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15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 SOUTHERN DIVISION

18 UNITED STATES OF AMERICA,) NO. SA CR 09-00077-JVS
19 Plaintiff,)
20 v.) GOVERNMENT'S OPPOSITION TO
21 STUART CARSON et al.,) DEFENDANTS' AMENDED MOTION TO
22 Defendants.) DISMISS COUNTS ONE THROUGH TEN OF
23) THE INDICTMENT; MEMORANDUM OF
) POINTS AND AUTHORITIES
) Hearing Date & Time:
) May 9, 2011
) 3:00 p.m.

24
25 Plaintiff United States of America, by and through its
26 attorneys of record, the United States Department of Justice,
27 Criminal Division, Fraud Section, and the United States Attorney
28 for the Central District of California (collectively, "the

1 government"), hereby files its Opposition to Defendants' Amended
2 Motion to Dismiss Counts One through Ten of the Indictment. The
3 government's Opposition is based upon the attached memorandum of
4 points and authorities, the declaration of Assistant United
5 States Attorney Douglas F. McCormick and accompanying exhibits,
6 the declaration of FBI Special Agent Brian Smith and accompanying
7 exhibits, the declaration of Clifton M. Johnson, the files and
8 records in this matter, as well as any evidence or argument
9 presented at any hearing on this matter.

10 DATED: April 18, 2011

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The Indictment charges violations of the Foreign Corrupt
3 Practices Act ("FCPA"), a statute passed by Congress with one of
4 its purposes being to restore confidence in the integrity of the
5 free market system. Through their motion to dismiss, defendants
6 improperly seek to limit the FCPA's reach to a small portion of
7 the global economy and erroneously attempt to transform a fact-
8 based determination of whether the specific entities charged in
9 the indictment are instrumentalities of a foreign government into
10 an abstract legal question - whether ANY state-owned entity
11 ("SOE") could ever be a government instrumentality - even though
12 every court that has considered the issue has determined that the
13 FCPA can prohibit bribes to SOEs. Defendants base their argument
14 on the insupportable legal conclusion that an entity cannot
15 engage in both governmental and commercial activity. For the
16 reasons set forth below, the Court should deny the motion to
17 dismiss.

18 **I. FACTUAL AND LEGAL BACKGROUND**

19 **A. The Foreign Corrupt Practices Act**

20 The FCPA was enacted as a comprehensive response to what was
21 seen as a pervasive problem of foreign bribery and an attempt to
22 address the negative impact that corruption has on the global
23 economy. In explaining the need for the legislation, Congress
24 explained:

25 The payment of bribes to influence the acts or decisions of
26 foreign officials, foreign political parties or candidates
27 for foreign political office is unethical. It is counter to
28 the moral expectations and values of the American public.
But not only is it unethical, it is bad business as well. It
erodes public confidence in the integrity of the free market
system. It short-circuits the marketplace by directing
business to those companies too inefficient to compete in

1 terms of price, quality or service, or too lazy to engage in
2 honest salesmanship, or too intent upon unloading marginal
3 products. In short, it rewards corruption instead of
efficiency and puts pressure on ethical enterprises to lower
their standards or risk losing business.

4 H. Rep. No. 95-640 (1977) at 4-5. To address this serious
5 economic problem, Congress was clear that the legislation was to
6 have expansive reach. Id. at 7 (explaining that the legislation
7 "broadly prohibits transactions that are corruptly intended to
8 induce the recipient to use his or her influence to affect any
9 act or decision of a foreign official, foreign government or an
10 instrumentality of a foreign government") (emphasis supplied).

11 During the period surrounding the FCPA's adoption, SOEs held
12 virtual monopolies and operated under state-controlled price-
13 setting in many national industries around the world. See
14 Exhibit A¹ Bureaucrats in Business: The Economics and Politics of
15 Government Ownership, World Bank Policy Research Report at 78
16 (1995), Table 2.4a (indicating domestic competition in select
17 industries and select countries).² While the United States was
18 the exception to the rule that SOEs comprised a critical part of
19 the national economy, for some of those countries with SOEs named
20 in the indictment, the World Bank data indicate that, as measured
21 by share of GDP, SOEs averaged over the 1978 to 1991 period
22 approximately 10% of the economy in Korea and over 17% of the
23

24
25 ¹ Citations to Exhibit A to Q are citations to exhibits
26 attached to the Declaration of Douglas F. McCormick, filed
concurrently herewith.

27 ² The World Bank defined SOEs as "government owned or
28 controlled economic entities that generate the bulk of their
revenue from selling goods and services." See Exhibit A
Bureaucrats in Business at 263-64 (focusing on governmental
control demonstrated by ownership).

1 economy in Malaysia. Id. at 270-71.

2 B. Elements of the FCPA

3 The defendants are charged with violations of the FCPA, the
4 Travel Act, and conspiracy to violate the FCPA and Travel Act.
5 To sustain its burden of proof for the offense of violating the
6 FCPA, the Government must prove the following seven elements
7 beyond a reasonable doubt.

8 First: The defendant is a domestic concern, or an
9 officer, director, employee, or agent of a
domestic concern;

10 Second: The defendant acted corruptly and willfully;

11 Third: The defendant made use of the mails or any means
12 or instrumentality of interstate commerce in
furtherance of an unlawful act under the FCPA;

13 Fourth: The defendant offered, paid, promised to pay, or
14 authorized the payment of money or of anything of
value;

15 Fifth: That the payment or gift was to a foreign official
16 or to any person, while knowing that all or a
17 portion of the payment or gift would be offered,
given, or promised, directly or indirectly, to a
foreign official;

18 Sixth: That the payment was for one of four purposes:

19 – to influence any act or decision of the foreign
20 official in his official capacity;

21 – to induce the foreign official to do or omit to
22 do any act in violation of that official's lawful
duty;

23 – to induce that foreign official to use his
24 influence with a foreign government or
instrumentality thereof to affect or influence any
act or decision of such government or
instrumentality; or

25 – to secure any improper advantage; and

26 Seventh: That the payment was made to assist the defendant
27 in obtaining or retaining business for or with, or
28 directing business to, any person.

1 See 15 U.S.C. § 78dd-1 *et seq.*; see also Exhibit B (Jury
2 Instructions in United States v. Bourke, 1:05-CR-518 (S.D.N.Y.
3 2009) (RT 3363:18 - 3368:19 (July 8, 2009))); Exhibit C (Jury
4 Instructions in United States v. Jefferson, 1:07-CR-209 (E.D. Va.
5 2009) (RT 77:21 - 79:13 (July 30, 2009))).

6 A "foreign official" is defined in the FCPA as

7 any officer or employee of a foreign government or any
8 department, agency, or instrumentality thereof, or of a
9 public international organization, or any person acting in
10 an official capacity for or on behalf of any such government
11 or department, agency, or instrumentality or for or on
12 behalf of any such public international organization.

13 15 U.S.C. § 78dd-2(h)(2)(A).

14 C. The Indictment and the Relevant State Owned Entities

15 A federal grand jury returned a sixteen-count indictment on
16 April 9, 2009 ("the Indictment"), charging defendants Stuart
17 Carson ("S. Carson"), Hong "Rose" Carson ("R. Carson"), Paul
18 Cosgrove, David Edmonds, Flavio Ricotti, and Han Yong Kim
19 (collectively, "the defendants") with conspiring to pay bribes to
20 officials of foreign state-owned companies and officers and
21 employees of foreign and domestic private companies, for the
22 purpose of assisting their employer, Controlled Components Inc.
23 ("CCI"), to obtain and retain business related to the sale of
24 products used in the generation and distribution of power.

25 Count One of the Indictment charges the defendants with
26 conspiring to violate the FCPA, 15 U.S.C. § 78dd-2, and the
27 Travel Act, 18 U.S.C. § 1952, from 1998 through 2007. Counts Two
28 through Ten of the Indictment allege substantive FCPA violations
involving corrupt payments to foreign officials at SOEs in Korea,
China, United Arab Emirates, and Malaysia. The specific entities
alleged in Counts Two through Ten are Korea Hydro and Nuclear

1 Power ("KHNP"), PetroChina, China Petroleum Materials and
2 Equipment Corporation ("CPMEC"), China National Offshore Oil
3 Corporation ("CNOOC"), National Petroleum Construction Company
4 ("NPCC") (United Arab Emirates), Dongfang Electric Corporation
5 (China), Guohua Electric Power (China), and Petronas (Malaysia).
6 Counts Eleven through Fifteen allege substantive violations of
7 the Travel Act involving corrupt payments to officers and
8 employees of private companies.³

9 In related cases, two former CCI executives previously
10 pleaded guilty to conspiring to bribe officers and employees of
11 foreign SOEs on behalf of CCI. On January 8, 2009, Mario Covino,
12 the former CCI director of worldwide factory sales, pleaded
13 guilty to one count of conspiracy to violate the FCPA. Case No.
14 SA CR 08-00336-JVS (Dkt. #11). Covino admitted that he caused
15 CCI employees and agents to make corrupt payments to foreign
16 officials at SOEs including, but not limited to several of the
17 SOEs identified in the Indictment, such as CPMEC, CNOOC,
18 PetroChina, KHNP, and Petronas. On February 3, 2009, Richard
19 Morlok, the former CCI finance director, pleaded guilty to one
20 count of conspiracy to violate the FCPA. Case No. SA CR
21 09-00005-JVS (Dkt. #17). Morlok admitted that he caused CCI
22 employees and agents to make corrupt payments to foreign
23 officials at SOEs including several SOEs identified in the
24 Indictment, such as CNOOC, PetroChina, and KHNP.

25 On July 7, 2010, the Court ruled that at trial the
26 Government could introduce evidence relating to the charged

27
28 ³ The sixteenth count, which charged R. Carson with
obstruction of justice, has been subsequently dismissed at the
Government's request.

1 transactions as well as an additional thirty transactions. On
2 August 11, 2010, the Government notified the defendants of the
3 additional thirty transactions. These additional transactions
4 involved officials at entities in China, India, Nigeria, Saudi
5 Arabia, Taiwan, and the United Arab Emirates. One of the
6 additional entities was the European Agency for Reconstruction,
7 which was an arm of the European Union.

8 The Government intends to prove at trial that each relevant
9 entity was a department, agency or instrumentality of a foreign
10 government. See Declaration of FBI Special Agent Brian Smith
11 ("Smith Dec.") ¶¶ 13-55 (describing specific characteristics of
12 the relevant SOEs) and ¶¶ 3-12 (providing overview of SOEs in
13 China). For example, the Chinese Criminal Code contains two
14 types of criminal bribery: official bribery and commercial
15 bribery. Employees of state owned companies or enterprises who
16 participate in bribery are covered by the Articles related to
17 official bribery. See Smith Dec. ¶¶ 6-11. The SOE at issue in
18 Count 6, CNOOC, was created under a Chinese government regulation
19 that designated the company as "a state corporation with the
20 qualification of a juridical person which has the exclusive right
21 to explore for petroleum within the areas of cooperation and to
22 develop, produce, and market it," and the government is able to
23 exert strong influence on CNOOC's strategy through the
24 appointment of board members and senior management. See Smith
25 Dec. ¶¶ 21-22. Similarly, the SOE at issue in Count 10,
26 Petronas, is wholly owned by the Malaysian Government, was
27 incorporated in 1974 pursuant to the Malaysian Petroleum
28 Development Act as the national oil company of Malaysia, and was

1 vested with the entire ownership and control of the petroleum
2 resources in the country. See Smith Dec. ¶¶ 30-33. According to
3 Malaysian domestic law, bribery includes payments to officials at
4 any public body, including subsidiary companies over which the
5 Government of Malaysia has a controlling interest. See Smith
6 Dec. ¶ 33.

7 **II. LEGAL ARGUMENT**

8 **A. Summary of Argument**

9 The defendants argue that the FCPA counts in the Indictment
10 must be dismissed because, as a matter of law, no employee or
11 officer of an SOE could ever be an official under the FCPA.
12 (Defts' Mot. at 3162).⁴ The defendants' legally insupportable
13 and limited reading of the FCPA should be rejected.

14 First, the defendants' argument is premature in that it is
15 premised, despite their denials, upon a question of fact for the
16 jury to determine - whether the named SOEs are agencies or
17 instrumentalities of a foreign government. Despite the
18 Government's request, the defendants will not stipulate to facts
19 that may be in dispute regarding the relevant entities. Because
20 there are outstanding factual disputes, it is therefore premature
21 to address the defendants' motion pre-trial.

22 A full analysis of the term instrumentality clearly
23 demonstrates that the term can include SOEs. The Court should
24 look to a number of different factors in identifying the proper
25 interpretation of instrumentality:

26 _____
27 ⁴ Because defendants filed both a Motion, Dkt. # 304, and an
28 Amended Motion, Dkt. # 317, all references to defendants' motion
are to Dkt. # 317, referred to as "Defts' Mot.," and the page
numbers refer to the Page ID # on the upper left corner.

- 1 • Under its plain meaning, instrumentality means an
2 entity through which a government achieves an end or
3 purpose, which could include SOEs - as every court has
4 found;
- 5 • Statutory language suggests that the FCPA is to be
6 interpreted broadly and proscribe a wide variety of
7 criminal conduct;
- 8 • Giving meaning to all parts of the statute suggests
9 that SOEs were explicitly considered in the FCPA;
- 10 • The term instrumentality as used in other contexts,
11 both foreign and in the United States, includes SOEs;
- 12 • An interpretation not including SOEs takes the United
13 States out of compliance with its treaty obligations;
- 14 • An interpretation that includes SOEs is consistent with
15 the legislative history of the FCPA;
- 16 • Defendants' reliance on absurd hypotheticals is
17 insufficient to invalidate the factual basis for the
18 specific allegations in the instant case.

19 Finally, contrary to defendants' arguments, neither the
20 "rule of lenity" nor "void for vagueness" doctrines should be
21 applied to this case.

22 B. The Defendants' Motion Is Premature

23 The defendants move to dismiss the FCPA counts in the
24 Indictment for failure to state an offense. The defendants argue
25 that, as a matter of statutory interpretation, any SOE must "fall
26 beyond the scope of the FCPA's definition of 'instrumentality.'" (Defts' Mot. at 3161). Such a challenge is premature.

27 Defendants incorrectly state that the Government's position
28 is that the charged SOEs are instrumentalities "solely by dint of
being state-owned in some fashion," (Defts' Mot. at 3161), or
that the Government's definition "encompass[es] any entity in
which a government has a monetary investment." (Defts' Mot. at
3171). Defendants are mistaken. The Government is not asking
for a legal conclusion that all SOEs are instrumentalities.

1 Rather, the Government intends to prove at trial the nature and
2 characteristics that demonstrate that these particular SOEs are
3 agencies or instrumentalities. See Smith Dec. ¶¶ 13-55. The
4 Court should deny their motion because, as discussed infra, the
5 defendants are appropriately informed of the elements of the
6 offenses and are sufficiently apprised of the essential facts to
7 be protected from double jeopardy.

8 The defendants' motion to dismiss is instead a challenge to
9 the sufficiency of the evidence. When the Government requested
10 that the defendants stipulate to certain facts so that there
11 would be no disputed issues for purposes of this motion, the
12 defendants demurred. Specifically, the Government proposed a
13 stipulation that the named SOEs were entities through which a
14 foreign government achieved an end or purpose. See Exhibit D
15 (relevant correspondence regarding request for a stipulation).
16 Defendants have thus far declined to enter into such a
17 stipulation. Based on that refusal alone, questions of fact
18 exist, and, thus, the Court should deny defendants' motion. In
19 addition, for the reasons set forth infra, defendants fail to
20 meet the legal standards necessary in a motion to dismiss for a
21 failure to state an offense.

22 1. Legal Standard for a Motion to Dismiss

23 Rule 7(c)(1) of the Federal Rules of Criminal Procedure
24 states that an indictment "shall be a plain, concise and definite
25 written statement of the essential facts constituting the offense
26 charged." Fed. R. Crim. P. 7(c)(1). It is a long-established
27 matter of law that:

28 The true test of the sufficiency of an indictment is not
whether it could have been made more definite and certain,

1 but whether it contains the elements of the offense intended
2 to be charged, and sufficiently apprises the defendant of
3 what he must be prepared to meet, and, in case any other
4 proceedings are taken against him for similar offenses,
5 whether the record shows with accuracy to what extent he may
6 plead a former acquittal or conviction.

7 Hagner v. United States, 285 U.S. 427, 431 (1932).

8 This well-known rule is simple to apply. An indictment is
9 sufficient if it: (1) states the elements of the offense
10 sufficiently to apprise the defendant of the charges against
11 which he or she must defend, and (2) provides a sufficient basis
12 for the defendant to make a claim of double jeopardy. See
13 Hamling v. United States, 418 U.S. 87, 117 (1974); United States
14 v. Vroman, 975 F.2d 669, 670-71 (9th Cir. 1992). Nothing more is
15 required.

16 A district court cannot grant a motion to dismiss an
17 indictment pursuant to Rule 12(b)(2) if the motion is
18 "substantially founded upon and intertwined with evidence
19 concerning the alleged offense." United States v. Lunstedt, 997
20 F.2d 665, 667 (9th Cir. 1993) (quoting United States v. Shortt
21 Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986)). Rather,
22 a district court can only grant such a dismissal if it is
23 "entirely segregable" from the evidence to be presented at trial.
24 Id. Otherwise, "the motion falls within the province of the
25 ultimate finder of fact and must be deferred [to the jury]." Id.
26 "[A] motion requiring factual determinations may be decided
27 before 'trial [only] if trial of facts surrounding the commission
28 of an alleged offense would be of no assistance in determining
the validity of the defense.'" Id. (quoting United States v.
Covington, 395 U.S. 57, 60 (1969)). As is most often the case,
when the sufficiency of an indictment turns on questions of fact,

1 motions premised on Rule 12(b)(2)(B) for failure to state a claim
2 are routinely denied. See, e.g., United States v. Jensen, 93
3 F.3d 667, 669 (9th Cir. 1996) (reversing a district court's
4 12(b)(2)(B) dismissal because "[b]y basing its decision on
5 evidence that should only have been presented at trial, the
6 district court in effect granted summary judgment for the
7 defendants. This it may not do.").

8 2. The Foreign Officials Are Properly Alleged

9 The Indictment clearly states every element of the offense,
10 and the step-by-step description in the overt acts makes it
11 impossible for the defendants to credibly claim either that they
12 do not know the offense against which they must defend or that
13 they would later be unable to assert a claim of double jeopardy.

14 The Indictment states:

15 Each of these state-owned entities was a department, agency,
16 and instrumentality of a foreign government, within the
17 meaning of the FCPA. The officers and employees of these
18 entities, including the Vice-Presidents, Engineering
19 Managers, General Managers, Procurement Managers, and
20 Purchasing Officers, were "foreign officials" within the
21 meaning of the FCPA.

22 Dkt. # 298-1 at 2710-11. Applying the Hagner test, the
23 Indictment properly alleges that the FCPA conspiracy and
24 substantive FCPA charges involved "foreign officials" of the
25 relevant agencies or instrumentalities of a foreign government.

26 Moreover, even though the indictment clearly identifies that
27 each of the SOEs was a "department, agency or instrumentality,"
28 defendants' entire motion focuses only on the definition of
"instrumentality." Yet, one of the relevant entities is clearly
an "agency" - the European Agency for Reconstruction. See Smith
Dec. ¶¶ 50-51. Defendants' choice to ignore whether the relevant

1 entities are "agencies" demonstrates a fundamental
2 misunderstanding of the legal basis for a motion to dismiss for
3 failure to state a claim.

4 The defendants fail to address the basic premise of criminal
5 procedure - whether the Indictment fails on either prong of the
6 Hagner test. Instead, they seek to circumvent the trial process
7 and have the Court determine, before the presentation of any
8 evidence, that the Government has not met its factual burden.
9 Taken as true, given the clear and binding precedent in this
10 Circuit, the Indictment is more than sufficient to meet the
11 Hagner standard, and, consequently, the defendants' motion should
12 be denied on this basis alone.

13 3. The Determination Of What Qualifies As an Agency Or
14 Instrumentality Is a Fact-Specific Question

15 Whether any given SOE is an agency or instrumentality is a
16 question of fact for the jury. In contrast to defendants'
17 characterizations, the Government's position is not that all SOEs
18 are, as a matter of law, agencies and instrumentalities. Some
19 SOEs may be instrumentalities - depending on the facts related to
20 the entity, but the terms are not coextensive.⁵ Indeed, the
21 Government has long opined that what makes up an instrumentality
22 is a factual question. See, e.g., Exhibit E (U.S. Response to
23 OECD Questions Concerning Phase I, at Section A.1.1 (p. 4))
24 ("state-owned businesses may, in appropriate circumstances, be
25 considered instrumentalities)." (emphasis supplied).

26
27 ⁵ The possibility that SOEs and instrumentalities are not
28 identical undercuts defendants' argument, Defts' Mot. at 3188,
that the inclusion of both instrumentality and SOEs in specific
legislation demonstrates that an instrumentality could never
include SOEs.

1 If the defendants are arguing that no matter the facts
2 surrounding the SOE, the simple corporate form automatically
3 moves the entity outside the definition of instrumentality, then
4 the argument should be quickly rejected. In examining the
5 definition of instrumentality in a domestic context, the Supreme
6 Court has disregarded the entity's corporate form: "That the
7 Congress chose to call it a corporation does not alter its
8 characteristics so as to make it something other than what it
9 actually is...." Lebron v. Nat'l Railroad Passenger Corp., 513
10 U.S. 374, 393 (1995) (quoting Cherry Cotton Mills, Inc. v. United
11 States, 327 U.S. 536, 539 (1946)). In Lebron, the Supreme Court
12 made clear that the corporate form is not sufficient to determine
13 the actual governmental nature of the entity. In finding that
14 Amtrak was a governmental entity, the Supreme Court dismissed the
15 corporate form, and instead relied upon Amtrak's origins, the
16 governmental purpose of the entity, and governmental direction
17 and control of the entity. 513 U.S. at 394-400. Consequently,
18 if defendants are basing their motion to dismiss only on the
19 corporate form of the SOEs, then the Court should deny it.

20 Defendants' argument appears instead to be that what
21 constitutes an instrumentality is "indecipherable." (Defts' Mot.
22 at 3164). Lurking behind the defendants' arguments about a
23 failure to state an offense, (Defts' Mot. at 3162-66), is
24 actually the claim that defendants do not know the precise
25 technical definition of which entities could be agencies or
26 instrumentalities under the FCPA. Such a challenge, however, is
27 not the primary challenge posed in their motion - that the
28 indictment fails to state an offense. If the defendants wish to

1 challenge the indictment on the basis that they did not know the
2 precise technical contours of what is illegal, the appropriate
3 challenge is only an as-applied, vagueness challenge, which
4 should be rejected for the reasons stated in Section II.D.2.

5 C. Interpretations of Instrumentality May Include SOEs

6 The bulk of the defendants' motion focuses on suggesting
7 that, based on the FCPA's legislative history, the Court must
8 adopt an insupportably narrow interpretation of government
9 instrumentality, and that the term instrumentality could never
10 include SOEs.⁶ Not only does defendants' argument turn the
11 ordinary canons of statutory construction on their head by
12 starting with the legislative history rather than the language of
13 the statute, but defendants' proposed limitation of
14 instrumentality is incorrect based on: (1) the plain meaning of
15 the term instrumentality, including the understanding of every
16 court that has faced the issue; (2) the FCPA's broad
17 construction; (3) the necessity of giving full definition to all
18 parts of the statute, including routine governmental action; (4)
19 the inclusion of SOEs in instrumentalities in both the foreign
20 and domestic contexts; (5) the requirement that the statute be
21 interpreted in light of the United States's treaty obligations;
22 (6) the legislative history, which includes references to SOEs;
23 and (7) the inapplicability of defendants' absurd hypotheticals.
24 Consequently, for the reasons identified infra, the Court should
25 deny defendants' motion to dismiss.

26
27
28

⁶ As noted supra, defendants' failure to even address whether the entities could be agencies, as alleged in the Indictment, is fatal to their argument.

1 1. Statutory Construction Begins With the Plain Meaning

2 Statutory interpretation starts with the text, and turns to
3 legislative history only where the text is ambiguous. As stated
4 in Barnhart v. Sigmon Coal Co.:

5 As in all statutory construction cases, we begin with
6 the language of the statute. The first step is to
7 determine whether the language at issue has a plain and
8 unambiguous meaning with regard to the particular
dispute in the case. The inquiry ceases if the
statutory language is unambiguous and the statutory
scheme is coherent and consistent.

9 534 U.S. 438, 450 (2002) (internal citations omitted). Where
10 the language of a statute is clear, the Ninth Circuit has held
11 that courts should “look no further than that language in
12 determining the statute’s meaning.” Oregon Natural Resources
13 Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996).

14 In so analyzing, “[p]articular phrases must be construed in
15 light of the overall purpose and structure of the whole statutory
16 scheme.” United States v. Lewis, 67 F.3d 225, 228-29 (9th Cir.
17 1995). In rejecting a claim that the FCPA’s statutory terms were
18 ambiguous, the Fifth Circuit held: “When construing a criminal
19 statute, we must follow the plain and unambiguous meaning of the
20 statutory language. Terms not defined in the statute are
21 interpreted according to their ordinary and natural meaning ...
22 as well as the overall policies and objectives of the statute.”
23 United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004).

24 (hereinafter “Kay I”). Moreover, “[w]hen we look to the plain
25 language of a statute in order to interpret its meaning, we do
26 more than view words or sub-sections in isolation. We derive
27 meaning from context, and this requires reading the relevant
28 statutory provisions as a whole.” Carpenters Health & Welfare

1 Trust Funds v. Robertson (In re Rufener Constr.), 53 F.3d 1064,
2 1067 (9th Cir. 1995).

3 Defendants summarily conclude that the dictionary definition
4 of instrumentality cannot assist the Court in determining whether
5 an SOE could be an instrumentality. (Defts' Mot. at 3168). Yet,
6 instrumentality is not an uncommon word in the law. See United
7 States Code (2009) (using the term instrumentality 1,492 times).
8 As such, it has an accepted legal definition. Black's Law
9 Dictionary (9th ed. 2009) (defining instrumentality as "[a] thing
10 used to achieve an end or purpose"); Merriam-Webster's Dictionary
11 of Law (1996 ed.) (defining instrumentality as "something through
12 which an end is achieved or occurs"). As the defendants note, an
13 instrumentality can also include "a means or agency through which
14 a function of another entity is accomplished, such as a branch of
15 a governing body" or "a subsidiary branch, as of a government, by
16 means of which functions or policies are carried out." (Defts'
17 Mot. at 3168).

18 Therefore, using the various dictionary definitions in the
19 context of the FCPA, a government instrumentality is an entity
20 through which a government achieves an end or purpose or carries
21 out the functions or policies of the government. Government
22 purposes and policies can be myriad - from providing national
23 defense and education, to developing infrastructure and
24 delivering necessary utilities, or even returning corporate
25 assets to the government and redistributing wealth through
26 welfare systems. Of particular relevance to this case is the
27 fact that the generation and distribution of power is still
28 controlled, at least in part, by the government in many

1 countries,⁷ including the United States, with state-owned
2 corporations like the Tennessee Valley Authority ("TVA").⁸
3 Therefore, the governmental function and purpose of the
4 generation and delivery of power obviously can include SOEs. If
5 instrumentality's plain meaning is achieving a government end or
6 purpose, then instrumentalities can include SOEs.

7 Indeed, while obviously not controlling, the Court can and
8 should consider that every court that has confronted the issue
9 and examined the meaning of instrumentality in the FCPA has
10 determined that it can include SOEs.

11 To date, three similar motions to dismiss for failure to
12 state an offense have been decided by district courts, all of
13 which denied the motions. See Exhibit H.1-H.3. Most recently,
14 in United States v. Aguilar, et al., CR 10-1031-AHM (C.D. Cal),
15 the district court, after extensive briefing, determined that the
16 relevant SOE, a Mexican electrical utility, was an
17 instrumentality. See Exhibit H.1 (RT 16:20-31:1 (April 1,
18 2011)). In that case, even though the defendants relied on many
19 of the same arguments as these defendants, including hefty
20 reliance on Professor Michael Koehler's affidavit regarding
21 portions of the legislative history, the Court found that the
22 meaning of instrumentality is plain. See id. at 29:21-24 ("I

23

24 ⁷ "Power utilities in nearly 85 developing countries are
25 still owned and operated by the state." Exhibit F (Sunita Kikeri
26 and Aishetu Kolo, The World Bank Group, State Enterprises at 3
(Feb. 2006)).

27 ⁸ Indeed, TVA operates in the same industries as the SOEs
28 identified in the Indictment. See Exhibit G. See also 16 U.S.C.
§ 831 et seq.; McCarthy v. Middle Tenn. Elec. Membership Corp.,
466 F.3d 399, 411 (6th Cir. 2006) ("[T]here is no question that
TVA is an agency and instrumentality of the United States.").

1 think that the language itself, and the very definition of
2 instrumentality that you proposed in your briefs, makes it
3 unnecessary to even engage in a legislative history or statutory
4 analysis....").

5 Similarly, in United States v. Esquenazi, a case involving
6 Haiti's state-owned telecommunications company, "Haiti Teleco,"
7 the district court rejected the defendants' argument that SOEs
8 were not included in the FCPA's definition of government
9 instrumentality:

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

16 Exhibit H.2 (Order Denying Motion to Dismiss in United States v.
17 Esquenazi, et al., 09-CR-21010 (S.D. Fl. 2010)). Likewise, the
18 district court in United States v. Nguyen denied a motion based
19 on the same premise. Exhibit H.3 (Order Denying Motion to
20 Dismiss in United States v. Nguyen, et al., 08-CR-522 (E.D. Pa.
21 2009)). While these decisions are not binding on this Court,
22 they are persuasive to rebut defendants' argument that SOEs could
23 never be an instrumentality of a foreign government.

24 Additionally, district courts have accepted more than 35
25 guilty pleas by individuals who have admitted to violating the
26 FCPA by bribing officials of SOEs. See Exhibit I (listing
27 enforcement actions based on foreign officials of SOEs). For a
28 court to accept a plea of guilty, a district court must have a
factual basis to believe that a crime has been committed. Fed.
R. Crim. Proc. 11(b)(3). This precedent is further evidence that

1 the plain meaning of instrumentality under the FCPA includes
2 SOEs.

3 2. Courts Should Interpret the FCPA Broadly

4 This Court also should interpret instrumentality to include
5 SOEs because Congress intended the FCPA to be interpreted
6 broadly. The FCPA "broadly prohibits transactions that are
7 corruptly intended to induce the recipient to use his or her
8 influence to affect any act or decision of a foreign official,
9 foreign government or an instrumentality of a foreign
10 government." H. Rep. No. 95-640 (1977) at 7 (emphasis supplied).
11 See Kay I, 359 F.3d at 751 (finding that "the FCPA uses broad,
12 general language in prohibiting payments....").

13 Also, the FCPA's section prohibiting corrupt payments by
14 domestic concerns uses the word "any" twenty-seven times. 15
15 U.S.C. § 78dd-2(a). The FCPA's definition of "foreign official"
16 includes the term "any" an additional five times. 15 U.S.C.
17 § 78dd-2(h)(2)(A) ("The term "foreign official" means any officer
18 or employee of a foreign government or any department, agency, or
19 instrumentality thereof, or of a public international
20 organization, or any person acting in an official capacity for or
21 on behalf of any such government or department, agency, or
22 instrumentality, or for or on behalf of any such public
23 international organization.") (emphasis added).

24 "The term 'any' is generally used to indicate lack of
25 restrictions or limitations on the term modified." U.S. ex rel.
26 Barajas v. United States, 258 F.3d 1004, 1011 (9th Cir. 2001);
27 see Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th
28 Cir. 1999) (observing that a dictionary defines "any" as "one, no

1 matter what one" and that the term's "broad meaning" has been
2 recognized by the Ninth Circuit). Consistent with Congress's use
3 of the term "any," this Court should give a broad construction to
4 the FCPA generally and, specifically, interpret the phrase "any
5 department, agency or instrumentality" to include a variety of
6 entities, such as SOEs, that fall into those categories.

7 3. Courts Interpret Statutes to Give Meaning to All Parts

8 Defendants argue that the other provisions of the FCPA lead
9 to the conclusion that SOEs could never be an instrumentality.
10 (Defts' Mot. at 3173-75). The opposite is true - reading all
11 parts of the statute makes clear that foreign government
12 instrumentalities could include SOEs. A basic principle of
13 statutory construction is that courts should not interpret a
14 statute in such a way that portions of the statute have no
15 effect. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1978)
16 (explaining that "[in] construing a statute we are obliged to
17 give effect, if possible, to every word Congress used"). See
18 also Kay I, 359 F.3d at 742 ("Furthermore, a statute must, if
19 possible, be construed in such fashion that every word has some
20 operative effect.") (citations and quotations omitted) (analyzing
21 statutory language of FCPA in reversing and remanding District
22 Court's dismissal of FCPA charges based on a motion to dismiss
23 for failure to state an offense).

24 The FCPA prohibits corrupt payments to foreign officials,
25 but it also provides an exception to its prohibitions for
26 "routine governmental action." 15 U.S.C. § 78dd-2(b) (emphasis
27 supplied). This provision provides

28 (b) Exception for routine governmental action
Subsections (a) and (i) of this section [prohibiting

1 payments to foreign officials, political parties, and party
2 officials] shall not apply to any facilitating or expediting
3 payment to a foreign official, political party, or party
4 official the purpose of which is to expedite or to secure
5 the performance of a routine governmental action by a
6 foreign official, political party, or party official.

7 Id. The FCPA goes on to provide examples of what "routine
8 governmental action" is:

9 (A) The term "routine governmental action" means only an
10 action which is ordinarily and commonly performed by a
11 foreign official in-

12 (i) obtaining permits, licenses, or other official
13 documents to qualify a person to do business in a
14 foreign country;

15 (ii) processing governmental papers, such as visas and
16 work orders;

17 (iii) providing police protection, mail pick-up and
18 delivery, or scheduling inspections associated
19 with contract performance or inspections related
20 to transit of goods across country;

21 (iv) providing phone service, power and water supply,
22 loading and unloading cargo, or protecting
23 perishable products or commodities from
24 deterioration; or

25 (v) actions of a similar nature.

26 (B) The term "routine governmental action" does not include
27 any decision by a foreign official whether, or on what
28 terms, to award new business to or to continue business
with a particular party, or any action taken by a
foreign official involved in the decision-making
process to encourage a decision to award new business
to or continue business with a particular party.

15 U.S.C. § 78dd-2(h)(4) (emphases added). The "routine
governmental action" exception thus describes actions that
individuals and companies can pay foreign officials to perform
without running afoul of the FCPA. Defendants argue that this
provision supports their position that SOEs could not be included
because the exception must be "governmental" action. (Defts'
Mot. at 3174). But their argument fails because it is based on

1 the false dichotomy that there cannot be both "governmental" and
2 "commercial" action. Yet, one of the express exceptions for
3 routine action is providing "power" - which can be both
4 governmental and commercial action, as demonstrated by a domestic
5 SOE like TVA or a foreign SOE power utility. See Exhibit H-1 (RT
6 16:20-31:1 (April 1, 2011)) (describing traits of Mexican SOE
7 electric utility and finding that it was an instrumentality).

8 Indeed, for all of the provisions of the "routine
9 governmental action" exception to have meaning, the definition of
10 foreign official must include officials at governmental entities
11 that actually do provide phone service, electricity, water, and
12 mail service; otherwise there would be no need for Congress to
13 provide an exception for those actions. While commercial
14 entities may provide those services, governmental entities do in
15 certain countries. Because of the "routine governmental action"
16 exception, Congress must have considered that some routine
17 functions, like delivering power, were governmental functions.

18 If those are government functions, it defies logic for the
19 FCPA to except payments to foreign governments or foreign
20 departments and agencies that provide those services, but not to
21 address state-owned telecommunications companies, state-owned
22 electric and water utilities, and state-owned mail services that
23 perform the exact same function. Defendants' argument fails
24 because they rely again on the false premise that there cannot be
25 both a governmental and commercial function. The "routine
26 governmental action" exception demonstrates that there are
27 functions, like delivery of power, that can be both governmental
28 and commercial. Therefore, analyzing the FCPA's full statutory

1 scheme including the "routine governmental action" exception, the
2 FCPA's terms of "agency and instrumentality" can include SOEs,
3 which can have both commercial and governmental functions.

4 In their motion, the defendants also discuss how the
5 "routine governmental action" provision was an amendment to the
6 FCPA and that when this provision was added, part of the
7 definition of "foreign official" was deleted. (Defts' Mot. at
8 3184-85).⁹ This substitution of routine governmental action
9 provision for part of the definition of "foreign official" only
10 strengthens the Government's argument that the term "foreign
11 official" was intended to apply to employees of SOEs.¹⁰ Indeed,
12 in examining the FCPA's legislative history, the Fifth Circuit
13 found that the addition of the routine governmental exception in
14 1988 "replicates the equally capacious language of prohibition in
15 the 1977 legislative history." Kay I, 359 F.3d at 751.

16 4. Agency and Instrumentality Should Be Defined Similarly
17 In Similar Contexts

18 Instrumentality is not an uncommon word, but defendants seek
19 to invent a new definition untethered from other definitions of
20 instrumentality. Congress's use of instrumentality of a foreign
21 government in two other statutes, the Foreign Sovereign
22 Immunities Act ("FSIA") and the Economic Espionage Act ("EEA"),

23
24 ⁹ The original definition of "foreign official" excluded "an
25 employee of a foreign government or any department, agency or
26 instrumentality whose duties are essentially ministerial or
27 clerical." Foreign Corrupt Practices Act of 1997, Pub. L. No.
28 95-213 §104(d)(2), 91 Stat. 1494,

¹⁰ Defendants argue, Defts' Mot. at 3175, that the absence
of instrumentality in 78dd-2(c)(2) illustrates that SOEs are
excluded. Yet, there is also no mention of "department." Logic
suggests "contracting with the foreign government" also includes
departments and instrumentalities.

1 supports the conclusion that "agency or instrumentality" in those
2 contexts could include SOEs. Additionally, Congress's use of
3 instrumentality in describing U.S. entities makes clear that
4 "agency or instrumentality" could include SOEs.

5 (a) FSIA and EEA's definition of Foreign Government
6 Agency and Instrumentality Includes SOEs

7 Defendants point to the fact that instrumentality is defined
8 in the FSIA and EEA to demonstrate that Congress did not intend
9 to include SOEs in the FCPA. (Defts' Mot. at 3186-89). The
10 defendants cite no cases supporting this position, and it is
11 unclear why, as a logical matter, this should be true. Indeed,
12 in most cases, including a definition of a term limits that
13 term's meaning, rather than expanding the meaning. Importantly,
14 a relevant canon of statutory construction is that courts should
15 interpret the same term in at least two similar statutes to have
16 the same or similar meanings. See Smith v. City of Jackson, 544
17 U.S. 228, 233 (2005) (plurality opinion) ("[W]hen Congress uses
18 the same language in two statutes having similar purposes,
19 particularly when one is enacted shortly after the other, it is
20 appropriate to presume that Congress intended that text to have
21 the same meaning in both statutes.").

22 An examination of the FSIA and EEA make clear that an SOE
23 could be an agency or instrumentality of a foreign government.
24 For example, the FSIA, which Congress passed the year before the
25 FCPA, defines agency or instrumentality in a manner that would
26 include SOEs:

27 An "agency or instrumentality of a foreign state" means any
28 entity (1) which is a separate legal person, corporate or
otherwise, and (2) which is an organ of a foreign state or
political subdivision thereof, or a majority of whose shares

1 or other ownership interest is owned by a foreign state or
2 political subdivision thereof. . . .

3 28 U.S.C. § 1603(b)(2) (emphasis added). Accordingly, an agency
4 or instrumentality pursuant to the FSIA can include SOEs. In
5 addition, besides majority ownership, the FSIA looks to many
6 other factors to determine whether an entity is an agency or
7 instrumentality, including purpose and government control. See,
8 e.g., Patrickson v. Dole Food Co., 251 F.3d 795, 807 (9th Cir.
9 2001)(examining six factors to be considered under the FSIA
10 "organ" prong). See also USX Corp. v. Adriatic Ins. Co., 345 F.3d
11 190, 208 (3d Cir. 2003).

12 Similarly, the Court can look to the EEA definition of
13 instrumentality of a foreign government to see if instrumentality
14 under the FCPA could ever include SOEs. Although the words used
15 are slightly different, the EEA, passed in 1996, conceptually
16 defines "instrumentality of a foreign government" much the same
17 way as "agency or instrumentality" was defined by the FSIA. Like
18 the FSIA, the EEA looks at both ownership and other elements,
19 like control and management, to determine what constitutes an
20 instrumentality. The EEA defines instrumentality to mean:

21 any agency, bureau, ministry, component, institution,
22 association, or any legal, commercial, or business
23 organization, corporation, firm, or entity that is
24 substantially owned, controlled, sponsored, commanded,
25 managed, or dominated by a foreign government.

26 18 U.S.C. § 1839(1). Therefore, under the EEA, an SOE could be a
27 foreign instrumentality.¹¹

28 The Government is not suggesting that the analysis used to
determine what is an "agency and instrumentality" under the FSIA

¹¹ To date, no court has specifically interpreted "foreign instrumentality" under the EEA.

1 or EEA is identical to the analysis used in the FCPA, but only
2 that "instrumentality" under both FSIA and EEA can include SOEs.
3 If the term instrumentality of a foreign government in the FCPA,
4 FSIA and the EEA are to be given similar interpretations, an
5 agency and instrumentality of a foreign government pursuant to
6 the FCPA could include SOEs.

7 (b) U.S. Instrumentalities Demonstrate That Foreign
8 Agencies and Instrumentalities Could Include SOEs

9 Importantly, Congress did not use the term instrumentality
10 exclusively when discussing the activities of foreign
11 governments. The U.S. government has created numerous SOEs in
12 order to pursue governmental functions with a wide variety of
13 organizational structures, and some of them are identified as
14 agencies and instrumentalities. Thus, the facts of a particular
15 entity are examined to determine if U.S. government entities,
16 including SOEs, are instrumentalities of the U.S. government.

17 The Government Corporation Control Act, 59 Stat. 597, as
18 amended, 31 U.S.C. § 9101 et seq., identifies a number of
19 different U.S. SOEs, which are wholly or partially owned by the
20 United States. Indeed, the Government Accountability Office
21 describes why these types of government corporations are used:

22 corporate form of organization ... is generally appropriate
23 for administering government programs that:

- 24 • are predominantly of a business nature
- 25 • produce revenue and are potentially self-sustaining
- 26 • involve a large number of business type transactions
27 and
- 28 • require greater flexibility than the appropriations
process ordinarily permits

26 Exhibit J (Federally Created Entities An Overview of the Key
27 Attributes, United States Government Accountability Office, GAO
28 10-97, October 2009) at 14. See also id. at 13-24 (identifying

1 numerous types of governmental organizations). U.S. government
2 corporations include entities that generate and distribute power,
3 like TVA¹² or even those that manufacture products for sale, like
4 Federal Prison Industries, Inc.¹³ See also Optiperu, S.A. v.
5 Overseas Private Inv. Corp., 640 F. Supp. 420, 424 (D.D.C. 1986)
6 (concluding that the Overseas Private Investment Corporation
7 ("OPIC") is an instrumentality because "although OPIC is
8 authorized by Congress to carry out commercial activities that
9 can be characterized as private in nature, OPIC's transactions
10 must further the policy interests of the federal government.").

11 Defendants fail to include any discussion of domestic
12 instrumentalities, although they discuss U.S. departments and
13 agencies. (Defts' Mot. at 3171). Instead, defendants rely on
14 the principle of noscitur a sociis for the proposition that
15 because the FCPA lists three items ("department, agency and
16 instrumentality"), instrumentality must be defined in relation to
17 the other two. The Government does not disagree that
18 instrumentality can be defined in relation to the other two
19 terms, but defendants' argument fails because it is based on the
20 insupportable assumption that infects their entire motion:

21 business enterprises, regardless of any investment by a
22 foreign government, cannot fairly be said to be carrying out
23 governmental (rather than commercial) functions.

24 ¹² TVA is a federal corporation, set up by Congress in 1933,
25 with numerous missions, including to reduce flood damage, improve
26 navigation on the Tennessee River, provide electric power and
27 promote "agricultural and industrial development" in the region.
28 See Exhibit G (TVA Key Facts).

¹³ Federal Prison Industries Inc., also known as UNICOR, is
a government corporation established by the Congress in 1934.
UNICOR provides job skills training to inmates as well as selling
quality products and services. See Exhibit K (Unicor Key Facts).

1 (Defts' Mot. at 3171). Nowhere do the defendants provide any
2 support for such a distinction or the conclusion that an entity
3 cannot have both a governmental and commercial function.

4 SOEs, like departments and agencies, often carry out
5 government policies and functions, are governed by public laws,
6 and draw from and contribute to the public fisc. SOEs often
7 function as strategic tools that governments use in the pursuit
8 of national policy objectives and supplement or provide
9 alternatives to privatization or regulation. See Exhibit L
10 (Corporate Governance of State Owned Enterprise: A Survey of OECD
11 Countries (2005) at 20-21 (describing the history and rationale
12 leading to SOES, including "[t]he combination of regulatory
13 deficiencies, political economy issues and social goals [that]
14 led to state ownership of many 'strategic' enterprises....").
15 SOEs can be instruments for governments to create revenues or
16 distribute subsidies, often "substituting for under developed
17 welfare systems." Id. Consequently, SOEs can act commercially,
18 but at the same time be instrumentalities to achieve a
19 governmental end or purpose.

20 5. Agency and Instrumentality Should Be Interpreted To
21 Comport with U.S. Treaty Obligations

22 The United States would be in violation of its treaty
23 obligations if the Court interprets "agency and instrumentality"
24 to exclude SOEs. Indeed, "an act of Congress ought never to be
25 construed to violate the law of nations if any other possible
26 construction remains...." Murray v. The Schooner Charming Betsy,
27 6 U.S. (2 Cranch) 64, 117-18 (1804). Known as the "Charming
28 Betsy" rule of statutory construction, the canon provides,
"[w]here fairly possible, a United States statute is to be

1 construed so as not to conflict with international law or with an
2 international agreement of the United States." Restatement of
3 Foreign Relations Law (Third) § 114. The rationale behind the
4 canon is straightforward:

5 If the United States is to be able to gain the benefits of
6 international accords and have a role as a trusted partner
7 in multilateral endeavors, its courts should be most
8 cautious before interpreting its domestic legislation in
9 such manner as to violate international agreements.

10 Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528,
11 539 (1995).

12 With respect to the instant matter, the Charming Betsy canon
13 is easy to apply because the treaty obligations require the
14 United States to criminalize bribes made to officials of SOEs.
15 On December 17, 1997, the members of the Organization of Economic
16 Co-Operation and Development adopted the Convention on Combating
17 Bribery of Foreign Officials in International Business
18 Transactions (the "OECD Convention"). Exhibit M (the OECD
19 Convention). The Senate ratified the OECD Convention on July 31,
20 1998, 144 Cong. Rec. 18509 (1998), and Congress implemented it
21 through various amendments to the FCPA. See The International
22 Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366,
23 S. Res. 2375, 105th Cong. (1998). Congress was explicit in its
24 intentions: "This Act amends the FCPA to conform it to the
25 requirements of and to implement the OECD Convention." S. Rep.
26 No. 105-2177 (1998) at 2.¹⁴ Indeed, the State Department's first
27 annual report to Congress on implementation of the OECD

28 ¹⁴ See also Exhibit N (Presidential Statement on Signing the
International Anti-Bribery and Fair Competition Act of 1998)
("This Act makes certain changes in existing law to implement the
Convention on Combating Bribery of Foreign Public Officials in
International Business Transactions.")

1 Convention, which was required by the Senate's resolution of
2 advice and consent, "found that 1998 amendments to the FCPA
3 "conform[ed] it to the requirements of and...implement[ed] the
4 OECD Convention."). See Exhibit 0 (Dept. of State, Bureau of
5 Econ. & Bus. Affairs, Battling International Bribery: 1999
6 Report, Chapter 2 at p. 3).

7 With regard to the definition of "foreign official," only
8 one unrelated amendment to the FCPA was necessary in Congress's
9 view to bring the statute into compliance with the OECD
10 Convention.¹⁵ Otherwise, Congress considered the FCPA's
11 definition of "foreign official" to be inclusive of the
12 definition in the OECD Convention. In other words, Congress
13 intended that bribes to any official that was prohibited under
14 the OECD Convention was also prohibited under the FCPA as
15 originally passed. As the Fifth Circuit found in reviewing the
16 legislative history of the FCPA, "[s]ubsequent legislation
17 declaring the intent of an earlier statute is entitled to great
18 weight in statutory construction." Kay I, 359 F.3d at 752.

19 Importantly for purposes of this motion, the OECD
20 Convention, Exhibit M, contains an explicit prohibition against
21 the bribery of officials of SOEs. The OECD Convention requires
22 OECD parties to make it a criminal offense under their law for:

23 any person intentionally to offer, promise or give any undue
24 pecuniary or other advantage, whether directly or through
25 intermediaries, to a foreign public official, for that
26 official or for a third party, in order that the official
act or refrain from acting in relation to the performance of
official duties, in order to obtain or retain business or

27
28 ¹⁵ Congress expanded the definition to include officials of
public international organizations. S. Rep. No. 105-2177 (1998)
at 2.

1 other improper advantage in the conduct of international
2 business.

3 Id. at art. 1.1 (emphasis added). The Convention further
4 provides that a

5 "foreign public official" means any person holding a
6 legislative, administrative or judicial office of a foreign
7 country, whether appointed or elected; any person exercising
8 a public function for a foreign country, including for a
9 public agency or public enterprise; and any official or
10 agent of a public international organisation;

11 Id. at art. 1.4.a (emphasis added). Finally, the OECD
12 Convention's Commentaries further elaborate on the OECD

13 Convention's definitions:

14 12. A "Public function" includes any activity in the public
15 interest, delegated by a foreign country, such as the
16 performance of a task delegated by it in connection
17 with public procurement.

18 13. A "public agency" is an entity constituted under public
19 law to carry out specific tasks in the public interest.

20 14. A "public enterprise" is any enterprise, regardless of
21 its legal form, over which a government, or
22 governments, may, directly or indirectly, exercise a
23 dominant influence. This is deemed to be the case,
24 *inter alia*, when the government or governments hold the
25 majority of the enterprise's subscribed capital,
26 control the majority of votes attaching to shares
27 issued by the enterprise or can appoint a majority of
28 the members of the enterprise's administrative or
managerial body or supervisory board.

29 Id. at cmt. on art. 1.4 (emphasis added). Therefore, the OECD
30 Convention is clear that in the case of public enterprises when
31 the government exercises a "dominant influence," directly or
32 indirectly, the OECD Convention is intended to prohibit bribes to
33 those enterprises. A fair reading would suggest that many, but
34 not all, SOEs fall squarely within the definition of "public
35 enterprise." Importantly, Congress understood that "t]he legal
36 definition given to the term 'foreign public official' by each
37 Party will be pivotal in ensuring that the obligations of the

1 Convention have an impact on current practices." Exhibit P at
2 p.6 (S. Exec. Rep. 105-19 (1998)). After reciting the OECD
3 definition, the Senate explicitly sought to ensure that the
4 Executive would not interpret the OECD definition of "foreign
5 public official" narrowly, and stated: "the Committee expects
6 that the Executive will ensure this broad understanding is shared
7 by other Parties to the Convention." Id. (emphasis supplied).
8 See also Section II.B.3, supra, discussing broad interpretation
9 of the FCPA.

10 In light of such a clear requirement by the OECD Convention
11 to criminalize bribes paid to "public enterprises" and Congress's
12 clear intent to comport the FCPA with the OECD Convention, the
13 defendants' arguments, (Defts' Mot. at 3185-86), that the 1998
14 amendments illustrate Congress's clear intent to "exclude" SOEs
15 is nonsensical. Indeed, if this Court were to interpret the FCPA
16 in such a way that officials of SOEs could not be foreign
17 officials, the United States State Department has declared that
18 the United States would be out of compliance with its treaty
19 obligations under the OECD Convention, which requires the FCPA to
20 prohibit payments to officials at SOEs. See Declaration of
21 Clifton Johnson, Assistant Legal Adviser of the United States
22 Department of State. "Although not conclusive, the meaning
23 attributed to treaty provisions by the Government agencies
24 charged with their negotiation and enforcement is entitled to
25 great weight." Sumitomo Shoji America, Inc. v. Avagliano, 457
26 U.S.176, 184 (1982). See also Abbott v. Abbott, 130 S.Ct. 1983,
27 1986 (2010) ("The Court owes deference to the Executive Branch's
28 treaty interpretations.").

1 In addition, it is worth noting that before the 1998
2 amendments to the FCPA, from 1977 to 1997, over a dozen FCPA
3 guilty pleas were accepted by U.S. District Courts involving
4 bribery of officials of SOEs. See, e.g., Exhibit I (listing FCPA
5 enforcement actions related to SOEs). These enforcement actions
6 put Congress, as well as businesses and the general public, on
7 notice that SOEs were agencies or instrumentalities of foreign
8 governments under the FCPA. Had Congress believed that this was
9 an inappropriate interpretation of the FCPA by the enforcement
10 agencies, it could have narrowed the definition when it amended
11 the FCPA in 1998, but it did not.

12 6. The FCPA's Legislative History Supports the
13 Interpretation That Officers and Employees of SOEs Are
Foreign Officials

14 The defendants' primary argument is that an employee of an
15 SOE could never be a foreign official because the legislative
16 history of the FCPA "confirms that Congress did not intend the
17 statute to encompass payments made to employees of state owned
18 business enterprises." (Defts' Mot. at 3178). The defendants
19 are mistaken. Indeed, review of Professor Koehler's lengthy
20 legislative history of the FCPA is chiefly revealing for what it
21 does not contain. In spite of 150 hours and 448 paragraphs in
22 over 140 pages that attempt to distill his exhaustive research,
23 Professor Koehler is unable to find even one reference in any
24 part of the legislative history that Congress intended to exclude
25 SOEs from the definition of instrumentality. Defendants' entire
26 legislative history argument basically boils down to the premise
27 that because an SOE is not specifically enumerated in the text of
28 the statute, it could not possible be included in the broad term

1 "instrumentality." Again, the defendants rely on the faulty
2 premise that an entity could not have both a governmental and
3 commercial purpose.

4 (a) A Review of the Legislative History Is Not
5 Necessary Because the Meaning is Plain

6 The Government first submits that a review of legislative
7 history is not necessary because the meaning of instrumentality
8 is clear and unambiguous. As discussed supra at II.C.1, the
9 Court should look first at the language of the statute before
10 addressing the legislative history. Carter v. United States, 530
11 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by
12 examining the text ... not by psychoanalyzing those who enacted
13 it...."). Most recently, in United States v. Aguilar, et al., CR
14 10-1031-AHM (C.D. Cal), the court determined that it was
15 unnecessary to examine the FCPA legislative history to find that
16 the SOE was an instrumentality. See Exhibit H-1 at 29:21-24 ("I
17 think that the language itself, and the very definition of
18 instrumentality that you proposed in your briefs, makes it
19 unnecessary to even engage in a legislative history or statutory
20 analysis....").

21 (b) Legislative History Includes References to SOEs

22 An actual review of the legislative history illustrates the
23 narrow slice of the legislative history the defendants chose to
24 provide to the Court.¹⁶ Defendants choose portions of the
25 substantial legislative debate to support their novel proposition

26
27 ¹⁶ Two important pieces of legislative history, the addition
28 of the "routine governmental action" exception and Congress's
intent to conform with the OECD Convention are addressed above in
discussing the statutory construction. See supra at II.C.3 and
II.C.5.

1 that an employee of an SOE could never be a foreign official
2 under the FCPA. Certainly, the legislative history refers on a
3 number of occasions to the impact of corruption of senior
4 government officials, but nowhere in the vast review of
5 legislative history can the defendants point to a single quote
6 that supports the position that the FCPA should not apply to
7 employees of SOEs. That absence is striking. Simply because
8 some legislators mentioned that the FCPA should cover high-level
9 public officials does not mean that others, or even those same
10 legislators, were not considering that the FCPA should also cover
11 officials of SOEs. See United States v. Trans-Missouri Freight
12 Ass'n, 166 U.S. 290, 318 (1897) ("[I]t is impossible to determine
13 with certainty what construction was put upon an act by members
14 of the legislative body that passed it by resorting to the
15 speeches of individual members thereof. Those who did not speak
16 may not have agreed with those who did; and those who spoke might
17 differ from each other....").

18 Indeed, the defendants' analysis of the legislative debate
19 avoids identifying portions of the legislative history that
20 discuss bribery of employees of SOEs, which obviously would imply
21 that SOEs were considered by the FCPA. Cf. Conroy v. Aniskoff,
22 507 U.S. 511, 519 (1993)(Scalia, J. concurring) (criticizing the
23 use of legislative history and describing it "as the equivalent
24 of entering a crowded cocktail party and looking over the heads
25 of the guests for one's friends").

26 While the defendants argue that there is "no express
27 statement or information" supporting the conclusion that the FCPA
28 covers SOEs, Defts' Mot. at 3179, the full legislative history of

1 the FCPA contains references regarding the problems of bribes
2 paid to SOEs. See Smith Dec. ¶ 56 (discussing payments "for
3 orders received from government-owned businesses and agencies");
4 ¶ 57 (referencing money being channeled through "the government-
5 owned" electrical utility); ¶ 58 (describing payments "for
6 assistance in purchasing oil from the government owned oil
7 company" and bribe demands from officials of "a state enterprise
8 of a [L]atin American country"); ¶ 59 (testimony describing
9 problems arising in "the interface between [] business
10 organizations and [] Government and quasi-Government industrial
11 establishments"); ¶ 60 (identifying sales to "quasi-government
12 organizations"). Thus, the FCPA was not concerned only about the
13 high-level government officials receiving the bribes, but the
14 legislative history includes references to bribes paid to
15 officials at SOEs. See Kay I, 359 F.3d at 749 ("Congress was
16 obviously distraught not only about high profile bribes to high
17 ranking foreign officials, but also by the pervasiveness of
18 foreign bribery by United States businesses and businessman.").

19 Because the legislative history is supportive of the
20 conclusion that Congress intended to prohibit bribery of
21 officials of SOEs, the Court should reject defendants' narrow
22 interpretation of instrumentality.

23 (c) When Congress Chose a General Term Over a List of
24 Specific Categories, It Did Not Intend to Exclude
the Specific Categories

25 The defendants' remaining substantive argument concerning
26 the FCPA's legislative history is that because Congress was
27 presented with bills that explicitly included SOEs in a list of
28 covered entities and did not choose to incorporate that list in

1 the final bill, Congress must have intended to exclude SOEs from
 2 the FCPA's requirements. (Defts' Mot. at 3183-84). The fatal
 3 flaw in the defendants' logic, however, is that Congress did not
 4 choose a more limited definition of "foreign official" but
 5 instead chose to include a broad general term that by its plain
 6 meaning and previous use would include officials at SOEs. There
 7 is no reason to presume that when Congress chooses a general term
 8 over a specific list it intends to exclude the specific items.
 9 See National-Standard Co. v. Adamkus, 881 F.2d 352, 360 (7th Cir.
 10 1989) (finding it significant that Congress "chose [a] broad,
 11 general term" over an enumerated list).

12 A side-by-side comparison of the four versions of bills
 13 discussed by the defendants demonstrates the replacement of a
 14 specific enumerated item with the broad term instrumentality:

S. 3741, 94th Cong. (1976)	H.R. 7543, 95th Cong. (1977)	S. 305, 95th Cong. (1977)	H.R. 3815, 95th Cong. (1977)
Defined "foreign government" as (1) the government of a foreign country, irrespective of recognition by the United States; (2) a department, agency, or branch of a foreign government; (3) <u>a corporation or other legal entity established or owned by, and subject to control by, a foreign government;</u> (4) a political subdivision of a foreign government, or a department, agency or branch of the political subdivision; or	Defined "foreign government" as: (A) the government of a foreign country, whether or not recognized by the United States; (B) a department, agency, or branch of a foreign government; (C) a political subdivision of a foreign government, or a department, agency or branch of such political subdivision; (D) <u>a corporation or other legal entity established, owned, or subject to managerial control by a foreign government;</u>	Prohibited payments to an official of a foreign government or instrumentality of a foreign government	Defined "foreign official" as Any officer or employee of a foreign government or any department, agency or instrumentality thereof, of any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality.

1 (5) a public
2 international
3 organization.
(emphasis added)

or
(E) a public
international
organization.
(emphasis added)

4 S. 3741 and H.R. 7543 were both bills requiring reporting of
5 corrupt payments as opposed to prohibition of such payments.¹⁷
6 Both were referred to committee, and no further action was taken.
7 Ultimately, the FCPA of 1977 was an amalgamation of S. 305 and
8 HR. 3815. With respect to the definition of "foreign official,"
9 the Senate acceded to the House. H. Conf. Rep. 95-831 (1977).

10 What is striking, in terms of understanding Congress's use
11 of the term instrumentality, is that the final approved language
12 of the FCPA mirrors the other four provisions of the proposed
13 legislation in HR 7543 and S. 3741, but replaces the imprecise
14 language referring generally to SOEs in subsection D of H.R. 7543
15 and subsection 3 of S. 3741, with the broader legal term of art
16 "instrumentalities" that Congress had just adopted the previous
17 year in the FSIA. Thus, it is clear that language describing
18 SOEs was not an explicit rejection of SOEs, as argued by the
19 defendants, Defts' Mot. at 3185, but instead that SOEs were
20 included in the broad term instrumentality.

21 If anything, the intent of Congress was to broaden the law's
22 scope beyond a specific enumerated list. A parallel can be seen
23 in examining the Fifth Circuit's analysis of the broad term
24 "obtaining or retaining business." Kay I, 359 F.3d at 753.
25 After examining the legislative history of the FCPA which
26 included specific recommendations from the SEC regarding payments
27

28 ¹⁷ These bills can be found as Exhibits 32, 38, 39, and 44
of Professor Koehler's Declaration.

1 made "for the purpose of obtaining more favorable tax treatment,"
2 id. at 753, the Fifth Circuit found that the "more generally
3 worded prohibition against payments designed to assist in
4 obtaining or retaining business," id., demonstrated that
5 Congress's intent was broad enough to include payments to customs
6 officials to obtain favorable tax treatment. Id. at 755.
7 Indeed, the Fifth Circuit affirmed the trial convictions of two
8 defendants who bribed customs officials for the purpose of
9 obtaining favorable tax treatment. Id. Similarly, the Court
10 should interpret instrumentality broadly to include SOEs.

11 7. Absurd Examples Do Not Invalidate Meaning of Agency or
12 Instrumentality

13 The defendants purport to have found "absurd" hypothetical
14 examples of SOEs that, in their opinion, should not be considered
15 government instrumentalities under the FCPA. (Defts' Mot. at
16 3176-78). Implicit in their argument is the flawed contention
17 that if a single example exists in which the facts suggest that
18 one SOE is not a government instrumentality, then no SOE could
19 ever be a government agency or instrumentality.

20 Importantly, courts do not decide hypothetical cases, and
21 imaginary situations do not control real ones. Cf. National
22 Endowment for Arts v. Finley, 524 U.S. 569, 584 (1998) ("[W]e are
23 reluctant ... to invalidate legislation on the basis of its
24 hypothetical application to situations not before the Court.")
25 (internal quotation marks omitted); Grayned v. City of Rockford,
26 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can
27 never expect mathematical certainty from our language. It will
28 always be true that the fertile legal imagination can conjure up
hypothetical cases in which the meaning of (disputed) legal terms

1 will be in nice question.... [However,] we think it is clear what
2 the ordinance as a whole prohibits."). Thus, the defendants'
3 hypothetical examples are irrelevant to a determination of
4 whether this Indictment properly alleges violations of the FCPA.

5 Most importantly, posing the possibility of an "absurd"
6 result does not mean that as a matter of law no SOEs could ever
7 be an instrumentality. Some SOEs are instrumentalities, and some
8 are not. While the issue has not been litigated in the FCPA
9 context, U.S. courts and regulatory agencies often struggle with
10 whether a U.S. entity is an instrumentality of the United States
11 for a certain purpose.¹⁸ See, e.g., Lebron, 513 U.S. 374 at 393
12 (determining that Amtrak is an instrumentality of the U.S. for
13 certain purposes); Exhibit Q (relying on various factors to
14 conclude that The Kennedy Center is an instrumentality).
15 Similarly, in the FSIA context, courts examine a variety of
16 factors to determine whether an SOE is an instrumentality of a
17 foreign government. See, e.g., Corporacion Mexicana de Servicios
18 Maritimos v. The M/T Respect, 89 F.3d 650, 653-54 (9th Cir. 1996)
19 (examining various factors to conclude that Pemex, a state-owned
20 oil company, is an instrumentality for purposes of the FSIA).

21 Defendants argue based on their "absurd" factual scenarios,
22 (General Motors and CITGO), that an SOE could never be a foreign
23 instrumentality. But their reliance on extreme facts demonstrate
24 that whether an SOE is an instrumentality depends entirely on the
25 facts of the instrumentality. Defendants' reliance on absurd

26
27 ¹⁸ The Government is not suggesting that the analysis used
28 to determine what is an "agency and instrumentality" in those
decisions is identical to that of the FCPA, but only that various
facts and factors are examined in making the determination for
that specific entity.

1 factual situations suggests that the inquiry is actually a
2 factual issue not a legal question. See Section II.B supra on
3 disputed factual issues. Whether the U.S. government's ownership
4 of shares of GM stock makes GM an instrumentality is a factual
5 determination that will depend on a number of factors - not
6 merely, as defendants posit, on the ownership of its stock by the
7 U.S. government. (Defts' Mot. at 3177).¹⁹ Similarly, whether a
8 CITGO employee is a Venezuelan foreign official or whether an
9 employee of Blackstone Group is a Chinese foreign official is not
10 controlled by simple stock ownership, but by a number of factors,
11 including the origin and purpose of the entity and the extent of
12 the control of the entity by the foreign government.²⁰

13 Similarly, defendants argue based on a hypothetical that a
14 janitor could never be an "official" of a foreign government for
15 purposes of the FCPA. (Defts' Mot. at 3172). Yet, under
16 domestic law, if a government janitor is acting in his official
17 capacity and was bribed to inappropriately allow access to a
18 government building to gather sensitive information about an
19 upcoming procurement contract, such a bribe would be a violation
20 of 18 U.S.C. § 201. Defendants posit no valid reason why such a
21
22

23
24 ¹⁹ Indeed, in finding that Amtrak was a governmental entity,
25 the Supreme Court differentiated a corporation that was merely
26 "in the temporary control of the Government (as a private
27 corporation whose stock comes into federal ownership might be)"
28 from Amtrak. Lebron, 513 U.S. at 398.

29 ²⁰ Defendants argue, Defts' Mot. at 3172, that because
30 certain statutes enumerate the officials of a foreign government
31 and exclude employees of SOEs, that the FCPA must do the same.
32 Because those statutes do not include the broader FCPA terms of
33 "department, agency and instrumentality," their argument fails.

1 bribe would not also be an FCPA violation if the bribe provided a
2 business advantage.

3 D. Defendants' Legal Challenges Based on The Rule of Lenity and
4 Void For Vagueness Doctrines Are Insufficient

5 As noted supra at II.B.3, defendants' legal challenges
6 regarding the precise definition of instrumentality should not be
7 brought under a motion to dismiss for failure to state an
8 offense, but rather as challenges under the Rule of Lenity and
9 the Void for Vagueness Doctrines. As detailed infra, under those
10 strict requirements, defendants' challenges, Defts' Mot. at 3189-
11 3204, fail to meet the legal standards.

12 1. The Rule of Lenity Does Not Apply

13 Defendants argue, (Defts' Mot. at 3191-96), that the rule of
14 lenity obligates this Court to adopt their interpretation of the
15 term "instrumentality." Defendants' argument misapprehends
16 lenity's proper role in statutory construction. The rule of
17 lenity applies not where it is possible to articulate a
18 construction narrower than the government's, but only where the
19 statute is grievously ambiguous, leaving courts to guess as to
20 its proper construction. Such is not the case here. As
21 discussed supra at II.C, the standard canons of statutory
22 construction yield an interpretation of the term instrumentality
23 that is clear and reflects Congress's purposes. Accordingly,
24 defendants' efforts to invoke the rule of lenity should be
25 rejected.

26 The Supreme Court recently reiterated the proper role of
27 lenity in statutory interpretation. "[T]he rule of lenity only
28 applies if, after considering text, structure, history, and
purpose, there remains a 'grievous ambiguity or uncertainty in

1 the statute,' such that the Court must simply 'guess as to what
2 Congress intended.'" Barber v. Thomas, 130 S. Ct. 2499, 2508-09
3 (2010) (quoting Muscarello v. United States, 524 U.S. 125, 139
4 (1998) and Bifulco v. United States, 447 U.S. 381, 387 (1980));
5 see also Chapman v. United States, 500 U.S. 453, 463 (1991) ("The
6 rule of lenity ... is not applicable unless there is a grievous
7 ambiguity or uncertainty in the language and structure of [an]
8 Act, such that even after a court has seized everything from
9 which aid can be derived, it is still left with an ambiguous
10 statute.").²¹ "The simple existence of some statutory ambiguity
11 ... is not sufficient to warrant application of [the rule of
12 lenity], for most statutes are ambiguous to some degree."
13 Muscarello v. United States, 524 U.S. 125, 138 (1998).

14 The Ninth Circuit has held that "[c]ourts should not deem a
15 statute 'ambiguous' for purposes of lenity merely because it is
16 possible to articulate a construction more narrow than that urged
17 by the Government." Lisbey v. Gonzales, 420 F.3d 930, 933 (9th
18 Cir. 2005); see also United States v. Banks, 514 F.3d 959, 968
19 (9th Cir. 2008); United States v. Carr, 513 F.3d 1164, 1168-69
20 (9th Cir. 2008) ("[L]enity ... may not be used in complete
21 disregard of the purpose of the legislature ... to dictate an
22 implausible interpretation of a statute or one at odds with the
23 generally accepted contemporary meaning of a term."). Thus, the
24 rule of lenity "only serves as an aid for resolving an ambiguity;
25

26
27 ²¹ Similarly, in finding that the business nexus element of
28 the FCPA did not merit application of the rule of lenity, the
Fifth Circuit called the rule of lenity "a last resort of
interpretation." United States v. Kay, 513 F.3d 432, 445 (5th
Cir. 2007) (hereinafter "Kay II").

1 it is not to be used to beget one." Callanan v. United States,
2 364 U.S. 587, 596 (1961).

3 Contrary to defendants' suggestion, United States v. Santos,
4 553 U.S. 507 (2008), does not support application of lenity here.
5 Five Justices in Santos applied the rule of lenity because they
6 agreed that "proceeds" could mean "profits" or "receipts," in
7 that both meanings are "accepted ... in ordinary usage." Id. at
8 511 (plurality opinion); see also id. at 524-26 (Stevens, J.).

9 Under either of the word's ordinary meanings, all
10 provisions of the federal money-laundering statute are
11 coherent; no provisions are redundant; and the statute
12 is not rendered utterly absurd. From the face of the
13 statute, there is no more reason to think that
14 'proceeds' means 'receipts' than there is to think that
15 'proceeds' means 'profits.' Under a long line of
16 decisions, the tie must go to the defendant.

17 Id. at 513-14 (plurality opinion). Justice Stevens, who supplied
18 the deciding fifth vote, did not agree with this assessment, as
19 he thought that the legislative history made clear that Congress
20 intended "proceeds" to mean "receipts" for some specified
21 unlawful activities. Id. at 525-26 (Stevens, J.). But because
22 operation of an illegal gambling enterprise was not one of those
23 activities, Justice Stevens agreed with the plurality that the
24 rule of lenity dictated the outcome. Id. at 528 (Stevens, J.)

25 Here, by contrast, the plain meaning of the term
26 instrumentality could encompass SOEs, see supra at II.C.1, and
27 there is no legitimate alternate definition of instrumentality
28 that does not include SOEs. Additionally, the text of the entire
FCPA, the broad purpose of the FCPA, and the interpretation given
to other similar statutes all support the Government's
interpretation. See supra at II.C. Thus, unlike Santos, this is
not a situation when "the tie must go to the defendant."

1 In sum, this is not a case where the statute, like that
2 examined in Santos, is infected by such "grievous ambiguity or
3 uncertainty" that this Court is left to "guess as to what
4 Congress intended." The plain meaning of instrumentality,
5 together with the text, context, and purpose of the FCPA, leave
6 "no reasonable doubt" that the term instrumentality could include
7 SOEs. While it is possible to posit an interpretation of the
8 term instrumentality that is narrower than the Government's, that
9 fact alone does not warrant application of the rule of lenity.

10 2. "Foreign Official" is Not Void for Vagueness

11 The Court should also reject the defendants' void for
12 vagueness challenge. (Defts' Mot. 3196-3204). A statute is void
13 for vagueness only if it fails to "define the criminal offense
14 with (1) sufficient definiteness that ordinary people can
15 understand what conduct is prohibited and (2) in a manner that
16 does not encourage arbitrary and discriminatory enforcement."
17 Skilling v. United States, 130 S. Ct. 2896, 2927-28 (2010)
18 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The
19 relevant inquiry "is whether the statute, either standing alone
20 or as construed, made it reasonably clear at the relevant time
21 that the defendant's conduct was criminal." United States v.
22 Lanier, 520 U.S. 259, 267 (1997). Simply because a term is not
23 defined in the statute does not mean that it is void for
24 vagueness. See, e.g., United States v. Rudzavice, 586 F.3d 310,
25 314-15 (5th Cir. 2009). In assessing void for vagueness
26 challenges, courts should "construe, not condemn, Congress'
27 enactments." Skilling, 130 S. Ct. at 2928 (quotations omitted).

28

1 Additionally, it is well-established that a mens rea or
2 scienter requirement may serve to defeat a claim that a defendant
3 is being punished for conduct he did not know was wrong. See
4 Gonzales v. Carhart, 550 U.S. 124, 149 (2007) ("The Court has
5 made clear that scienter requirements alleviate vagueness
6 concerns."); United States v. Jae Gab Kim, 449 F.3d 933 (9th Cir.
7 2006) ("[A] scienter requirement may mitigate a law's vagueness,
8 especially with respect to the adequacy of notice to the
9 complainant that his conduct is proscribed."); see also United
10 States v. Guo, 634 F.3d 1119, 1123 (9th Cir. 2011) (rejecting
11 vagueness challenge to conviction for exporting without license
12 because of statute's willfulness element).

13 No court has applied these principles to hold that the
14 definition of "foreign official" in the FCPA is
15 unconstitutionally vague. Indeed, in three recent decisions on
16 similar motions, the district courts denied the motions to
17 dismiss and rejected defendants' void for vagueness arguments.
18 See Exhibit H-1 (Aguilar 4/1/11 Tr. at 30:21-31:1); Exhibit H-2
19 (Esquanazi Order ("[T]he Court finds that persons of common
20 intelligence would have fair notice of this statute's
21 prohibitions")); Exhibit H-3 (Nguyen order). Additionally, no
22 court has adopted the defendants' position since the FCPA was
23 enacted over three decades ago despite approximately 35 guilty
24 pleas from individuals who admitted to bribing officials at SOEs,
25 see Exhibit I; it is thus "plain as a pikestaff," Skilling, 130
26 S. Ct. at 2933, that the FCPA prohibits paying bribes to
27 officials who work at SOEs.

28

1 Despite the fact that “[i]t is well established that
2 vagueness challenges to statutes which do not involve First
3 Amendment freedoms must be examined in light of the facts of the
4 case at hand,” United States v. Mazurie, 419 U.S. 544, 550
5 (1975), defendants do not make any reference to the facts of this
6 case in arguing that the statute is vague as applied. Instead,
7 they raise what they themselves describe as “an extreme example”
8 related to a gas station attendant at a local CITGO station and
9 argue that, “[a]t best, one could only hazard a guess as to
10 whether a gasoline company might constitute a government
11 ‘instrumentality.’” (Defts’ Mot. at 3197). The facts of this
12 extreme example, however, do not relate in any way to the case at
13 hand. Such an example is irrelevant in an as-applied challenge
14 because the facts do not apply to defendants’ conduct. Indeed,
15 improper payments made to employees of several of the relevant
16 entities in the instant matter could be prosecuted under the
17 domestic bribery statutes of the foreign country, see, e.g.,
18 Smith Dec. ¶¶ 6-11, 25, 33.

19 Moreover, the FCPA’s scienter requirement eliminates any
20 claim that the statute is unconstitutionally vague as applied to
21 defendants. For a violation to occur, Section 78dd-2(a) requires
22 that defendants act “corruptly.” Additionally, the penalty
23 provision, Section 78dd-2(g)(2), requires the defendants to act
24 “willfully.” Because the statute requires corrupt and willful
25 conduct, the statute is not unconstitutionally vague as applied
26 to defendants. See, e.g., Guo, 634 F.3d at 1123; United States
27 v. Jensen, 532 F. Supp. 2d 1187, 1196 (N.D. Cal. 2008) (rejecting
28

1 vagueness challenge because "knowing and willful conduct"
2 "mitigates any vagueness in the statute.").

3 In addition, where, as here, "a criminal statute regulates
4 economic activity, it generally is subject to a less strict
5 vagueness test because its subject matter is more often narrow
6 and because businesses can be expected to consult relevant
7 legislation in advance of action." United States v. Reliant
8 Energy Services, 420 F. Supp. 2d 1043, 1054 (N.D. Cal. 2006)
9 (quoting United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir.
10 1998)); United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir.
11 1999) (same); Jensen, 532 F. Supp. 2d at 1196 (fact that "the
12 statute regulates only economic conduct" was one factor in
13 court's finding that criminal sanctions for falsifying company's
14 books, records, and accounts was not void for vagueness). The
15 legislative history makes clear that the FCPA was a criminal
16 statute focusing on "economic activity." See Section I.A.
17 Indeed, unlike domestic bribery statutes, the FCPA only addresses
18 corruption that is linked to a business advantage. See Section
19 I.B (discussing the elements of the FCPA, including requiring a
20 business nexus to the corrupt act).

21 Contending that Congress "plainly had a 'core' of 'foreign
22 officials' in mind when it enacted the FCPA," Defts' Mot. at
23 3190-91, defendants inappropriately apply the Supreme Court's
24 guidance in Skilling to urge the Court to find that bribery of
25 officials at SOEs is somehow outside the "core" of the FCPA.
26 Skilling involved the reach of the honest services statute, 18
27 U.S.C. § 1346, which states that a "scheme or artifice to
28 defraud" includes "a scheme or artifice to deprive another of the

1 intangible right of honest services." Because bribery,
2 kickbacks, or other fraud schemes are not specifically mentioned
3 in the text of the honest services fraud statute, the Supreme
4 Court in Skilling relied primarily on an analysis of the factual
5 predicate of pre-McNally²² honest services cases to determine
6 that Section 1346 criminalized "only the bribe-and-kickback core
7 of the pre-McNally case law." Skilling, 130 S. Ct. at 2931.

8 If the Court were to follow Skilling and similarly examine
9 the "core" factual predicate of past prosecutions, the extensive
10 previous prosecutions of bribes to officials at SOEs would make
11 clear that the "core" encompasses those types of bribes. See
12 Exhibit I (identifying over 35 FCPA prosecutions related to
13 SOEs). Indeed, when examining the conduct prohibited by the
14 FCPA, there is no need for a court to "write in" what the text
15 prohibits because, considering the plain meaning of
16 instrumentality and the many other factors discussed supra, what
17 is prohibited is spelled out in the text of the statute itself.
18 Defendants are simply incorrect about what they believe the core
19 of the FCPA to be - the "core" of the FCPA is not what makes up a
20 foreign official, but instead what was the corruption. See Kay I,
21 359 F.3d at 761 ("We conclude that, as important to the statute
22 as the business nexus element is, it does not go to the FCPA's
23 core of criminality. When the FCPA is read as a whole its core
24 of criminality is seen to be bribery of a foreign official to
25 induce him to perform an official duty in a corrupt manner.").

26
27 ²² Congress enacted 18 U.S.C. § 1346 in specific response to
28 the Supreme Court's decision in McNally v. United States, 483
U.S. 350 (1987), striking down the common law "honest services"
theory of mail and wire fraud.

1 The question of whether a specific individual would be considered
2 a "foreign official" is a factual question that relates to the
3 "core," but is not, as defendants claim, the "core" itself.

4 Defendants further assert that the Department's "Lay-
5 Person's Guide [to the FCPA]," the U.S. Attorney's Manual, and
6 the government's submissions to the OECD do not state with
7 technical clarity when an employee of an SOE is considered a
8 foreign official for purposes of the FCPA. The determination of
9 whether an individual is a "foreign official" under the FCPA is a
10 fact-specific inquiry, which may take into account various
11 factors including the ownership, control, nature, and function of
12 the relevant entity.²³ None of the documents cited by the
13 defendants provide any support for defendants' claim that
14 employees and officials of SOEs can never be held to be "foreign
15 officials" under the FCPA.

16 For all these reasons, defendants' void for vagueness claim
17 should be rejected.

18 III. CONCLUSION

19 For the reasons set forth above, this Court should deny
20 the defendants' motion to dismiss the FCPA counts of the
21 Indictment.

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27 ²³ Relatedly, the Fifth Circuit has rejected a "technical
28 Kay II, 513 F.3d at 441; see also Kay I, 359 F.3d at 744 n.16
(rejecting vagueness claim on appeal of dismissal).