UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. SACR 09-00077-JVS Date May 18, 2011

Present: The Honorable James V. Selna

Interpreter Not Present

Karla J. Tunis	Not Present	Not Present
Deputy Clerk	*Court Reporter.*	*Assistant U.S. Attorney*

	U.S.A. v. Defendant(s):	Present	Cust.	Bond		Attorneys for Defendants:	Present	App.	Ret.
1.	**Stuart Carson**	**NOT**		**X**	**1.**	**Nicola T. Hanna**	**NOT**		
						Joshua Jessen			**X**
2.	**Hong Carson**	**NOT**		**X**	**2.**	**Kimberly A. Dunne**	**NOT**		**X**
3.	**Paul Cosgrove**	**NOT**		**X**	**3.**	**Kenneth Miller**	**NOT**		**X**
						Teresa Cespedes Alarcon			**X**
4.	**David Edmonds (Waiver on File)**	**NOT**		**X**	**4.**	**David W. Weichert**	**NOT**		**X**
						Michael Weinbaum			**X**
						Jessica Munk			**X**

Proceedings: (In Chambers) Order Denying Defendants' Motion to Dismiss Counts 1 though 10 of the Indictment (Fld 2-21-11)

I. Introduction

Defendants Stuart Carson, Hong "Rose" Carson, Paul Cosgrove, and David Edmonds (collectively "Defendants") move to dismiss Counts 1 through 10 of the Indictment on the grounds that they fail to state an offense ("Motion"). Count 1 charges Defendants with a conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2, and Counts 2 through 10 charge them with substantive violations of the FCPA.[1] Defendants contend that employees of state-owned companies can never be "foreign officials" under the FCPA. The FCPA designates a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." According to Defendants, state-owned companies are not departments, agencies, or instrumentalities of a foreign government, and thus Counts 1 through 10 should be dismissed. However, to the extent that there is any ambiguity concerning the reach of "foreign official" under the FCPA, Defendants

[1] Count 1 also charges Defendants with conspiring to violate the Travel Act, 18 U.S.C. § 1952, from 1998 through 2007. 18 U.S.C. § 371. Counts 2 through 10 additionally charge aiding and abetting. 18 U.S.C. § 2.

argue that the rule of lenity requires dismissal. Finally, even if the FCPA proscribes payments made or promised to employees of state-owned companies, Defendants submit that the statute is unconstitutionally vague as applied to them. The Government opposes Defendants' Motion.

II. Factual Background

A federal grand jury returned a sixteen-count indictment on April 9, 2009 ("the Indictment").[2] The counts at issue here target certain alleged bribes by Defendants — or, a conspiracy to pay bribes — to officials of foreign, state-owned companies for the purpose of obtaining or retaining business for their employer, Controlled Components Inc. ("CCI").[3] (Indictment ¶ 14.) CCI is in the business of manufacturing "control valves for use in the nuclear, oil and gas, and power generation industries worldwide." (Indictment ¶ 3.) CCI's customers include state-owned companies in China (China National Offshore Oil Corporation, China Petroleum Materials and Equipment Corporation, Dongfang Electric Corporation, Guohua Electric Power, Jiangsu Nuclear Power Corporation, and PetroChina), Korea (Korea Hydro and Nuclear Power), Malaysia (Petronas), and United Arab Emirates (National Petroleum Construction Company). (Indictment ¶ 12.) The Indictment alleges that $4.9 million in bribes or "corrupt payments" were made to officers and employees of CCI's foreign, state-owned customers between 2003 and 2007. (Indictment ¶ 14.) Counts 1 through 10 are summarized as follows:

> Count 1: Conspiracy to violate the FCPA and the Travel Act, 18 U.S.C. § 1952, from 1998 through 2007. (Indictment ¶¶ 15-31.)
>
> Count 2: Violation of the FCPA, as reflected by a wire transfer of approximately $250,200 to official(s) at Korea Hydro and Nuclear Power on September 21, 2004. (Indictment ¶¶ 32-33.)
>
> Count 3: Violation of the FCPA, as reflected by a wire transfer of approximately $57,658 to official(s) at Korea Hydro and Nuclear Power on April 21, 2004. (Indictment ¶¶ 32-33.)
>
> Count 4: Violation of the FCPA, as reflected by a wire transfer of approximately

[2] Count 16 of the Indictment was dismissed on February 28, 2011.

[3] Company A, referred to in paragraph 14 of the Indictment, is now known as CCI. CCI is a Delaware corporation that is headquartered in Rancho Santa Margarita, California. (Indictment ¶ 3.)

$15,000 to official(s) at PetroChina on April 13, 2004. (Indictment ¶¶ 32-33.)

Count 5: Violation of the FCPA, as reflected by a wire transfer of approximately $33,706.80 to official(s) at China Petroleum Material and Equipment Corporation on March 1, 2005. (Indictment ¶¶ 32-33.)

Count 6: Violation of the FCPA, as reflected by a wire transfer of approximately $58,500 to official(s) at China National Offshore Oil Corporation on January 14, 2005. (Indictment ¶¶ 32-33.)

Count 7: Violation of the FCPA, as reflected by a wire transfer of approximately $161,413.31 to official(s) at National Petroleum Construction Company on April 2, 2007. (Indictment ¶¶ 32-33.)

Count 8: Violation of the FCPA, as reflected by a wire transfer of approximately $125,447.10 to official(s) at Dongfang Electric Corporation on February 2, 2005. (Indictment ¶¶ 32-33.)

Count 9: Violation of the FCPA, as reflected by a wire transfer of approximately $24,500 to official(s) at Guohua Electric Power on October 21, 2003. (Indictment ¶¶ 32-33.)

Count 10: Violation of the FCPA, as reflected by a wire transfer of approximately $98,000 to official(s) at Petronas on January 6, 2004. (Indictment ¶¶ 32-33.)

III. Legal Standard

Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." "A pretrial motion is generally 'capable of determination' before trial if it involves questions of law rather than fact." United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986). When issues raised in a pretrial motion are "entirely segregable" from the evidence that will be presented a trial, they must be decided before trial. Id. (quoting United States v. Barletta, 644 F.2d 50, 57-58 (1 Cir. 1981)). However, when issues are "'substantially founded upon and intertwined with' evidence concerning the alleged offense," the issues "fall[] within the province of the ultimate finder of fact and must be deferred." Id. (quoting United States v. Williams, 644 F.2d 950, 952-53 (2d Cir. 1981)). "Finally, if an issue raised in a pretrial motion is not entirely segregable from the evidence to be presented at trial, but also does not require review of a substantial portion of that evidence, the

district court has discretion to defer decision on the motion." Id.

IV. Discussion

The anti-bribery provisions of the FCPA prohibit any domestic individual or business entity from offering payments to a "foreign official" for the purpose of inducing that official to direct business a certain way (e.g., to obtain or retain business by the individual or business entity, or to direct business to any other person).[4] See 15 U.S.C. § 78dd-2(a)(1). The term "foreign official" is defined as follows:

> [A]ny 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.

15 U.S.C. § 78dd-2(h)(2)(A). Defendants argue that employees of state-owned companies can never be "foreign officials" under these provisions.

A. Defendants' Motion Is Not Entirely Segregable from the Evidence To Be Presented at Trial

Defendants contend that the question of whether employees of state-owned companies are "foreign officials" under the FCPA is a legal issue that does not depend on the evidence. For this purpose, Defendants submit that the Court may assume that the state-owned companies named in the Indictment are wholly owned companies by foreign states. (Mot. at 11; Reply at 3.) The Government responds that Defendants' Motion is premature because the Government intends to prove at trial that the state-owned companies charged in the Indictment are "agencies" or "instrumentalities" under the FCPA. (Opp'n at 9.) According to the

[4] More specifically, and as relevant here, the FCPA makes it "unlawful for any domestic concern, . . . or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to — (1) any foreign official for purposes of — . . . (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person . . . ." 15 U.S.C. § 78dd-2(a)(1). The term "domestic concern" means "(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h)(1).

Government, Defendants' Motion is a challenge to the sufficiency of the evidence — an inappropriate challenge on a motion to dismiss. (Opp'n at 9.) Because Defendants are informed of the elements of their charged offenses and have a sufficient basis to make a claim for double jeopardy, thereby satisfying both prongs of the Hagner test, their Motion should be denied. (Opp'n at 9-12 (citing Hagner v. United States, 285 U.S. 427, 431 (1932).)

The Court agrees with the Government that the Indictment satisfies the requirements of Rule 7(c)(1) of the Federal Rules of Criminal Procedure. Defendants are not only apprised of the elements of the charged offenses, but also have a sufficient basis to make a claim for double jeopardy. See Hagner, 285 U.S. at 431. The Court also takes Defendants' point that satisfying the Hagner test is not necessarily dispositive if, as a matter of law, the FCPA does not proscribe corrupt payments made to officers and employees of state-owned companies. (Reply at 4.) Ultimately, however, the Court concludes that the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact. As discussed more fully below, simply assuming that a company is wholly owned by the state is insufficient for the Court to determine as a matter of law whether the company constitutes a government "instrumentality." Several factors bear on the question of whether a business entity constitutes a government instrumentality, including:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

Such factors are not exclusive, and no single factor is dispositive. As applicable here, their chief utility is simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an "instrumentality" under the FCPA — with state ownership being only one of several considerations.

Accordingly, for these reasons and those discussed in more detail below, Defendants' Motion is not entirely segregable from the evidence to be presented at trial, and therefore must be denied. Shortt Accountancy, 785 F.2d at 1452.

B. Employees of State-Owned Companies Could Be "Foreign Officials" within the Meaning of the FCPA

1. The Meaning of the Statutory Text Is Clear

Statutory interpretation begins with the language of the statute. CSX Transp., Inc. v. Ala. Dep't of Revenue, __ U.S. __, 131 S. Ct. 1101, 1107 (2011). The "plain and unambiguous statutory language" must be enforced according to its terms. Hardt v. Reliance Standard Life Ins. Co., __ U.S. __, 130 S. Ct. 2149, 2156 (2010). Here, whether employees of state-owned companies could be "foreign officials" withing the meaning of the FCPA turns on whether state-owned companies can be considered "instrumentalities" under any circumstances.[5]

The FCPA does not define "instrumentality," so it must be given its ordinary meaning. Schindler Elevator Corp. v. United States ex rel. Kirk, __ U.S. __, 2011 WL 1832825, at *4 (May 16, 2011); CSX Transp., 131 S. Ct. at 1107. "Instrumentality" generally refers to something that is used to achieve an end — an intermediary or means through which something is accomplished. Black's Law Dictionary (9th ed. 2009) ("1. A thing used to achieve an end or purpose. 2. A means or agency through which a function of another entity is accomplished, such as a branch or governing body.")[6]; Oxford English Dictionary (2d ed. 1989; online version March 2011) ("1. The quality or condition of being instrumental; the fact or function of serving or being used for the accomplishment of some purpose or end; agency."); Webster's Third New International Dictionary of the English Language (1981) ("1. the quality or state of being instrumental : a condition of serving as an intermediary . . . 2 a : something by which an end is achieved : Means . . . b: something that serves as an intermediary or agent through which one ore more functions of a controlling force are carried out : a part, organ, or subsidiary branch esp. of a governing body . . . .").

According to the Government, a "government instrumentality" in the context of the

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[5] The Government argues that one of the relevant entities, the European Agency for Reconstruction, clearly falls under the FCPA because it is an agency. (Opp'n at 6, 11.) Defendants respond that this entity was not identified in the Indictment and is only relevant to the alleged conspiracy in Count 1, which should be dismissed if Counts 2 through 10 are dismissed. (Reply at 4.) The Court notes in passing that Count 1 also charges violations of the Travel Act. Be that as it may, the Court finds it unnecessary to consider what effect, if any, the inclusion of the European Agency for Reconstruction has on Defendants' Motion. The Court's analysis will be limited to whether the state-owned companies named in the Indictment could ever be "instrumentalities" under the FCPA.

[6] Defendants note that the Revised Fourth Edition of Black's Law Dictionary (the version in effect in 1977 when the FCPA took effect) did not have an entry for "instrumentality." (Reply at 7; Decl. of Nicola T. Hanna, Ex. 1.) While this may be true, Defendants do not suggest that the ordinary meaning of "instrumentality" as used in 1977 differed from more recent dictionary definitions. Moreover, there is no contention that the term "instrumentality" did not have a common dictionary definition. See text, infra.

FCPA "is an entity through which a government achieves an end or purpose or carries out the functions or policies of the government." (Opp'n at 16.) Defendants reject this definition, arguing that the Government's proposed definition and other dictionary definitions are too broad and largely beg the question. (Mot. at 12; Reply at 7-8.) Defendants submit that there is no settled legal definition of "instrumentality." (Reply at 7.) Moreover, bestowing a broad definition to "instrumentality," as proposed by the Government, would render the preceding terms of "department" and "agency" mere surplusage: both a "department" and an "agency" are entities "through which a government achieves an end or purpose." (Reply at 7; see also Mot. at 15 ("'Departments' and 'agencies' are subdivisions, units, or organs of a government that carry out functions of the government.").) Instead, Defendants propose that term "instrumentality" should be considered in the context of the preceding terms, meaning "governmental units and subdivisions that are akin to departments and agencies." (Mot. at 12.)

The Court agrees that the meaning of "instrumentality" should be considered both within the context of the preceding terms of the FCPA and in view of the FCPA as a whole.[7] The Court also agrees that the term "instrumentality" was intended to capture entities that are not "departments" or "agencies" of a foreign government, but nevertheless carry out governmental functions or objectives. (See Mot. at 15 (stating that "governments also have myriad bureaus, boards, administrations, commissions, and the like that also carry out governmental functions.").) Thus, the Court accepts Defendants' point that domestic governmental entities such as the FBI, FTC, SEC, and NLRB are not "departments" or "agencies" of the government, but most certainly would qualify as "instrumentalities" of the government. (See id.) It does not follow, however, that state-owned companies should be categorically excluded from Defendants' non-exclusive list of hypothetical instrumentalities. Admittedly, a mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality.

At oral argument, and in their briefs, Defendants placed great weight on McBoyle v. United States, 283 U.S. 25 (1931). (Mot. at 38-39; Reply at 18.) The question there was whether an airplane fell within the statutory definition of "vehicle" for purposes of the National Motor Vehicle Theft Act, which prohibited interstate transfer of certain stolen means of transportation. Id. at 25-26. Mr. Justice Holmes noted that "in everyday speech 'vehicle' calls

[7] Specifically, with respect to viewing the FCPA as a whole, the Court has considered Defendants' position that other provisions of the FCPA make it clear that the term "instrumentality" does not include state-owned companies, (see Mot. at 17-19; Reply at 12-13), as well as the Government's position that reading all parts of the FCPA make clear that foreign government instrumentalities could include state-owned companies. (Opp'n at 20-23.) In the Court's view, the Government's position is the stronger of the two.

up the picture of a thing moving on land." Id. at 26. Indeed, the language of the statute "evoke[s] in the common mind only the picture of vehicles moving on land." Id. at 27. The use of the term "instrumentality" in the FCPA produces no such crisp exclusion of a state-owned entity. To the contrary, a state-owned entity — just like an agency or department — is a modality through which a government may conduct its business.[8]

Finally, Defendants ask the Court to give the term "instrumentality" meaning by looking its surrounding statutory "friends," "department" and "agency." (Mot. at 12-15.) The fallacy of the Defendants' reliance on the *noscitur a sociis* doctrine is pointed out by the Supreme Court's recent decision in Schindler Elevator Corp., 2011 WL 1832825, at *6. There the Second Circuit had concluded that the term "reports" in the *qui tam* statute should be given a narrow meaning since it fell among terms such as "hearing, audit, or investigation" and "civil, criminal [and] administrative hearing" in defining the public source exclusion for *qui tam* claims. Id. The Supreme Court rejected that view because it did not take into account the entire statute, including Congress' intent for broad exclusions, particularly as reflected in term "news media." Id. at 7. Here, Defendants construction of "instrumentality" as constrained by the characteristics of the surrounding terms "agency" and "department" would work a similarly impermissible narrowing of a statute intended to mount a broad attack on government corruption.

2. Domestic Instrumentalities Demonstrate that State-Owned Companies Could Be Considered an "Instrumentality"

The fact that corporations have long been used in this country to carry out governmental objectives supports the conclusion that state-owned companies could be considered an "instrumentality." See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386 (1995) (recounting "the long history of corporations created and participated in by the United States for the achievement of governmental objectives."). The first and second Banks of the United States

[8] The Court recognizes that McBoyle's "fair warning requirement" is often discussed in the context of the rule of lenity or vagueness doctrine. See United States v. Lanier, 520 U.S. 259, 265-66 (1997) (discussing "three related manifestations of the fair warning requirement" articulated in McBoyle: the vagueness doctrine, rule of lenity, and due process). However, before Justice Holmes reaches this "fair warning requirement," he discusses the ordinary meaning of "vehicle" in the context of National Motor Vehicle Theft Act. Id. at 26-27. It is at this point that McBoyle and this case diverge: the ordinary meaning of "vehicle" might exclude something "that flies," especially when an airplane is "not commonly called a vehicle" and the common "theme" of the National Motor Vehicle Act was "a vehicle running on land," id. at 26, but it is undisputed that the ordinary meaning of "instrumentality" could include a state-owned enterprise when the FCPA was enacted, as discussed infra. Indeed, in McBoyle, Justice Holmes supports his "etymologically" narrow construction of the word "vehicle" by noting that Congress never mentioned airplanes in debates: "Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress." Id. Here, as Defendants acknowledge, state-owned enterprises were expressly mentioned in competing bills introduced to Congress. (Mot. at 26.) Thus, unlike in McBoyle, Congress considered state-owned enterprises in their debates and adopted a term "instrumentality" that was broad enough to encompass them.

created in the 18th and 19th centuries were the first such corporations created by the Federal Government. Id. at 386-87. These were later followed by corporations such as the Panama Railroad Company in the early 20th century, as well as the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation during the First World War. Id. at 387-88. Later still, the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation ("FDIC"), and the Tennessee Valley Authority ("TVA") were created during the Great Depression. Id. at 388. The list of corporations created by the Federal Government goes on. See id. at 386-89. It is true that the control exercised by the Government over these corporations has historically varied. See id. at 386-89. For example, the Government held 20% of the stock in the second Bank of the United States with the President appointing 5 of the Bank's 25 directors, whereas the Government "became the sole shareholder of the Panama Railroad . . . with the Secretary of War, as the holder of the stock, electing the Railroad's 13 directors." Id. at 387. But it is also undisputed that the Government was involved with the "commercial sale of goods and services" in a few of these corporations, such as the TVA. Id. at 388; see also Optiperu, S.A. v. Overseas Private Inv. Corp., 640 F. Supp. 420, 424 (D.D.C. 1986) (concluding that the Overseas Private Investment Corporation ("OPIC") is an instrumentality because "although OPIC is authorized by Congress to carry out commercial activities that can be characterized as private in nature, OPIC's transactions must further the policy interests of the federal government."). Given this country's long history of using corporations to carry out governmental objectives, the Court rejects the idea that governmental and commercial actions are necessarily incompatible. (Compare Mot. at 15 (stating that "a business enterprise, regardless of any investment by a foreign government, cannot fairly be said to be carrying out governmental (rather than commercial) functions") with Opp'n at 21-22 (stating that Defendants' "argument fails because it is based on the false dichotomy that there cannot be both 'governmental' and 'commercial' action.").)

Defendants concede that "there are a handful of U.S. [state-owned enterprises] and that some of these entities may be considered U.S. 'instrumentalities' under specific statutes," but argue that this has "no bearing on the meaning of 'instrumentality' as used in the FCPA." (Reply at 6-7, 14.) According to Defendants, an entity may qualify as an instrumentality under one statute but not another. (Reply at 13 (citing Hall v. Am. Nat'l Red Cross, 86 F.3d 919, 921 (9th Cir. 1996).) The Court certainly agrees that whether an entity is considered an "instrumentality" depends on the statute in consideration. However, the statute under consideration here is the FCPA that uses the word "instrumentality" and does not further define it. The fact that domestic, state-owned corporations have been considered "instrumentalities" of the United States, as Defendants concede, is indisputably relevant to whether foreign, state-

owned companies could ever be considered "instrumentalities" of a foreign state.[9]

3. Other Statutes Support the Fact that a State-Owned Enterprised Could Be Considered an "Instrumentality"

Defendants argue that Congress knows how to define the term "instrumentality" as a function of government ownership of a business enterprise when it desires to do so. (Mot. at 30.) In the Foreign Sovereign Immunities Act ("FSIA"), Congress expressly defined an "agency or instrumentality" to include state-owned enterprises. (Mot. at 31.) Because the FCPA does not expressly define "instrumentality" to include state-owned companies, Defendants argue that the appropriate inference to be drawn is that Congress did not intend to capture state-owned companies. (Mot. at 30-32.)

The Court disagrees. Essentially, Defendants attempt to apply the well known canon of statutory construction *expressio unius est exclusio alterius* or similar variation to the FCPA, but these canons apply only within the same statute. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) ("As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."); Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted) (emphasis added). Such canons do not apply when comparing two different statutes, and Defendants do not cite any authority supporting their proposition. Contrary to Defendants' argument, the Court agrees with the Government that the use of the word "instrumentality" in other statutes to encompass state-owned companies supports the opposite inference. (Opp'n at 24-26.) The fact that Congress passed FSIA a year before the FCPA, and defined "instrumentality" to include state-owned companies, ultimately supports the Court's conclusion that an "instrumentality" could include such entities under the FCPA.

[9] In dicta, the court in Hall speculated as to why Congress used the word "instrumentality" in the Religious Freedom Restoration Act when it was clear that Congress did not intend to expand the class of government actors. 86 F.3d at 921. The court reasoned that "courts sometimes use the phrase 'agency or instrumentality' when they are actually asking whether a particular institution is part of the government itself," and "Congress's incorporation of words which are sometimes used to refer to those entities simply indicates a desire to encompass all parts of the government itself within the Act." 86 F.3d at 921. The court concluded that "the use of the word 'instrumentality' in a general, inclusionary definition does not indicate an intention to encompass entities which are not a part of the government, even though they may be governmental 'instrumentalities' in some sense." Id. The Court does not discern any tension between Hall's dicta and the Court's conclusion that state-owned companies could be an "instrumentality" of a foreign government: some state-owned companies are undoubtedly "part of the government."

Alternatively, Defendants point to the accounting provisions of the FCPA, specifically 15 U.S.C. § 78m(b)(6), to argue that the FCPA employs an "explicit 'control test' in defining the responsibilities of corporate owners for acts of subsidiaries," but does not "employ such a test with respect to government 'instrumentalities.'"[10] (Mot. at 32.) According to Defendants, the fact that the FCPA uses a "a control test in the accounting provisions, but not in the anti-bribery provisions' definition of 'foreign official' or 'instrumentality,' suggests that Congress did not intend the word 'instrumentality' in the anti-bribery provision to cover business entities that are owned or controlled by a government.'" (Mot. at 32.)

The Court cannot discern any inference to be drawn from 15 U.S.C. § 78m(b)(6). Section 78m(b)(6) deems that issuers who own 50% or less of the voting power of a foreign or domestic firm have met the filing requirements delineated paragraph (2) (e.g., filing annual and quarterly reports) as long as the issuers use "good faith efforts" to influence the firm to meet paragraph (2)'s requirements. These accounting provisions under § 78m appear wholly separate from (and irrelevant to) the anti-bribery provisions of the FCPA codified under § 78dd-2.[11]

4. A Review of the Legislative History of the FCPA Is Unnecessary

In all statutory construction cases, "the first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" Sigmon Coal, 534 U.S. at 450 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)); Schindler Elevator Corp., 2011 WL 1832825, at *8. When the "statutory language is unambiguous and the statutory scheme is coherent and consistent," the "inquiry ceases."[12] Id. (internal quotation marks omitted).

The Court finds that the statutory language of the FCPA is clear, that the statutory scheme is coherent and consistent, and that resort to the legislative history of the FCPA is

[10] Section 78m(b)(6) states: "Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2)." 15 U.S.C. § 78m (b)(6) (emphasis added).

[11] It bears noting that the FCPA was codified in the chapter "Securities Exchange Act of 1934." See 15 U.S.C. § 78a.

[12] As Defendants point out, "[t]here is some debate as to the propriety of considering legislative history in criminal cases even when the text is *unclear*." (Mot. at 22 n.15 (citing Santos, 553 U.S. at 513 n.3).)

unnecessary.[13]

5. Conclusion for Statutory Construction

The Court concludes that some business entities may be considered an "instrumentality," but this is a fact-specific question that depends on the nature and characteristics of the business entity. Other district courts considering this issue have reached similar conclusions. See United States v. Aguilar, No. 2:10-cr-01031-AHM, ECF No. 474 (C.D. Cal. Apr. 20, 2011); United States v. Esquenazi, No. 1:09-cr-21010-JEM, ECF No. 309 (S.D. Fla. Nov. 19, 2010); United States v. Nguyen, No. 2:08-cr-00522-TJS, ECF No. 144 (E.D. Pa. Dec. 30, 2009).

In Aguilar, for example, defendants made virtually identical arguments to those made here — that the proper construction of "instrumentality" excluded state-owned companies. The court rejected this argument:

> Defendants' very language reveals an illogical flaw in their "all or nothing" approach. That is, they argue that a state-owned corporation can never be an "instrumentality" because state-owned corporations "do not always" share the characteristics of departments and agencies. This formulation implicitly concedes that some state-owned corporations can and do share the characteristics of departments and agencies. And Defendants never explain why those corporations must be excluded from the definition of "instrumentality."

Aguilar, ECF No. 474 at 9. Likewise, defendants in Equenazi also argued that Telecommunications D'Haiti ("Haiti Teleco") was not an instrumentality under the FCPA, which the court rejected:

> The Court also disagrees that Haiti Teleco cannot be an instrumentality under the FCPA's definition of a foreign official. The plain language of this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government.

Esquenazi, ECF No. 379 at 3. The Court reaches the same conclusion as these district courts:

[13] Defendants include a comprehensive review of the legislative history of the FCPA with their motion. (See Decl. of Prof. Michael J. Koehler, Feb. 2, 2011, ECF No. 305.) The Government argues that "nowhere in the vast review of legislative history can the defendants point to a single quote that supports the position that the FCPA should not apply to employees of [state-owned enterprises]." (Opp'n at 35.) Defendants reply that "the inverse is equally true, that is, the Government 'cannot point to a single quote' from a member of Congress that supports the position that the FCPA *should* apply to employees of [state-owned enterprises]." (Reply at 17.)

state-owned companies may be considered "instrumentalities" under the FCPA, but whether such companies qualify as "instrumentalities" is a question of fact.[14]

C. The Rule of Lenity Does Not Apply

The rule of lenity applies "if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute,' such that the Court must simply 'guess as to what Congress intended.'" Barber v. Thomas, __ U.S. __, 130 S. Ct. 2499, 2508-09 (2010) (internal citation and quotation marks omitted). "Courts should not deem a statute 'ambiguous' for purposes of lenity merely because it is possible to articulate a construction more narrow than that urged by the Government." Lisbey v. Gonzales, 420 F.3d 930, 933 (9th Cir. 2005); but see United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances — where text, structure, and history fail to establish that the Government's position is unambiguously correct — we apply the rule of lenity and resolve the ambiguity in [defendant's] favor.") "Instead, courts have 'reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.'" Lisbey, 420 F.3d at 933.

Defendants argue that the rule of lenity applies because the Government cannot show that its position with respect to the term "instrumentality" is "unambiguously correct." (Mot. at 39.) First, Defendants point out that the ordinary meaning of the word "instrumentality" is too broad. (Mot. at 12, 39.) Second, if the Government's broad interpretation were adopted, Defendants submit that it would lead to absurd results. (Mot. at 20-22, 39.) Third, Defendants argue that the legislative history of the FCPA indicates that Congress did not intend to create a general anti-bribery statute, and that Congress knows how to include state-owned or state-controlled business enterprises in the definition of "instrumentality" when it wants to do so. (Mot. at 22-32, 39.) Fourth, Defendants contend that the Government's proposed interpretation would render the statute unconstitutionally vague because it would be impossible to say with certainty that Congress intended employees of state-owned business enterprises to be deemed "foreign officials." (Mot. at 33-35, 39.) Finally, in the event that the Government's proposed interpretation and Defendants' interpretation are equally plausible, a "tie" must go to Defendants. (Reply at 19 (citing United States v. Santos, 553 U.S. 507, 514 (2008).)

The Government responds that the FCPA is not infected by a "grievous ambiguity or

[14] The Court notes that the parties make a number of additional arguments regarding statutory construction. For example, Defendants argue that the Government's proposed interpretation would lead to absurd results and that courts should avoid interpretations resulting in unconstitutional vagueness. (Mot. at 20-22, 33-35.) The Government argues that the "Charming Betsy" rule of statutory construction applies. (Opp'n at 28-33.) Because the Court finds that the grounds discussed above are dispositive, the Court need not formally address these additional arguments.

uncertainty" that leaves this Court left to "guess as to what Congress intended." (Opp'n at 45.) The plain meaning of instrumentality, together with the text, context, and purpose of the FCPA, leave "no reasonable doubt" that the term instrumentality could include state-owned companies. (Opp'n at 44-45.) While it is possible to posit an interpretation of the term instrumentality that is narrower than the Government's, that fact alone does not warrant application of the rule of lenity. (Opp'n at 43-45.)

After considering the text, structure, history, and purpose of the FCPA, the Court finds that there is no "grievous ambiguity or uncertainty in the statute" such that the Court must simply "guess as to what Congress intended." Barber, 130 S. Ct. at 2508-09. As discussed previously, the ordinary meaning of "instrumentality" indicates that state-owned companies could fall under the ambit of the FCPA. Whether such companies do, in fact, qualify as an instrumentality is a question of fact. For this reason, the Court does not find that Defendants' reliance on Santos, 553 U.S. at 507, is persuasive. The rule of lenity applied in Santos because the word "proceeds" was susceptible to two different meanings, "profits" or "receipts." Id. at 511. This reasoning does not apply here because "instrumentality" does not have two or more equally plausible meanings that produce divergent results. Defendants attempt to transform what is essentially a question of fact — whether a business entity qualifies as an "instrumentality" — into an alternative, narrower definition of "instrumentality" that excludes such entities. This is not a proper basis to invoke the rule.

More fundamentally, Defendants' principal challenge seems to be that the ordinary dictionary definitions of "instrumentality" or the Government's proffered definition are too broad. This type of challenge is better analyzed as an as-applied, vagueness challenge.

D. "Foreign Official" Is Not Void for Vagueness

To satisfy due process, a statute must "define the criminal offense with (1) sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." Skilling v. United States, __ U.S. __, 130 S. Ct. 2896, 2927-28 (2010) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "The void-for-vagueness doctrine embraces these requirements." Id. at 2928.

When considering a void-for-vagueness challenge, a strong presumptive validity attaches to an Act of Congress. Id. (stating that court must "construe, not condemn, Congress' enactments.") "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." United States v. Valenzuela, 596 F.2d 1361, 1367 (9th Cir. 1979) (quoting United States v. Mazurie, 419 U.S. 544, 550 (1975)). Scienter requirements in criminal statutes may alleviate vagueness

concerns.[15] Gonzales v. Carhart, 550 U.S. 124, 149 (2007); Colautti v. Franklin, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.").

Defendants contend that the definition of "foreign official" fails to meet both due process requirements. First, Defendants argue that it is not "reasonably clear" from the face of the FCPA that employees of state-owned business enterprises also constitute "foreign officials." (Mot. at 41.) Defendants offer an admittedly extreme example a gas station attendant at a local CITGO station as potentially qualifying as a "foreign official," concluding that "few ordinary citizens would ever imagine that . . . [the attendant] might be considered an 'officer or employee of a foreign government or any department, agency, or instrumentality thereof.'" (Mot. at 41.) Defendants also take issue with the Government's contention that "'[s]tate-owned business enterprises may, *in appropriate circumstances*, be considered instrumentalities of a foreign government,'" because the Government "never defines what those 'appropriate circumstances' are," which "unquestionably encourages arbitrary and discriminatory enforcement of the statute." (Mot. at 41-42 (emphasis in original).) The Department of Justice's website and its submission to the Organization for Economic Cooperation and Development do not provide clear guidance on who constitutes a "foreign official." (Mot. at 42-44.) The Government has offered mixed and conflicting signals as to what qualifies as an "instrumentality" for the purposes of FCPA. (Mot. at 44-45.) Finally, many commentators — including former FCPA prosecutors — have acknowledged the vagueness of FCPA's definition of a "foreign official." (Mot at 45-48.) For all of these reasons, Defendants submit that the FCPA is void for vagueness.

The Government disagrees, pointing out that no court has held that the definition of "foreign official" in the FCPA is unconstitutionally vague. (Opp'n at 46.) Defendants have not referenced any facts of this case in arguing that the FCPA is vague as applied, and the FCPA's scienter requirement eliminates any claim that the statute is unconstitutionally vague as applied to Defendants. (Opp'n at 47.) Moreover, where a criminal statute regulates economic activity, the Government argues that the vagueness test is less strict because businesses can be expected to consult relevant legislation in advance of action. (Opp'n at 48 (quoting United States v. Reliant Energy Servs., 420 F. Supp. 2d 1043, 1054 (N.D. Cal. 2006).) Finally, the Government contends that the "core" of the FCPA concerns "corruption," not what constitutes a "foreign official." (Opp'n at 49.) Given the extensive, previous prosecutions of bribes to officials of state-owned businesses, as well as the plain text of the statute, it is clear that the FCPA covers those types of bribes. (Opp'n at 49-50.)

[15] The Court need not consider presently the type of detailed scienter instruction which would be appropriate here.

Defendants' void-for-vagueness challenge fails. First, the meaning of "instrumentality" in the FCPA is sufficiently definite that an ordinary person can understand what conduct is prohibited. Skilling, 130 S. Ct. at 2927. This conclusion is supported by the FCPA's scienter requirement. Carhart, 550 U.S. at 149. Second, Defendants do not apply the facts of the case to their vagueness challenge. Valenzuela, 596 F.2d at 1367. Were Defendants charged with bribing an attendant at the local CITGO gas station, they undoubtedly would have a strong as-applied challenge.[16] But those are not the facts of this case, and Defendants have not put forward even one argument concerning the charges in this Indictment. Finally, the Court does not find that defining a term broadly, such as "instrumentality," would "encourage arbitrary and discriminatory enforcement." Skilling, 130 S. Ct. at 2927-28. Given the Government's substantial evidentiary burden to establish that a business entity constitutes a government instrumentality, and the scienter requirement mentioned above, the definition of a "foreign official" does not encourage arbitrary or discriminatory enforcement.

V. Conclusion

Accordingly, for the foregoing reasons, Defendants' Motion is denied.

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[16] Indeed, Defendants' example only reinforces the Court's conclusion that a fact-specific analysis is required.