *See* Recent Cases, *supra* note 66, at 1504–05; Muma, *supra* note 25, at 1353; Alexander G. Hughes, Note, *Drawing Sensible Borders for the Definition of "Foreign Official" Under the FCPA*, 40 AM. J. CRIM. L. 253, 272 (2013).

132. *See* Golumbic & Adams, *supra* note 22, at 49; Cohen et al., *supra* note 14, at 1262–63.

133. *See* Cohen et al., *supra* note 14, at 1261.

Congress amend the FCPA to redefine "instrumentality" to be explicitly synonymous with the OECD Convention's definition of "public enterprise," including the use of the "dominant influence" test.[134] Others see the OECD Convention as a starting point for developing a new definition for "instrumentality" that could incorporate additional factors.[135]

One proposed approach to defining "instrumentality" is a variation of the categorical Australian test, which would require an entity to satisfy each of four different attributes to be considered an instrumentality.[136] The necessary attributes under this proposal are: (1) over 50% ownership by a foreign government; (2) performing a traditional government function related to health, safety, and welfare; (3) sole appointment power vested in the foreign government; (4) no public trading of the entity's shares.[137] Such a bright-line rule would provide guidance to businesses and practitioners, but it would also likely hamper legitimate corruption prosecutions by preventing the FCPA from reaching a group of entities that are considered public enterprises by much of the international community. The scope of the DOJ and SEC's prosecutorial power should not be so severely curtailed in the name of greater predictability and clarity.

Two other proposals for solving the instrumentality problem in the FCPA are instructing the State Department to produce country-specific guidance[138] and eliminating the foreign official requirement altogether from the FCPA.[139] These ideas, while unique and creative, would require a large departure from previous interpretation and enforcement of the FCPA and would be difficult to implement. The former would require an allocation of resources that the State Department may not be ready to make, while the latter would immensely broaden the scope of the FCPA. Similarly, rewriting the FCPA to more closely match that of its steroid-enhanced cousin—the UKBA—would be logistically challenging.[140]

The ideal solution will be clear enough to provide ex ante predictability for companies looking to conduct business internationally, broad enough to allow the DOJ and SEC to continue prosecuting bribes intended to corrupt foreign officials, and simple enough to work within the existing FCPA enforcement framework.

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134. *See id*. at 1270.

135. *See* Golumbic & Adams, *supra* note 22, at 50–51.

136. *See* Hughes, *supra* note 131, at 272.

137. *Id*. at 272–76.

138. Muma, *supra* note 25, at 1353.

139. Salbu, *supra* note 26, at 664.

140. *See* Lindsey Hills, *Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt To Create Universal Legislation To Combat Bribery Around the Globe*, 13 RICH. J. GLOB. L. & BUS. 469, 487–89 (2014).

B. Adopting a Broad and Predictable Definition Similar to the Australian Approach

In recognition of the large role that state-owned and state-controlled entities play in the global economy, a new definition for "instrumentality" under the FCPA should not severely limit the scope of "foreign official."[141] However, a new definition should also recognize that some state-owned and state-controlled entities are so removed from performing a public function that their employees and officers are not "public officials."[142] Striking a balance between over-inclusion and under-inclusion is no easy task, particularly in light of the different circumstances in which foreign governments may structure their enterprises.[143] A definition of "instrumentality" similar to the definition of "public enterprise" in the Australian Criminal Code could achieve that balance.

Under the Australian Criminal Code, an entity qualifies as a "public enterprise" if it matches any one of a number of statutory attributes.[144] A new definition of "instrumentality" under the FCPA could apply this approach to the factors promulgated by the *Esquenazi* court. The factors for control and function could be turned into two lists of attributes. An "instrumentality" of a foreign government would satisfy at least one attribute from both the control list and the function list. This approach would reduce the indeterminacy inherent in *Esquenazi*'s unweighted factors[145] while ensuring that a broad range of entities wielding public power fall within the meaning of "instrumentality."[146]

Basing the attributes for control and function on the preexisting *Esquenazi* factors would lend legitimacy to the new definition given *Esquenazi*'s dominance in the current enforcement landscape.[147] For control, the attributes of an "instrumentality" could be:

> (1) if the government formally designates the entity as a state-owned or state-controlled entity; (2) if the government has a majority interest in the entity; (3) if the government can hire and fire the entity's principals; (4) if the entity's profits go directly into the governmental fiscal account; and (5) if the government funds the entity if it fails to break even.

For function, the attributes of an "instrumentality" could be:

> (1) if the entity is granted a monopoly over the function it exists to carry out; (2) if the government subsidizes the costs associated with the entity providing

141. *See supra* Part II.
142. *See* United States v. Esquenazi, 752 F.3d 912, 926 (11th Cir. 2014).
143. *See* FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 20.
144. *See supra* Part III.C.
145. *See* Recent Cases, *supra* note 66, at 1505.
146. *See* FCPA RESOURCE GUIDE 2D ED., *supra* note 11, at 20.
147. *See* Jordan, *supra* note 11, at 682–83.

> services; (3) if the entity provides service to the public at large; (4) if indicia exist that the entity is perceived to perform a governmental function.

As opposed to expending a large amount of compliance resources to analyze each of the *Esquenazi* factors,[148] this new definition would allow companies doing business overseas to more easily determine which entities qualify as an "instrumentality." Because an entity would qualify as an "instrumentality" by meeting just one attribute from the control list and one from the function list, the scope of who is a "foreign official" would remain broad. Thus, the new definition would achieve greater clarity for businesses without damaging the ability of the DOJ and SEC to combat illicit foreign bribery.

Implementing the new definition could take a number of forms, including an amendment to the FCPA, further judicial guidance, or new guidance from the DOJ and SEC.[149] Given the strong incentives to settle FCPA enforcement actions,[150] it is unlikely that further guidance will come from the courts. As it has been nearly twenty-six years since its last amendment,[151] Congress is due for a fresh look at the FCPA. While adding a clear statutory definition of "instrumentality" to the FCPA would provide much needed clarity, it is unlikely that Congress will take such a step.[152]

The most pragmatic way to implement the new definition would be through a revision of the FCPA Resource Guide. The DOJ and SEC shape FCPA jurisprudence through their resolutions, publications, and guidance.[153] These agencies could take the step of clarifying the meaning of "instrumentality" by incorporating the new definition into the Resource Guide. Doing so would be as simple as replacing the brief discussion of the *Esquenazi* factors with the new list of attributes. The DOJ and SEC made a similar change to the Resource Guide in 2020 following the *Esquenazi* decision.[154] Adopting the new definition through an update to the Resource Guide would require far less effort than a Congressional amendment to the FCPA, while still effectively clarifying what it means to be an "instrumentality" of a foreign government.

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148. *See* Koehler, *supra* note 27, at 183–84.

149. Salbu, *supra* note 26, at 663.

150. *See id.* at 663 n.135.

151. *See, e.g.*, United States v. Esquenazi, 752 F.3d 912, 923 (11th Cir. 2014) (describing the 1998 amendment to FCPA).

152. "On December 14, 2023, the U.S. Congress approved the Foreign Extortion Prevention Act ('FEPA'), which will make it a federal crime for any foreign government official to demand or receive a bribe from a U.S. citizen, resident or company . . . ." Kara Brockmeyer, Andrew M. Levine, David A. O'Neil, Winston M. Paes, Jane Shvets, Bruce E. Yannett, Douglas S. Zolkind & Erich O. Grosz, *Congress Passes Foreign Extortion Prevention Act, Targeting "Demand Side" of Foreign Bribery*, DEBEVOISE & PLIMPTON (Dec. 15, 2023), https://www.debevoise.com/insights/publications/2023/12/congress-passes-foreign-extortion-prevention-act. Congress subsequently enacted an updated version of FEPA in July of 2024. Foreign Extortion Prevention Technical Corrections Act, Pub. L. No. 118-78, § 2, 138 Stat. 1512, 1512–14 (2024). Like the FCPA, the new Act uses the term "instrumentality" without providing a further definition for the term. *Id.*

153. *See* Boedecker, *supra* note 45, at 22.

154. *See supra* Part II.B.

CONCLUSION

The FCPA stands as a cornerstone of the global fight against corruption, and it served as the inspiration for many of the modern foreign bribery frameworks developed in other OECD countries. However, the language of the FCPA has not kept pace with the shifting landscape of the global economy, where state-owned and state-adjacent enterprises play an increasingly important role. The FCPA's failure to define "instrumentality of a foreign government" casts uncertainty on whether a wide category of conduct falls within the scope of the Act.

Despite the Eleventh Circuit's attempt to create a more workable definition of "instrumentality," the term remains a source of confusion and debate. The current fact-based inquiry leaves businesses and individuals subject to potential FCPA liability in murky waters, especially when dealing with state-owned enterprises. Other OECD nations, like Australia, have implemented clear legal tests that expressly state which characteristics will push an entity across the line from private enterprise to public entity.

Adopting a definition for "instrumentality" like the Australian Criminal Code definition of "public enterprise" would help alleviate the current confusion in interpreting the FCPA. To maintain consistency with current enforcement practices, that definition should be based on the *Esquenazi* factors. A more categorical test would allow businesses and practitioners to better understand when conduct may implicate liability under the FCPA, while maintaining the DOJ and SEC's ability to effectively prosecute the supply-side corruption that the FCPA was intended to combat.