I've finished the defense brief in US v. Carson. There are a couple of really good points the defense makes. The government's position has withstood, in a term I coined many years ago, the "non-test of time." There have been at least two enforcement actions where a "private" company, with minority government ownership, served as the basis of the action. (I got that from the brief).

The defense makes a few arguments. There are two key ones that I think have at least the possibility to have legs. First, that the statutory language "department, agency, or instrumentality," if read to include state-owned enterprises, would lead to absurd results. For example, the gas company CITGO is a subsidiary of a Venezuelan government agency. Does that mean all the US citizens who work at your corner gas station are "foreign officials?" I worried about Bank of America. It was one thing when the government invested. It was an entirely different thing, as I've said before, when the government forced out CEO Ken Lewis in April 2009. Asserting operational control crossed a line, in my opinion. Under the OECD Convention national implementing legislation, were BofA employees government officials?

The other really good argument had to do with legislative history. There were bills—and I'm relying here on the brief and on the comprehensive Affidavit submitted by the FCPA Professor—that included state-owned enterprises in the definition explicitly and were rejected by Congress when they approved the final version, which was absent that language. Read in context, "department, agency, or instrumentality," it seems that the specific term "instrumentality" would mean something more restrictive.

The other arguments, that lenity requires a strict definition, and that if instrumentality includes SOEs then the statute is unconstitutionally vague, seem weaker to me. Compliance programs throughout the US have adapted to the idea that SOEs are included, and the government has always been vocal and always consistent that SOEs could be considered government. And to limit the definition to formal government agents would harm the purpose of the FCPA: in a lot of places, the line between government and private isn't as bright, and to limit the reach of the statute would take significant chunks of potentially violative conduct out of the reach of the statute. Wrongly, in my opinion. In China, for example, dealing with larger banks is the same as dealing with the government. To exclude that reality would be an absurd result, in my opinion.

I've also read that the UK Bribery Act excluded SOEs. According to Vivian Robinson's interview with Compliance Week (Ms. Robinson is the General Counsel of the SFO):

We don't think the Act is directed to people of that sort. We are not regarding employees of a state-owned company as falling in the ambit of Section 6. People can rest assured that is not what we are looking at at all…. Also, such people would not likely have a sufficient connection with the UK.

I don't know whether that would help the defense here. Citing to the UK for enforcement has a little bit of "stay off my team" vibe to it.

In any event, I'm halfway through the FCPA Professor's incredibly thorough affidavit (weighing in at 152 pages and chock full of legislative history). As an aside, if anyone has a copy of the

SEC's report on questionable payments from the 70′s, please drop me a line. I've been dying to read that for a while, and can't seem to locate a copy. I'd file a FOIA request with the SEC, but I read that they only provide documents in 13% of FOIA requests, so that's a low-probability effort.