UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-21010-CR-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOEL ESQUENAZI, et al.,

Defendants.
_____/

DEFENDANT JOEL ESQUENAZI' MOTION TO DISMISS INDICTMENT FOR FAILURE TO STATE A CRIMINAL OFFENSE AND FOR VAGUENESS

I. INTRODUCTION

Defendant, Joel Esquenazi ("Mr. Esquenazi") respectfully moves the Court to dismiss the indictment for failure to state a criminal offense and, in the alternative, for vagueness with respect to who would constitute a "foreign official" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2, *et seq.* ("FCPA").

First, as demonstrated below, the indictment fails to allege facts that would constitute a criminal offense. Federal Rule of Criminal Procedure 7(c)(1) demands a "plain, concise, and definite written statement of the essential facts constituting the offense charged," and the FCPA, on which all Counts are predicated, requires, among other things, proof of an improper payment to a "foreign official." The instant indictment fails to state a criminal offense because it alleges that the recipients of the improper payments were "foreign officials" because they were employees of an entity "owned" by the Republic of Haiti.[1] Such a definition of "foreign official" is unsupported by the text or the purpose of the FCPA. The FCPA is a public bribery statute

[1] The government's allegation is patently false because, in truth and in fact, at all times material and relevant, the entity, Telecommunications D'Haiti S.A.M. ("Teleco") was only *partially* owned by the Republic of Haiti.

which criminalizes improper payments to officials *performing a public function*. Mere control or partial control or ownership (or partial ownership) of an entity by a foreign government no more makes that entity's employees "foreign officials" than control of General Motors by the U.S. Department of the Treasury makes all GM employees U.S. officials.

Second, and in the alternative, the Court should dismiss the indictment on the grounds that the FCPA's definition of "foreign official," which includes employees of any foreign government "department, agency or instrumentality", is unconstitutionally vague. Especially in the context of third world country under a coup such as Haiti was under at the relevant time, a vague definition of "foreign official" to include employees of entities solely based on partial or even full government "ownership" of those entities would unfairly sweep nearly all economic activity within the scope of the statute.

II. DISCUSSION

A. The Indictment Does Not Allege a Criminal Violation, Because the FCPA Does Not Cover Payments to Employees of Entities Merely Because Such Entities are Controlled by a Department, Agency or Instrumentality of a Foreign Government.

1. Standard for a Motion to Dismiss.

On a pre-trial motion to dismiss an indictment for failure to state an offense, the indictment is invalid unless it "allege[s] that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating." *United States v. Hedaithy*, 392 F.3d 580, 589 (3d Cir. 2004). Moreover, "a charging document fails to state an offense if the specific facts alleged *in the charging document* fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002). Accordingly, if the indictment is premised upon an incorrect interpretation of the statute, it must be dismissed. *See, e.g., United States v. Enmons*, 410 U.S.

396, 410-12 (1973) (rejecting government's interpretation of statute and affirming dismissal of complaint); *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997) (same).

2. A Person Is Not a "Foreign Official" Within the Meaning of the FCPA Merely Because He Is Employed by an Entity "Owned or Partially Owned" by a Foreign Government Department, Agency, or Instrumentality, As Alleged in the Indictment.

The FCPA prohibits, *inter alia*, (1) U.S. citizens, nationals, and residents (2) from using the mails or any means or instrumentalities of interstate commerce, (3) corruptly, (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything of value, (5) ***to a "foreign official,"*** (6) for the purpose of influencing any act or decision of that official in his official capacity to obtain or retain business. *See generally* 15 U.S.C. § 78dd-2(a) (emphasis added).

The gravamen of the indictment is that Defendant allegedly conspired with others to pay money in violation of the FCPA to employees of a Teleco.

The FCPA defines "foreign official" to include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." § 78dd-2(h)(2)(A). Importantly, the statute does not further define "department, agency, or instrumentality." *See id.* The subject of this motion to dismiss is the sufficiency of the syllogism in the indictment, namely, that the employees of Teleco are "foreign officials" because they are employed by entities "controlled" by an entity within the Haitian Government.

Critically, the indictment does not allege any payments by any defendant to employees of the Republic of Haiti. Rather, the payments at issue in the indictment were allegedly made for the most part, indirectly to employees of Teleco. The difference between employment by the Republic of Haiti and Teleco is significant because the indictment does not allege that Teleco is a "department, agency, or instrumentality" of the Republic of Haiti—*except insofar as Teleco is*

"owned" by the Republic of Haiti. (*See* Indictment ¶3.) The indictment does not allege that Teleco performs any government function.

The indictment is entirely premised upon the notion that any entity "owned" by a foreign government thereby automatically becomes a government department agency, or instrumentality solely by virtue of that alleged ownership, so that *any* officer or employee of such government-owned entity is necessarily a "foreign official" within the meaning of the FCPA. Neither the text nor the underlying purpose of the FCPA supports this conclusion, and the indictment must accordingly be dismissed.

3. The Court Cannot Read into the Statute an Extension of the FCPA Definition of "Department, Agency, or Instrumentality" to Entities Controlled by Departments, Agencies or Instrumentalities.

a) The Court must accord the plain text of the FCPA its ordinary meaning.

In the absence of any specific language in the FCPA extending the definition of "department, agency, or instrumentality," to entities owned by departments, agencies, or instrumentalities, the task for the Court is to determine whether Teleco is a "department[s], agenc[ies], or instrumentality[ies]" within the meaning of the FCPA, so that *all* employees of Teleco will constitute "foreign officials."

As noted above, the terms "department, agency, or instrumentality" are not defined in the FCPA. "When a term is undefined, [courts] give it its ordinary meaning." *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008) (Scalia, J.) (finding ambiguity in undefined term "proceeds"); *Lin-Zheng v. Attorney Gen.*, 557 F.3d 147, 156 (3d Cir. 2009). But "if the language [of a statute] is unclear, [courts] attempt to discern Congress' intent using the canons of statutory construction." *United States v. Introcaso*, 506 F.3d 260, 265 (3d Cir. 2007).

The ordinary meaning of the words "department" and "agency" in the FCPA is relatively unmistakable; the Republic of Haiti would clearly meet the definition. But, as noted above, the Defendant is not accused of bribing *Haitian government officials*. Instead, Defendant is accused of participating in alleged bribes of employees of Teleco allegedly "owned" by the Republic of Haiti. The indictment fails to allege directly that Teleco is a Haitian government "department, agency, or instrumentality." The indictment alleges only that Teleco is "owned" by a government department, agency, or instrumentality. (*Id.*)

With no definition of "instrumentality" in the statute to refer to, this Court must seek to define that term in the manner that "best accords with the overall purposes of the statute." *Introcaso*, 506 F.3d at 267 (quotations omitted). For the reasons set forth below, a definition of "instrumentality" that includes any entity controlled by a department, agency, or instrumentality simply by virtue of control or even ownership would not accord with the overall purpose of the statute. Rather, "instrumentality" would include only those entities that perform a government function. Indeed, in the case of Haiti in 2000, government "ownership" is nearly ubiquitous, a definition premised on ownership only would result in virtually everyone being deemed a "foreign official," which clearly would be inconsistent with Congress' intent.

b) Congress' purpose in enacting the FCPA was to criminalize corporate bribery of public officials.

Congress enacted the FCPA upon discovering that "[m]ore than 400 corporations had admitted making questionable or illegal payments . . . to foreign government officials, politicians, and political parties." H. Rep. 95-640, at 4 (Sept. 28, 1977). Not only did such bribes undermine the credibility of American business, but

> Corporate bribery also create[d] severe foreign policy problems for the United States. The revelation of improper payments invariably tend[ed] to embarrass friendly governments, lower[ed] the esteem

> for the United States among the citizens of foreign nations, and len[t] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert[ed] a corrupting influence on the political processes of their nations.

Id. at 5.

Congress was thus motivated to criminalize bribery of *public officials* in particular. This motivation controls any interpretation the Court applies to the FCPA according to the rule of construction that "directs a court to look to the 'mischief and defect' that the statute was intended to cure" when interpreting a statute. *Elliot Coal Min. Co., Inc. v. Director, Office of Workers' Comp. Programs*, 17 F.3d 616, 631 (3d Cir. 1994). Congress' purpose in prohibiting bribery of public officials, and not all acts of commercial bribery, is best achieved by an interpretation of "instrumentality" that incorporates a concept of government function, rather than merely government control. Four traditional rules of statutory construction necessitate this outcome. First, federal law already defines the term "instrumentality" to require something in excess of mere government-control. Second, Congress could have defined, but did not define, instrumentality to incorporate only control, even though Congress explicitly references notions of "control" *in the FCPA* and analogous statutes. Third, Congress amended the FCPA to implement an international convention that explicitly predicates liability upon payment to officials of entities that are more than simply government-controlled. Fourth, under the doctrine of *ejusdem generis*, the Court should construe the term "instrumentality" in light of the specific terms immediately preceding it. Thus, the term "instrumentality" in the FCPA should be understood to convey some notion of government function akin to functions performed by "agencies" and "departments."

Indeed, as alluded to above, the distinction between an FCPA definition of "instrumentality" premised on ownership alone, and a definition of "instrumentality" that

includes a notion of government function, is critical if the Court considers the overbroad results that could occur under the former. A government such as Haiti "owns" nearly all economic activity within its borders[2]—even purely commercial transactions that bear no indicia of any government function. In such countries where government control or "ownership" is pervasive, this would expand the statute beyond its original purpose to cover large swaths of commercial activity, not just public bribery. Indeed, an interpretation of "instrumentality" premised on full or partial government control or full or partial ownership alone, without any accompanying concept of government function, would lead to absurd results, and not just in communist countries or countries under an unstable government. For example, in the United States, the government now controls General Motors and AIG, just as the British government controls the Royal Bank of Scotland. A definition of "instrumentality" that rested solely on ownership—as alleged in the indictment—would mean that improper inducements to all the thousands of employees of those commercial institutions would amount to "public bribery," even though it could not be credibly asserted that General Motors, AIG, or the Royal Bank of Scotland perform government functions for the governments that "control" them.

(1) Federal law defines "instrumentality" to require performance of a government function, rather than merely government control.

When a term is ambiguous, the Court should "look to other statutes pertaining to the same subject matter which contain similar terms." *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 823 (3d Cir. 1999). The other statute's definition will control if it is reasonable to assume that the legislature was influenced by the prior statute. *Id.* at 823-24. In other words, "[w]hen Congress adopts the wording of a previously enacted statute, that adoption

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[2] *See* 19 U.S.C. § 2436(e) (in context of trade relations and customs duty, defining "Communist country" as a country dominated or controlled by communism).

will usually carry with it the previous judicial interpretations of the wording." *Richerson v. Jones*, 551 F.2d 918, 927 n.17 (3d Cir. 1977). In this case, therefore, the Court should examine prior constructions of the term "instrumentality" under at least two federal statutes that predated the FCPA, neither of which support a definition of "instrumentality" that rests on the fact of government control alone.

First, the Foreign Sovereign Immunities Act ("FSIA") requires that an "instrumentality" be "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). The Supreme Court has construed this definition to mean that government "control" of an entity does not automatically transform the entity into an instrumentality, because, under the FSIA, "[m]ajority ownership by a foreign state, *not control*, is the benchmark of instrumentality status." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003) (emphasis added). Thus, in *Dole Food*, the defendant companies were deemed not to be "instrumentalities" of the Israeli government even though "the State of Israel exercised considerable control over their operations." *Id.* That is because in many instances, "government control[] is not considerably different from the control a majority shareholder would enjoy under American corporate law." *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 998 (9th Cir. 2001) (quoting *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001), *aff'd*, 538 U.S. 468).

The FSIA alternatively contemplates that a business may be an "instrumentality" of a foreign government in light of "the circumstances surrounding the entity's creation, the purpose of its creation, its independence from the government, its employment policies, and its

obligations and privileges under state law." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206-07 (3d Cir. 2003). The Third Circuit emphasized the importance of alleging such facts, because

> [r]equiring less would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status[.] . . . This result would be unfair to plaintiffs, *who in some such cases might not have reason to know of the slight relationship of their dealings with the foreign states*, and who, therefore, likely would not have had the opportunity to consider this important fact when negotiating contracts.

Id. at 208 (emphasis added).

Second, courts have construed the definition of "instrumentality" as that term is used in the Employee Retirement Income Security Act ("ERISA"). That statute exempts governmental retirement plans from certain of its provisions, where "governmental plan" means a plan established "by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32). At least two courts and the Internal Revenue Service determine whether an entity is an "instrumentality" according to whether, *inter alia*, the entity performs a governmental function or functions versus whether the entity involves primarily private interests and financial independence from the government. *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 918 (2d Cir. 1987) (quoting Revenue Ruling 57-128, 1957-1 C.B. 311); *Caranci v. Blue Cross & Blue Shield of Rhode Island*, 194 F.R.D. 27, 33-34 (D.R.I. 2000) (quoting same).

Other courts have likewise determined that an "instrumentality" of the state includes the concept of performance of a government function. *Fed. Reserve Bank v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 185 (8th Cir. 1981), *aff'd* 455 U.S. 995 (1982) ("A governmental instrumentality is one that performs an important governmental function."); *Tenn. Valley Auth. v. Kinzer*, 142 F.2d 833, 837 (6th Cir. 1944) ("Its great functions are governmental in nature, and might have been performed directly by officers of the Government. It is plainly a

governmental agency or instrumentality of the United States."). The courts in these cases did *not* rely on mere allegations of control to confer "instrumentality" status.

The FSIA, ERISA, and other federal statutes thus characterize "instrumentalities" as entities that serve a public function, without resort to a test of government control. The Court should require a criminal indictment under the FCPA to allege at least the same facts constituting "instrumentality" status as the Court would require under these civil statutes. *See Liberty Lincoln-Mercury*, 171 F.3d at 823; *Richerson*, 551 F.2d at 927 n.17.

(2) The fact that Congress describes "control" elsewhere in the FCPA and in other federal statutes supports the notion that "control" alone is not sufficient to confer "instrumentality" status.

The corollary canon of textual interpretation supports this reading of "instrumentality" as well. "[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed." *Richerson*, 551 F.2d at 928 (citation omitted). Congress' intention to omit government control from the meaning of "instrumentality" under the FCPA is clear from the fact that Congress has included the concept of control elsewhere.

First, the FCPA itself contemplates control of a corporation in establishing liability for corporate owners. The FCPA's accounting provision, 15 U.S.C. § 78m, which imposes certain accounting controls on issuers of securities on U.S. stock exchanges, provides that "[w]here an issuer . . . *holds 50 per centum or less of the voting power* with respect to a domestic or foreign firm, . . . the issuer [shall] proceed in good faith to use its influence to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls." 15 U.S.C. § 78m(b)(6) (emphasis added). In other words, the FCPA incorporates an explicit control test to determine whether subsidiaries of issuers must adopt the same systems of controls as required of

the issuer. But the statute makes no similar reference to control in relation to whether entities may be "instrumentalities" of the foreign government. The inclusion of an explicit control concept in one section of the FCPA, but not in the section defining "instrumentalities," is highly instructive. "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (citation omitted). If Congress intended the FCPA to apply to certain foreign entities by virtue of government control, "it knew how to use express language to that effect." *Cf. Colgrove v. Battin*, 413 U.S. 149, 163 (1973).

Second, numerous other federal statutes use a concept of "control" in analogous contexts where the FCPA does not. For example, federal procurement laws require disclosure by contractors if they are "owned or *controlled (whether directly or indirectly)* by a foreign government or an agent or *instrumentality* of a foreign government." 10 U.S.C. § 2327(a) (emphasis added). Statutes governing the Federal Deposit Insurance Corporation distinguish between an "*instrumentality* of the United States[] and any corporation owned or *controlled* by the United States." 12 U.S.C. § 1831r(a) (emphasis added). Security interests backed by the Federal Agricultural Mortgage Corporation are not securities "issued or guaranteed by a person *controlled* or supervised by, or acting as an *instrumentality* of, the Government of the United States." 12 U.S.C. § 2279aa-12(a)(1) (emphasis added).

These statutes discuss instrumentalities and "control" separately, which is fatal to the indictment's necessary assumption that all government-controlled entities are "instrumentalities" under the FCPA based solely on control. The statutes demonstrate that Congress intended to distinguish government-owned entities from "instrumentalities." *See Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 380-81 (3d Cir. 2002) ("Based on Congress's past usage, if Congress

intended that § 510 apply to hiring practices, it would have included the word 'hire' in the string of denominated employment practices.").

(3) Congress amended the FCPA to implement an international anti-bribery convention that explicitly imposes a government function, and not control, concept.

It is also instructive for the Court to consider the scope of the international anti-bribery convention that the FCPA was amended to implement. The Organisation of Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention") defines a "foreign public official" as *inter alia*, "any person exercising a public function for a foreign country," and does not premise liability on payments to an employee of an entity merely controlled by a foreign government. (Convention ¶ 1.4.a) Under the Convention, even in the case of a government-controlled enterprise, a violation is only established if the recipient was performing a public function. In the case of a government-controlled enterprise, a public function under the Convention is presumed 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." (Convention Commentary ¶¶ 14-15.) In other words, under the Convention, ordinary commercial activities, even among government-controlled enterprises, will not support a public bribery violation.

The Convention is relevant because Congress specifically amended the FCPA to implement the Convention. In 1998, the United States Senate ratified the Convention and implemented it through amendments to the FCPA. *See* S. Res. 2375, 105th Cong. (1998). The Committee report stated that the 1998 amendments to the FCPA were intended to "conform it to the requirements of and to implement the OECD Convention." S. Rep. 105-277, at 2 (July 30,

1998). Significantly, the implementing legislation ultimately enacted by Congress expanded the definition of "foreign official" to include "public international organizations." Pub. L. No. 105-366 § 2(b). Congress did not, however, expand the FCPA definition of "foreign official" to apply to employees of government-controlled enterprises. *See id.*

Congress' decision not to disturb the meaning of "instrumentality" while implementing the Convention further demonstrates its intent to require something more than mere government control to establish liability under the FCPA. "Courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the previous version." *Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 187 (3d Cir. 2006).

(4) Under the doctrine of *ejusdem generis*, the Court should construe the term "instrumentality" in light of the specific terms immediately preceding it.

The conclusion that "instrumentality" under the FCPA must encompass some notion of government function is also supported by the doctrine of *ejusdem generis*. "[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Marciano v. MONY Life Ins. Co.*, 470 F. Supp. 2d 518, 532 (E. D. Pa. 2007) (quotations omitted). Accordingly, an "instrumentality" under the FCPA—which follows "agency" and "department"—must perform a governmental function akin to functions performed by governmental agencies and departments. *Accord Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) ("[W]hen a statute sets out a series of specific terms ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.").

4. The Indictment Is Insufficient Because It Alleges "Control" Only, And Not the Exercise of any Government Function by the Five Subject Entities.

As the above arguments demonstrate, the term "instrumentality" in the FCPA necessarily includes a concept of government function, and not solely government control or ownership. The indictment fails to allege an offense because it incorporates an incorrect definition of "foreign official," relying instead on an overly-broad construction of the term "instrumentality" not supported by the text of the statute and not supported by any reasonable interpretation of the statute. The indictment must accordingly be dismissed. *Cf. Enmons*, 410 U.S. at 410-12 (rejecting government's interpretation of "extortion" under the Hobbs Act and affirming dismissal of indictment); *Alkhabaz*, 104 F.3d at 1496 (rejecting government's interpretation of "threat" under 18 U.S.C. § 875(c) and affirming dismissal of indictment).

A. The Rule of Lenity Requires a Narrow Construction of "Department, Agency, or Instrumentality," and the Phrase is Unconstitutionally Vague if it is Premised Solely on Government Control of Ownership.

1. To the Extent that the Term "Instrumentality" Remains Ambiguous, the Rule of Lenity Requires the Narrower Construction.

As noted above, the Court in connection with this indictment must determine whether the FCPA's definition of "department, agency, or instrumentality" is satisfied by a mere allegation of government-control or ownership or whether that definition includes a concept of government function. If ambiguity remains as to which construction of the FCPA is the proper one, then the Court should apply the rule of lenity.

The rule of lenity applies where "the statutory text, history, and legislative purpose do not provide clarity." *Introcaso*, 506 F.3d at 269. When competing interpretations of a statute are equally plausible, "the tie must go to the defendant. The rule of lenity requires ambiguous

criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S. Ct. at 2025. Justice Scalia explains:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Id.; *accord Introcaso*, 506 F.3d at 269-70.

Indeed, the Third Circuit requires a clear distinction between public "instrumentalities" and commercial entities in the civil context, since international businessmen "might not have reason to know of the slight relationship of their dealings with the foreign states" arising from business with "a party only tangentially related to a foreign state." *USX Corp.*, 345 F.3d at 208 (construing "instrumentality" under the FSIA). Given "the seriousness of criminal penalties," *Introcaso*, 506 F.3d at 270, it would be odd for Congress to provide more protection to businessmen in civil court than to businessmen in criminal court. If Congress actually intended such a result, then "Congress must have spoken in language that is clear and definite." *Id.*

Assuming Congress has provided no such clarity or definition, the rule of lenity requires the Court to adopt the construction that provides "a fair warning . . . of what the law intends to do if a certain line is passed." *United States v. Bass*, 404 U.S. 336, 348 (1971). That construction is the construction that clearly distinguishes between entities that perform a public function on the one hand, and entities that are merely government-controlled on the other. *Cf. Dole Food Co.*, 538 U.S. at 477; *USX Corp.*, 345 F.3d at 208. Especially given that the Convention does not predicate public bribery simply upon government control of the recipient's employer, it would not constitute fair warning if the FCPA (which implements the Convention) contained a different and broader test.

2. A Reading of the FCPA That Applies to Entities Based Only on Government Control Would Render the Statute Unconstitutionally Vague.

Constitutional due process "requires that a penal statute define [a] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "Although due process does not require impossible standards of clarity," *id.* at 361, it does require "that a legislature establish minimal guidelines to govern law enforcement," *id.* at 358. A statute is therefore deemed void and unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Waterman v. Farmer*, 183 F.3d 208, 212 n.4 (3d Cir. 1999) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

In other contexts, the Third Circuit has explained the difficulty of guessing the meaning and application of the term "instrumentality." Absent clear standards of what constitutes an "instrumentality," businessmen are left guessing whether a particular business partner has some "tangential" relationship to a foreign government and whether that relationship implicates the FCPA's criminal provisions. *See USX Corp.*, 345 F.3d at 208 (construing "instrumentality" under the FSIA). If that ambiguity is unfair in a civil context, *see id.*, it is doubly so in a criminal context.

The FCPA is vague as applied to this indictment because the indictment depends on a bare allegation of government ownership to transform *all* employees of Teleco "foreign officials" within the meaning of the statute. As a result, the indictment raises more questions about future behavior than it answers. How much government "control" over a particular entity is enough to make that entity an "instrumentality" under the FCPA? Given the extent to which

third world countries "control" or "ownership" economic activities within their borders, are all enterprises in Haiti "instrumentalities" and are all of their employees "foreign officials"?

In light of the confusion surrounding the term "instrumentality," *see USX Corp.*, 345 F.3d at 208, an FCPA definition of "department, agency, or instrumentality" premised upon "control" alone violates the "[d]ue process require[ment] that laws provide a fair warning of that which is prohibited" and provide "sufficiently explicit standards applying those laws," *Waters v. McGuriman*, 656 F. Supp. 923, 926 (E.D. Pa. 1987). As such, it is unconstitutionally vague under the Fifth Amendment to the U.S. Constitution. *Cf. id.* (finding state law unconstitutionally vague under Fourteenth Amendment).

III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss all Counts of the indictment.

Respectfully submitted,

s/ Richard Diaz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed via CM/ECF this 2nd day of November, 2010 and served upon all parties of record electronically.

s/ Richard Diaz

Richard J. Diaz, Esq.