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 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA, ) CR No. 10-1031(A)-AHM  
 )  
 14 Plaintiff, ) OPPOSITION TO DEFENDANTS' MOTION TO  
 ) DISMISS THE FIRST SUPERSEDING  
 15 v. ) INDICTMENT; MEMORANDUM OF POINTS  
 ) AND AUTHORITIES; EXHIBITS  
 16 ENRIQUE FAUSTINO AGUILAR )  
 NORIEGA, ANGELA MARIA ) Hearing: March 24, 2011, 9:30 a.m.  
 17 GOMEZ AGUILAR, KEITH E. ) (Courtroom 14)  
 LINDSEY, STEVE K. LEE, and )  
 18 LINDSEY MANUFACTURING )  
 COMPANY, )  
 19 )  
 Defendants. )  
 20

21 Plaintiff United States of America, by and through its  
 22 attorneys of record, the United States Department of Justice,  
 23 Criminal Division, Fraud Section, and the United States Attorney  
 24 for the Central District of California (collectively, "the  
 25 government"), hereby files its Opposition to defendants' KEITH E.  
 26 LINDSEY, STEVE K. LEE, and LINDSEY MANUFACTURING COMPANY's Motion  
 27 to Dismiss the First Superseding Indictment, joined by defendant  
 28 ANGELA AGUILAR, based upon the attached memorandum of points and

1 authorities, attached exhibits, and the files and records in this  
2 matter, as well as any evidence or argument presented at any  
3 hearing on this matter.

4 DATED: March 10, 2011

5 Respectfully submitted,

6  
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1 II.

2 MEMORANDUM OF POINTS AND AUTHORITIES

3 I. **FACTUAL AND LEGAL BACKGROUND**

4 A. The Foreign Corrupt Practices Act ("FCPA")

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

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

11 Second: The defendant acted corruptly and willfully;

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

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

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

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

20 - to influence any act or decision of the foreign  
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  
25 act or decision of such government or  
instrumentality; or

26 - to secure any improper advantage; and  
27

1 Seventh: That the payment was made to assist the defendant  
2 in obtaining or retaining business for or with, or  
3 directing business to, any person.

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

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

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

17 15 U.S.C. § 78dd-2(h)(2)(A).

18 B. The First Superseding Indictment ("FSI")

19 On October 21, 2010, the defendants were charged in the FSI  
20 with one count of conspiracy to violate the FCPA and five counts  
21 of substantive FCPA violations. The FSI alleges that "Comisión  
22 Federal de Electricidad ('CFE') was an electric utility company  
23 owned by the government of Mexico" that, at the time "was  
24 responsible for supplying electricity to all of Mexico other than  
25 Mexico City." FSI ¶ 3. The FSI further alleges that "Official 1  
26 [Nestor Moreno] was a Mexican citizen who held a senior level  
27 position at CFE" and "became the Sub-Director of Generation for  
28 CFE in 2002 and the Director of Operations in 2007." FSI ¶ 4.  
Likewise, the FSI alleges that "Official 2 [Arturo Hernandez] was  
a Mexican citizen who also held a senior level position at CFE"

1 and "was the Director of Operations at CFE until that position  
2 was taken over by [Moreno] in 2007." FSI ¶ 4. The FSI alleges  
3 that both of these individuals were foreign officials, as that  
4 term is defined in the FCPA. FSI ¶¶ 4, 5.

5 C. The Nature of CFE

6 Whether officials at CFE are "foreign officials" as defined  
7 by the FCPA is not a difficult question. At trial, the  
8 government intends to present factual evidence concerning many  
9 aspects of CFE, including its ownership, control, nature, and  
10 function. As will be discussed below, in deciding a motion to  
11 dismiss, all the government's allegations are assumed to be true,  
12 and, therefore, a full discussion of the government's evidence is  
13 inapposite. However, as the defendants claim that there are no  
14 factual issues for which trial would aid the Court, the  
15 government provides the following relevant facts that illustrate  
16 the nature of CFE.

17 Under the Mexican Constitution, the supply of electricity is  
18 solely a government function. (Exhibit C) (Mexican Constitution,  
19 translated by the Organization of American States).

20 Specifically, Article 27 provides:

21 It is exclusively a function of the general Nation to  
22 conduct, transform, distribute, and supply electric  
23 power which is to be used for public service. No  
24 concessions for this purpose will be granted to private  
persons and the Nation will make use of the property  
and natural resources which are required for these  
ends.

25 Id. Under the Public Service Act of Electricity of 1975, the  
26 organic law that created CFE, CFE is defined as "a decentralized  
27

1 public entity with legal personality and its own patrimony."  
2 (Exhibit D) (Electric Power Public Utility Service Law of 1975,  
3 certificate of translation and official translation). Article 10  
4 provides that CFE's Governing Board is composed of the  
5 Secretaries of Finance and Public Credit, Social Development,  
6 Trade and Industrial Development of Agriculture and Water  
7 Resources, and Energy, Mines, and State Industry, and Article 14  
8 provides that the "President of the Republic shall appoint the  
9 Director General." Id. Further, the law makes clear why the  
10 Mexican government created CFE: The provision of electricity in  
11 Mexico is considered a "public service." Id. at Art. 1.

12 Consequently, CFE is part of the Mexican government,  
13 mandated by its constitution, formed by its laws, owned in its  
14 entirety by the people of Mexico, and constituted to serve the  
15 public. Therefore, as a factual matter, the government does not  
16 anticipate difficulty proving that CFE's officers were foreign  
17 officials for the purpose of the FCPA.

## 18 **II. LEGAL ARGUMENT**

### 19 A. Summary of Argument

20 The defendants argue that the FSI must be dismissed because,  
21 "as a matter of law no state owned corporation is an  
22 'instrumentality,' meaning that no CFE employee is a 'foreign  
23 official' under the FCPA." (Mot. #220 at 6). The defendants'  
24 overbroad contention should be soundly rejected.<sup>1</sup>

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26 <sup>1</sup> This motion was originally filed by only LINDSEY, LEE,  
27 and LMC. On March 2, 2011, two days after the motion deadline,  
ANGELA AGUILAR joined in the motion. ANGELA AGUILAR is not

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1 First, the defendants' argument is premised, despite their  
2 denials, upon a question of fact and is therefore premature to  
3 address pre-trial. This prematurity is highlighted by the proof  
4 the government will offer at trial that CFE is a government  
5 agency and a government instrumentality.

6 Second, the plain language of the term government  
7 "instrumentality," as shown by the definition of  
8 "instrumentality" and by application of established canons of  
9 construction, demonstrates that it includes state-owned entities.  
10 Significantly, an interpretation that did not include state-owned  
11 entities would leave a portion of the FCPA without any effect and  
12 would take the United States out of compliance with its treaty  
13 obligations, results that precedent dictates be avoided. Indeed,  
14 every court that has faced the issue has rejected the defendants'  
15 cramped view of the term "instrumentality."

16 Third, an interpretation of government "instrumentality"  
17 that includes state-owned entities is consistent with the  
18 legislative history of the FCPA.

19 Finally, the Court should deny the motion because the  
20 defendants misapply the legal standards under the "rule of  
21 lenity" and "void for vagueness" doctrines, which do not apply to  
22 the facts of this case.

23 B. The Defendants' Motion Is Premature

24 The defendants move to dismiss the FSI for failure to state  
25 an offense. (Mot. #220 at 5). The Court should deny their

26 \_\_\_\_\_  
27 charged with conspiracy to violate the FCPA or FCPA violations.

1 motion because the defendants are appropriately informed of the  
2 elements of the charged offenses and are sufficiently apprised of  
3 the essential facts to be protected from double jeopardy. The  
4 defendants' motion to dismiss is instead a challenge to the  
5 sufficiency of the evidence that should be rejected pre-trial.

6 1. Legal Standard for a Motion to Dismiss

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

12 The true test of the sufficiency of an indictment is  
13 not whether it could have been made more definite and  
14 certain, but whether it contains the elements of the  
15 offense intended to be charged, and sufficiently  
16 apprises the defendant of what he must be prepared to  
meet, and, in case any other proceedings are taken  
against him for similar offenses, whether the record  
shows with accuracy to what extent he may plead a  
former acquittal or conviction.

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

18 This well known rule is simple to apply. An indictment is  
19 sufficient if it: (1) states the elements of the offense  
20 sufficiently to apprise the defendant of the charges against  
21 which he or she must defend, and (2) provides a sufficient basis  
22 for the defendant to make a claim of double jeopardy. See  
23 Hamling v. United States, 418 U.S. 87, 117 (1974) ("An indictment  
24 is sufficient if it, first, contains the elements of the offense  
25 charged and fairly informs a defendant of the charge against  
26 which he must defend, and, second, enables him to plead an

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1 acquittal or conviction in bar of future prosecutions for the  
2 same offense"); United States v. Vroman, 975 F.2d 669, 670-71  
3 (9th Cir. 1992) (same). Nothing more is required.

4 A district court cannot grant a motion to dismiss an  
5 indictment pursuant to Rule 12(b)(2) if the motion is  
6 "substantially founded upon and intertwined with evidence  
7 concerning the alleged offense . . . ." United States v.  
8 Lunstedt, 997 F.2d 665, 667 (9th Cir. 1993) (quoting United  
9 States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir.  
10 1986)). Rather, a district court can only grant such a dismissal  
11 if it is "entirely segregable" from the evidence to be presented  
12 at trial. Id. Otherwise, "the motion falls within the province  
13 of the ultimate finder of fact and must be deferred [to the  
14 jury]." Id. "[A] motion requiring factual determinations may be  
15 decided before 'trial [only] if trial of facts surrounding the  
16 commission of an alleged offense would be of no assistance in  
17 determining the validity of the defense.'" Id. (quoting United  
18 States v. Covington, 395 U.S. 57, 60 (1969)).

19 "A motion to dismiss the indictment cannot be used as a  
20 device for a summary trial of the evidence. . . . The Court  
21 should not consider evidence not appearing on the face of the  
22 indictment." United States v. Jensen, 93 F.3d 667, 669 (9th Cir.  
23 1996) (quoting United States v. Marra, 481 F.2d 1196, 1199-1200  
24 (6th Cir. 1973)). The Federal Rules of Criminal Procedure do not  
25 provide for pre-trial consideration of the available evidence  
26 like the summary judgment procedure set forth in Rule 56 of the  
27

1 Federal Rules of Civil Procedure. Id. (citing United States v.  
2 Critzer, 951 F.2d 306, 307 (11th Cir. 1992)). As is most often  
3 the case, when the sufficiency of an indictment turns on  
4 questions of fact, motions premised on Rule 12(b)(2)(B) for  
5 failure to state a claim are routinely denied. See, e.g.,  
6 Jensen, 93 F.3d at 669 (reversing a district court's 12(b)(2)(B)  
7 dismissal because "[b]y basing its decision on evidence that  
8 should only have been presented at trial, the district court in  
9 effect granted summary judgment for the defendants. This it may  
10 not do.").

11 The defendants do not address whether the FSI fails on  
12 either prong of the Hagner test, perhaps in an attempt to avoid  
13 its application. However, the FSI clearly states every element  
14 of the offense, and the step-by-step description in the overt  
15 acts makes it impossible for the defendants to credibly claim  
16 either that they do not know the offense against which they must  
17 defend or that they would later be unable to assert a claim of  
18 double jeopardy. Rather, the defendants seek to circumvent the  
19 trial process and have the Court determine, before the  
20 presentation of any evidence, that the government has not met its  
21 factual burden. As will be demonstrated in the government's  
22 case-in-chief, whether CFE was an agency or instrumentality of  
23 the Republic of Mexico is not a close call – a fact the  
24 defendants likely understand and therefore attempt to raise this  
25 issue before the Court and jury has heard evidence regarding CFE.  
26 Taken as true, the FSI is more than sufficient to meet the Hagner

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1 standard, as interpreted by the Ninth Circuit, and, consequently,  
2 the defendants' motion should be denied.

3 2. Directors of Operations of CFE Are Properly Pled as  
4 Foreign Officials, as CFE Is an Agency and  
Instrumentality of Mexico.

5 Of particular importance to the case at hand, the government  
6 is not limited to proving that CFE is a government  
7 instrumentality, which it is, but may also prove to the jury that  
8 CFE is a government agency. The defendants' motion focuses  
9 solely on whether CFE is a government "instrumentality," and does  
10 so at its peril. Indeed, while admitting in a footnote that "CFE  
11 describes itself as an 'agency' on its website," the defendants  
12 quickly and tautologically argue that "what CFE calls itself is  
13 of no moment." (Mot. #220 at 3 n.3). However, far from being  
14 "irrelevant," (*id.*), the question of what something is  
15 constitutes the very definition of a factual issue.

16 Here, the government has properly alleged in the FSI that  
17 the conspiracy to violate the FCPA and substantive FCPA  
18 violations involved "foreign officials," namely that Moreno and  
19 Hernandez were both, at times, Directors of Operations at  
20 Mexico's state-owned utility, CFE. At trial, the government  
21 intends to prove that CFE is an agency and an instrumentality of  
22 the Mexican government. Therefore, given the clear and binding  
23 precedent in this Circuit, the defendants' motion to dismiss for  
24 failure to state a claim should be denied, and the Court need not  
25 reach any further issues. Consequently, the defendants' legal  
26 arguments are better made in the context of jury instructions or  
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1 for the Court after the government's case-in-chief pursuant to  
2 Federal Rule of Criminal Procedure 29. However, given the  
3 imminent trial date and, thus, the lack of time for further  
4 briefing, the government will respond to the substance of the  
5 defendants' arguments.

6 C. Interpretation of the Term "Instrumentality"

7 1. Introduction

8 The bulk of the defendants' motion focuses on suggesting  
9 that, based on the legislative history of the FCPA, the Court  
10 should adopt an insupportably narrow interpretation of government  
11 "instrumentality." However, the defendants' proposed  
12 interpretation is contradicted by the plain meaning of the  
13 statute. The definition of "instrumentality" as well as  
14 established canons of construction demonstrate that the term  
15 includes state-owned entities. In particular, the term  
16 government "instrumentality" should be interpreted as including  
17 state-owned entities (1) to give effect to all of the provisions  
18 of the statute, (2) to allow the United States to remain in  
19 compliance with its treaty obligations, (3) to comport with the  
20 FCPA's broad construction, and (4) to interpret the term  
21 "instrumentality" consistently across similar statutes. Such an  
22 interpretation is also consistent with all prior interpretations  
23 of this provision by other courts and fully supported by the  
24 statute's legislative history.

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1 definition, if a government decides to provide electricity  
2 through an entity as a government service, that entity is an  
3 instrumentality of the government. Indeed, the Court's analysis  
4 could stop here. However, in addition, several important canons  
5 of construction further demonstrate that the term government  
6 "instrumentality" includes state-owned entities.

7           b. Canons of Construction

8           (1) Courts Interpret Statutes to Give  
9           Meaning to All Their Parts.

10           A basic principle of statutory construction is that courts  
11 should not interpret a statute in such a way that portions of the  
12 statute have no effect. See Reiter v. Sonotone Corp., 442 U.S.  
13 330, 339 (1978) (explaining that "[in] construing a statute we  
14 are obliged to give effect, if possible, to every word Congress  
15 used"). This strong presumption against surplusage has been  
16 repeatedly endorsed by the Supreme Court in analyzing the  
17 meanings of terms within a statute.

18           We are not at liberty to construe any statute so as to  
19 deny effect to any part of its language. It is a  
20 cardinal rule of statutory construction that  
21 significance and effect shall, if possible, be accorded  
22 to every word. As early as in Bacon's Abridgment,  
23 sect. 2, it was said that "a statute ought, upon the  
24 whole to be so construed that, if it can be prevented,  
25 no clause, sentence, or word shall be superfluous, void  
26 or insignificant." This rule has been repeated  
27 innumerable times.

28           Regions Hosp. v. Shalala, 522 U.S. 448, 467 (1998).

          The FCPA prohibits corrupt payments to foreign officials.  
It also provides an exception to its prohibitions for "routine

1 governmental action." 15 U.S.C. § 78dd-2(b). This provision  
2 provides

3 (b) Exception for routine governmental action  
4 Subsections (a) and (i) of this section [prohibiting  
5 payments to foreign officials, political parties, and  
6 party officials] shall not apply to any facilitating or  
7 expediting payment to a foreign official, political  
8 party, or party official the purpose of which is to  
9 expedite or to secure the performance of a routine  
10 governmental action by a foreign official, political  
11 party, or party official.

12 Id. The FCPA goes on to define precisely what a "routine  
13 governmental action" is:

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

17 (i) obtaining permits, licenses, or other  
18 official documents to qualify a person  
19 to do business in a foreign country;

20 (ii) processing governmental papers, such as  
21 visas and work orders;

22 (iii) providing police protection, mail  
23 pick-up and delivery, or scheduling  
24 inspections associated with contract  
25 performance or inspections related to  
26 transit of goods across country;

27 (iv) providing phone service, power and water  
28 supply, loading and unloading cargo, or  
protecting perishable products or  
commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not  
include any decision by a foreign official  
whether, or on what 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) (emphasis added). The routine

1 governmental action exception thus describes actions individuals  
2 and companies can pay foreign officials to perform without  
3 running afoul of the FCPA. For all of the provisions of the  
4 government action exception to have meaning, the definition of  
5 foreign official must include officials at governmental entities  
6 that provide phone service, electricity, water, and mail service;  
7 otherwise there would be no need for an exception for payments  
8 for phone service, power and water supply, or mail pickup. The  
9 only governmental entities that do perform such tasks are state-  
10 owned telecommunications companies, state-owned electric and  
11 water utilities, and state-owned mail services. Therefore, by  
12 the FCPA's statutory scheme, the term government instrumentality  
13 must include state-owned entities.<sup>3</sup>

14 (2) Courts Interpret Statutes So That They  
15 Comport with U.S. Treaty Obligations.

16 It is a long-established canon of statutory construction  
17 that "an act of Congress ought never to be construed to violate  
18 the law of nations if any other possible construction remains . .  
19 . ." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch)

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21 <sup>3</sup> In their motion, the defendants discuss how the "routine  
22 governmental action" provision was an amendment to the FCPA and  
23 that when this provision was added, part of the definition of  
24 "foreign official" was deleted. (Mot. #220 at 17). Originally,  
25 the definition of "foreign official" excluded "an employee of a  
26 foreign government or any department, agency or instrumentality  
27 whose duties are essentially ministerial or clerical." Foreign  
28 Corrupt Practices Act of 1997, Pub. L. No. 95-213 §104(d)(2), 91  
Stat. 1494. The fact that the routine governmental action  
provision in effect replaced part of the definition of "foreign  
official" only strengthens the government's argument that the  
term "foreign official" was intended to apply to employees of  
state-owned entities.

1 64, 117-18 (1804). Known as the "Charming Betsy" rule of  
2 statutory construction, the canon provides,

3       Where fairly possible, a United States statute is to be  
4       construed so as not to conflict with international law  
5       or with an international agreement of the United  
6       States.

7 Restatement of Foreign Relations Law (Third) § 114. The  
8 rationale behind the canon is straightforward:

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

15 Vimar Seguros y Reasegueros, S.A. v. M/V Sky Reefer, 515 U.S. 528,  
16 539 (1995); see also Weinberger v. Rossi, 456 U.S. 25, 32 (1982);  
17 Whitney v. Robertson, 124 U.S. 190, 194 (1888) (explaining that  
18 courts must "endeavor to construe [statutes and treaties] as to  
19 give effect to both, if that can be done without violating the  
20 language of either").

21       With respect to the term government "instrumentality," this  
22 canon is easy to apply because the United States' treaty  
23 obligations require it to criminalize bribes made to officials of  
24 state-owned enterprises, and Congress clearly indicated its  
25 conformity with those obligations through the FCPA. On  
26 December 17, 1997, the members of the Organization of Economic  
27 Co-Operation and Development adopted the Convention on Combating  
28 Bribery of Foreign Officials in International Business  
Transactions. (Exhibit F) (the "OECD Convention"). The Senate

1 ratified the OECD Convention on July 31, 1998, 144 Cong. Rec.  
2 18509 (1998), and Congress implemented it through various  
3 amendments to the FCPA. The International Anti-Bribery and Fair  
4 Competition Act of 1998, Pub. L. 105-366, S. Res. 2375, 105th  
5 Cong. (1998). Congress was explicit in its intentions: "This Act  
6 amends the FCPA to conform it to the requirements of and to  
7 implement the OECD Convention." S. Rep. No. 105-2177 (1998) at  
8 2; see also (Exhibit G) (Presidential Statement on Signing the  
9 International Anti-Bribery and Fair Competition Act of  
10 1998)("This Act makes certain changes in existing law to  
11 implement the Convention on Combating Bribery of Foreign Public  
12 Officials in International Business Transactions.").<sup>4</sup> Congress  
13 could not have been clearer that it intended for the FCPA to  
14 fully comport with the OECD Convention.<sup>5</sup>

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15  
16 <sup>4</sup> The State Department's first annual report to Congress on  
17 implementation of the OECD Convention, which was required by the  
18 Senate's resolution of advice and consent, reflected this  
19 understanding. (Exhibit H) (Dept. of State, Bureau of Econ. &  
20 Bus. Affairs, Battling International Bribery: 1999 Report,  
21 Chapter 2 at p. 3, [http://www.state.gov/www/issues/economic/  
toc99.html](http://www.state.gov/www/issues/economic/toc99.html) (1999)). Providing "an assessment of the  
compatibility of the laws of each country with the requirements  
of the Convention, the report found that 1998 amendments to the  
FCPA "conform[ed] it to the requirements of and . . .  
implement[ed] the OECD Convention." Id. at 3.

22 <sup>5</sup> If this Court were to interpret the FCPA in such a way  
23 that officials of state-owned and state-controlled enterprises  
24 could not be foreign officials, the United States would be out of  
25 compliance with its treaty obligations under the OECD Convention.  
26 The government has requested a declaration from the State  
27 Department confirming this assessment and explaining its  
implications for U.S. foreign policy. Given the short response  
period, the declaration could not be finalized, but the  
government will endeavor to secure the declaration before  
argument on this motion and will file it if and when it is  
received.

1 With regard to the definition of "foreign official," only  
2 one amendment to the FCPA was necessary in Congress's view to  
3 bring the statute into compliance with the OECD Convention,  
4 namely to expand the definition to include officials of public  
5 international organizations. Id. ("Section 3(b) implements the  
6 OECD Convention by amending § 104(h)(2) of the FCPA to expand the  
7 definition of 'foreign official' to include an official of a  
8 public international organization."). Otherwise, the FCPA's  
9 definition of foreign official was considered to be inclusive of  
10 the definition in the OECD Convention. S. Rep. No. 105-2177; S.  
11 Exec. R. 105-19 (1998). In other words, Congress intended that  
12 bribes to any official that were prohibited under the OECD  
13 Convention would also be prohibited under the FCPA. This is  
14 significant because, as will be discussed below, the OECD  
15 Convention has always contained a prohibition against the bribery  
16 of officials of state-owned and state-controlled entities.  
17 (Exhibit F).

18 First, the OECD Convention requires OECD parties to make it  
19 a criminal offense under their law for:

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

25 Id. at art. 1.1 (emphasis added). The Convention further  
26 provides that a  
27

1 "foreign public official" means any person holding a  
2 legislative, administrative or judicial office of a  
3 foreign country, whether appointed or elected; any  
4 person exercising a public function for a foreign  
country, including for a public agency or public  
enterprise; and any official or agent of a public  
international organisation;

5 Id. at art. 1.4.a (emphasis added). Finally, the OECD  
6 Convention's Commentaries further elaborate on the OECD  
7 Convention's definitions:

8  
9 12. "Public function" includes any activity in the  
10 public interest, delegated by a foreign country,  
11 such as the performance of a task delegated by it  
12 in connection with public procurement.

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

17  
18 14. A "public enterprise" is any enterprise,  
19 regardless of its legal form, over which a  
government, or governments, may, directly or  
indirectly, exercise a dominant influence. This  
20 is deemed to be the case, inter alia, when the  
21 government or governments hold the majority of the  
22 enterprise's subscribed capital, control the  
23 majority of votes attaching to shares issued by  
24 the enterprise or can appoint a majority of the  
25 members of the enterprise's administrative or  
26 managerial body or supervisory board.

27  
28 Id. at cmt. on art. 1.4 (emphasis added). Therefore, the OECD  
Convention is clear that in the case of public enterprises where  
the government exercises a "dominant influence," directly or  
indirectly, the OECD Convention is intended to prohibit bribes to  
those enterprises. Indeed, the OECD Convention specifically  
gives as examples of "public enterprise" those with majority  
state-ownership and majority state-control.

1 In light of such a clear requirement by the OECD Convention  
2 to criminalize bribes paid to "public enterprises" and Congress's  
3 clear intent to comport the FCPA with the OECD Convention, the  
4 defendants' arguments that the 1998 amendments illustrate  
5 Congress's clear intent to "exclude" state-owned entities from  
6 its definition is nonsensical. (Mot. #220 at 17). In fact, the  
7 contrary is true.<sup>6</sup>

8 (3) Courts Interpret Terms Following the Modifier  
9 "Any" Broadly.

10 Another reason why this Court should interpret  
11 "instrumentality" to include state-owned entities is that  
12 Congress intended the FCPA to be interpreted broadly, as  
13 evidenced by its use of the term "any." Indeed, the FCPA's  
14 section prohibiting corrupt payments by domestic concerns uses  
15 the word "any" twenty-seven times. 15 U.S.C. § 78dd-2(a)

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17  
18 <sup>6</sup> In addition, it is worth noting that from 1977 to 1997,  
19 over a dozen FCPA guilty pleas were accepted by U.S. District  
20 Courts, involved bribery of officials of state-owned companies.  
21 See, e.g., (Exhibit I) (List of Examples of Enforcement Actions  
22 Based on Foreign Officials of State-Owned Entities). These  
23 enforcement actions put Congress, as well as businesses and the  
24 general public, on notice that state-owned companies were  
25 "agencies or instrumentalities" of foreign governments under the  
26 FCPA. Had Congress believed that this was an inappropriate  
27 interpretation of the statute by the enforcement agencies, it  
28 could have narrowed the definition when it amended the FCPA in  
1998, but it did not do so. Subsequent to the 1998 amendments,  
enforcement of bribes to officials of state owned-companies has  
continued with more than 20 FCPA guilty pleas or trial  
convictions involving bribery of officials of state-owned  
enterprises. See, e.g., id. This enforcement activity should not  
be surprising as the FCPA (and the OECD Convention) is aimed at  
prohibiting bribes to foreign officials to obtain or retain  
business, which is often conducted by foreign governments through  
their respective agencies and instrumentalities. Id.

1 (prohibiting, among other things, "any" domestic concern or "any"  
2 officer or employee from making use of "any" means of interstate  
3 commerce corruptly in furtherance of "any" payment of "any money"  
4 or "any" promise of "anything" of value to "any" foreign official  
5 for influencing "any" act or securing "any" improper advantage,  
6 in order to assist in obtaining or retaining business for "any"  
7 person). The FCPA's definition of "foreign official" also  
8 includes the term "any" an additional five times. 15 U.S.C.  
9 § 78dd-2(h)(2)(A) ("The term "foreign official" means any officer  
10 or employee of a foreign government or any department, agency, or  
11 instrumentality thereof, or of a public international  
12 organization, or any person acting in an official capacity for or  
13 on behalf of any such government or department, agency, or  
14 instrumentality, or for or on behalf of any such public  
15 international organization.") (emphasis added).

16  
17 "The term 'any' is generally used to indicate lack of  
18 restrictions or limitations on the term modified." U.S. ex rel.  
19 Barajas v. United States, 258 F.3d 1004, 1011 (9th Cir. 2001);  
20 see Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th  
21 Cir. 1999) (observing that Webster's Third New Int'l Dictionary  
22 (3d ed. 1986) defines "any" as "one, no matter what one" and that  
23 the term's "broad meaning" has been recognized by the Ninth  
24 Circuit). Consistent with Congress's use of the term "any," this  
25 Court should give a broad construction to the FCPA generally and,  
26  
27  
28

1 specifically, interpret the phrase "any department, agency or  
2 instrumentality" to include state-owned entities within its  
3 scope.

4 (4) Courts Interpret Statutes So That the Same  
5 Term in Similar Statutes Is Given Consistent  
6 Meaning.

7 Another relevant canon of statutory construction is that  
8 courts should interpret the same term in at least two similar  
9 statutes to have the same or similar meanings. See Smith v. City  
10 of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]hen  
11 Congress uses the same language in two statutes having similar  
12 purposes, particularly when one is enacted shortly after the  
13 other, it is appropriate to presume that Congress intended that  
14 text to have the same meaning in both statutes."). As discussed  
15 below, the way that Congress used "instrumentality" in two other,  
16 similar statutes, the Foreign Sovereign Immunities Act ("FSIA")  
17 and the Economic Espionage Act ("EEA"), makes clear that  
18 instrumentality can include state-owned entities.<sup>7</sup>

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22 <sup>7</sup> The defendants cite the FSIA and the EEA to make another  
23 argument, namely, that because Congress included definitions of  
24 "instrumentality" in those statutes and not in the FCPA, the  
25 definition of instrumentality in the FCPA should be interpreted  
26 more narrowly than in the FSIA and the EEA. (Mot. #220 at 12).  
27 The defendants cite no cases supporting this position, and it is  
unclear why, as a logical matter, this should be true. Indeed,  
in most cases, including a definition of a term limits that  
term's meaning, rather than expanding it. The government's  
position is that the term "instrumentality" as used in the FCPA  
is broader than in the FSIA.

(a) The Foreign Sovereign Immunities Act's  
Definition of Instrumentality Includes  
State-Owned Entities.

The FSIA, which Congress passed the year before the FCPA, provides a definition of "agency or instrumentality" that includes state-owned entities. The FSIA states,

An "agency or instrumentality of a foreign state" means any 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 or other ownership interest is owned by a foreign state or political subdivision thereof . . . .

28 U.S.C. § 1603(b)(2). Therefore, close in time to the passage of the FCPA, Congress included state-owned entities within the scope of a term similar to that used in the FCPA.

Particularly relevant to the instant question, this Circuit has applied the FSIA to another Mexican state-owned entity, Pemex, and its subsidiary, Pemex-Refining. Corporacion Mexicana de Servicios Maritimos v. The M/T Respect, 89 F.3d 650, 653-54 (9th Cir. 1996) (noting that under the Mexican Constitution "the government of Mexico is the only entity that may own and exploit the country's natural resources, including all petroleum and hydrocarbons" and holding that Pemex and Pemex-Refining are each an "agency or instrumentality" of the Mexican government under FSIA). Under this precedent, CFE, which is a very similar Mexican institution, would also be considered an "agency or instrumentality" for purposes of the FSIA. If the Court,

1 following Smith, interprets these similar statutes in a similar  
2 manner, then CFE is also an "agency or instrumentality" under the  
3 FCPA.

4 (b) The Economic Espionage Act's Definition  
5 of Instrumentality Includes State-Owned  
6 Entities.

6 Similarly, the Court should look to the term  
7 "instrumentality" in the EEA. Although the words used are  
8 slightly different, the EEA, passed in 1996, defines  
9 "instrumentality" much the same way as it was defined by the  
10 FSIA. Like the FSIA, the EEA looks at both ownership and other  
11 elements to determine what constitutes an instrumentality. The  
12 EEA defines "foreign instrumentality" to mean:

13 any agency, bureau, ministry, component, institution,  
14 association, or any legal, commercial, or business  
15 organization, corporation, firm, or entity that is  
16 substantially owned, controlled, sponsored, commanded,  
17 managed, or dominated by a foreign government.

18 U.S.C. § 1839(1). By its text, under the EEA, a state-owned  
19 entity like CFE constitutes a "foreign instrumentality."<sup>8</sup>

20 Therefore, if the term "instrumentality" in both the FCPA and the  
21 EEA are to be given similar interpretations, this interpretation  
22 should include state-owned entities.  
23  
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25 <sup>8</sup> Although, to date, no court has specifically interpreted  
26 "foreign instrumentality" under the EEA, the statute's text is  
27 clear that the term includes a "corporation" that is  
28 "substantially owned" by a foreign government.

1 (5) The Canons of Construction Noscitur a Sociis  
2 and Ejusdem Generis, Cited by the Defendants,  
3 Support the Government's Interpretation That  
4 State-owned Entities Are Government  
5 Instrumentalities.

6 The defendants primarily cite to two canons of construction  
7 in support of their narrow interpretation of "foreign official."  
8 Specifically, the defendants rely on the principle of noscitur a  
9 sociis and ejusdem generis for the proposition that because the  
10 FCPA lists three items ("department, agency or instrumentality")  
11 in its list of government entities for which officers and  
12 employees are "foreign officials," "instrumentality" should be  
13 interpreted in relation to the other two. The defendants are  
14 quite right, as, of course, the term instrumentality should be  
15 interpreted in context with the provision as a whole. However,  
16 the defendants go too far when they argue that the term  
17 instrumentality "must be understood to capture only entities that  
18 share qualities both agencies and departments share." (Mot. #220  
19 at 15).

20 Preliminarily, it is worth noting that state-owned entities  
21 do, in fact, share qualities with both agencies and departments.  
22 State-owned entities, like departments and agencies, often  
23 perform public functions, are governed by public laws, and draw  
24 from and contribute to the public fisc. Indeed, every "share[d]  
25 quality" of departments and agencies listed by the defendants is,  
26 in fact, shared by state-owned entities generally and CFE in  
27 particular. Such entities exist at the "pleasure of  
28 governments," are "funded" by government (at least in part),

1 "orient to policies and/or public policy," and "the extent of  
2 their powers are defined" by the state. (Mot. #220 at 8).<sup>9</sup>

3       However, taken to its extreme, the defendants' argument that  
4 an "instrumentality" has to share all of its characteristics with  
5 both a "department" and an "agency" would rob "instrumentality"  
6 of independent meaning. As explained above, see supra Part  
7 II.C.2.b(1), canons of constructions counsel against such an  
8 interpretation resulting in a term being considered mere  
9 surplusage. See Am. Paper Inst., Inc. v. Am. Elec. Power Serv.  
10 Corp., 461 U.S. 402, 421 (1983) ("The Court will not adopt an  
11 interpretation that renders a section useless, because Congress  
12 did not mean to paralyze with one hand what it sought to promote  
13 with the other."); see also Pub. Lands Council v. Babbitt, 529  
14 U.S. 728, 748 (2000) ("Why would Congress add the words . . . if  
15 . . . they add nothing?"). Therefore, the Court should interpret  
16 the term "instrumentality" in accordance with its plain meaning.

17                               (6) The Defendants' "Absurd" Examples Have No  
18                               Relevance to This Case.

19       Finally, the defendants purport to have found "absurd,"  
20 hypothetical examples of state-owned entities that, in their  
21 opinion, should not be considered government instrumentalities  
22 under the FCPA. (Mot. #220 at 20). Implicit in their argument  
23

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24       <sup>9</sup> The defendants argue that the difference between state-  
25 owned entities and departments and agencies is that "[u]nlike  
26 agencies and departments, corporations can take myriad forms and  
27 are created and operated in innumerable ways and for infinitely  
variable purposes." (Mot. #220 at 8). The government submits  
that it is at least an open contest as to whether there are more  
kinds of government entities or private ones.

1 is the contention that if one example exists in which one state-  
2 owned entity is not a government instrumentality, then no state-  
3 owned entity is a government instrumentality. However, courts do  
4 not decide hypothetical cases, and imaginary situations do not  
5 control real ones. Cf. National Endowment for Arts v. Finley,  
6 524 U.S. 569, 584 (1998) (“[W]e are reluctant . . . to invalidate  
7 legislation on the basis of its hypothetical application to  
8 situations not before the Court.”) (internal quotation marks  
9 omitted); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)  
10 (“Condemned to the use of words, we can never expect mathematical  
11 certainty from our language. It will always be true that the  
12 fertile legal imagination can conjure up hypothetical cases in  
13 which the meaning of (disputed) legal terms will be in nice  
14 question. . . . [However,] we think it is clear what the  
15 ordinance as a whole prohibits.”). In the instant case, the  
16 defendants’ hypothetical examples are irrelevant to a  
17 determination of whether the FSI properly alleges violations of  
18 the FCPA against the defendants. Given the plain meaning of the  
19 FCPA, there is no question that officers of CFE are “foreign  
20 officials” under the statute.

21 3. Every Court That Has Faced the Issue Has Decided  
22 That Officials of State-Owned Entities Can Be  
23 Foreign Officials.

24 a. Previous Interpretations of the Term  
25 Government “Instrumentality”

26 To date, two similar motions to dismiss have been decided by  
27 district courts, both of which denied the motions. Most

1 recently, in United States v. Esquenazi, a case involving Haiti's  
2 97% state-owned telecommunications company, "Haiti Teleco," the  
3 district court rejected the defendants' argument that state-owned  
4 entities were not included in the FCPA's definition of government  
5 instrumentality:

6       The Court, however, finds that the Government has  
7 sufficiently alleged that [Officers of Haiti Teleco]  
8 were foreign officials by alleging that these  
9 individuals were directors in the state-owned Haiti  
10 Teleco. . . . The Court also disagrees that Haiti  
11 Teleco cannot be an instrumentality under the FCPA's  
12 definition of foreign official. The plain language of  
13 this statute and the plain meaning of this term show  
14 that as the facts are alleged in the indictment Haiti  
15 Teleco could be an instrumentality of the Haitian  
16 government. See 15 U.S.C. § 78dd-2(h)(2)(A).

17 (Exhibit J) (Order Denying Motion to Dismiss in United States v.  
18 Esquenazi, et al., 09-CR-21010 (S.D. Fl. 2010)). Likewise, the  
19 district court in United States v. Nguyen denied a motion based  
20 on the same premise. (Exhibit K) (Order Denying Motion to  
21 Dismiss in United States v. Nguyen, et al., 08-CR-522 (E.D. Pa.  
22 2009)). Although the defendants are correct that these decisions  
23 are not binding on this Court, they are persuasive.

24                   b. Previous Acceptance of State-Owned Entities  
25 as Government Instrumentalities

26       Additionally, this Court should be aware that district  
27 courts have accepted more than 35 guilty pleas by individuals who  
28 have admitted to violating the FCPA by bribing officials of  
state-owned entities.<sup>10</sup> For a Court to accept a plea of guilty,

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<sup>10</sup> See, e.g., (Exhibit I) (List of Examples of Enforcement  
Actions Based on Foreign Officials of State-Owned Entities)

1 a district court must have a basis to believe that a crime has  
2 been committed. Fed. R. Crim. Proc. 11(b)(3) ("Before entering  
3 judgment on a guilty plea, the court must determine that there is  
4 a factual basis for the plea."). Presumably, in these 35 cases,  
5 the district courts did.<sup>11</sup> This precedent is evidence that the  
6 plain meaning of "instrumentality" under the FCPA includes state-  
7 owned entities. Consequently, in arguing that as a matter of law  
8 a state-owned entity cannot be an "agency or instrumentality,"  
9 the defendants are arguing that on fifty different occasions,  
10 district court judges inaccurately assessed the law and  
11 improperly accepted guilty pleas.<sup>12</sup>

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14  
15 <sup>11</sup> Indeed, in 1985, a district court accepted a plea of  
16 guilty to an FCPA charge involving paying bribes to an employee  
17 of the exact same entity that is at issue in the instant case -  
18 CFE. See (Exhibit L) (Criminal Information in United States v.  
19 Silicon Contractors, Inc., 85-CR-251 (E.D. La. 1985)).

20 <sup>12</sup> Obviously, more than 35 pleas of guilty were not  
21 accepted by district court judges without considering that  
22 defense counsel, zealously representing the defendants, had  
23 thoroughly examined the legal issues and advised their clients of  
24 all legitimate legal arguments, including whether the alleged  
25 state-owned entity was an "agency or instrumentality" of a  
26 foreign government.

27 Of particular note here is that counsel for defendant LEE  
28 represents Mario Covino in a separate FCPA matter. United States  
29 v. Covino, 08-CR-00336 (C.D.C.A. Dec. 17, 2008). Mr. Covino  
30 pleaded guilty to FCPA violations for conspiring to make corrupt  
31 payments to "foreign officials at state-owned entities including,  
32 but not limited, to Petrobras (Brazil), Dingzhou Power (China),  
33 Datang Power (China), China Petroleum, China Resources Power,  
34 China National Offshore Oil Company, PetroChina, Maharashtra  
35 State Electricity Board (India), KHNP (Korea), Petronas  
36 (Malaysia), Dolphin Energy (UAE), and Abu Dhabi Company for Oil  
37 Operations (UAE)." See (Exhibit I.19) (List of Examples of  
38 Enforcement Actions Based on Foreign Officials of State-Owned  
39 Entities).

1 c. Jury Instructions Concerning the Term  
2 Government Instrumentality

3 Similarly, in considering the meaning of "instrumentality,"  
4 this Court should look to other courts that have recently  
5 examined the term "instrumentality" when instructing jurors on  
6 the scope of liability for defendants. Courts examining the  
7 issue have instructed the jury that the definition of government  
8 instrumentality includes companies owned or controlled by the  
9 state. See (Exhibit A) (Jury Instruction in United States v.  
10 Bourke, 1:05-CR-518 (S.D.N.Y. 2009) (Trial Tr. at at 3366:10-11  
11 (July 8, 2009)) ("An instrumentality of a foreign government  
12 includes government-owned or government-controlled companies.");  
13 (Exhibit B) (Jury Instructions in United States v. Jefferson,  
14 1:07-CR-209 (E.D. Va. 2009) (Trial Tr. 85:18-25 (July 30, 2009))  
15 ("An instrumentality of a foreign government includes a  
16 government-owned or government-controlled company, such as  
17 commercial carriers, airlines, railroads, utilities, and  
18 telecommunications companies: Internet/telephone/television. The  
19 Indictment in this case charges that the Nigerian  
20 Telecommunications, Limited, also known as Nitel, was a Nigerian  
21 government-controlled company."). That other courts have  
22 interpreted the term "foreign official" when instructing juries  
23 to include state-owned entities is persuasive that such an  
24 interpretation comports with the natural understanding of the  
25 statute.

1           4.    The FCPA's Legislative History Supports the  
2                    Government's Interpretation That Officers of  
3                    State-Owned Entities Are Foreign Officials.

4           Even though the definition of "instrumentality" plainly  
5 includes state-owned entities, as discussed above, the defendants  
6 still argue that an employee of a state-owned entity, like CFE,  
7 could never be a foreign official because the legislative history  
8 of the FCPA "evinces Congressional intent to address only a  
9 narrow range of conduct with the FCPA" that does not include  
10 these entities. (Mot. #220 at 21). The defendants are mistaken.  
11 Indeed, review of Michael Koehler's lengthy legislative history  
12 of the FCPA, cited by the defense, (Mot. #220 at 11 n.4), is  
13 chiefly revealing for what it does not contain. In spite of 150  
14 hours and 448 paragraphs spent distilling his research, Mr.  
15 Koehler is unable to find a single reference in any part of the  
16 legislative history that Congress intended to exclude state-owned  
17 companies from the definition of instrumentality. Indeed, the  
18 legislative history of the FCPA supports an interpretation in  
19 which bribes to officials of state-owned enterprises are  
20 criminalized.<sup>13</sup>

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25           <sup>13</sup> Two important pieces of legislative history, the addition  
26 of the "routine governmental action" exception and Congress's  
27 intent to conform with the OECD Convention are addressed above in  
28 discussing the statutory construction. See supra at Part  
II.C.2.b.(1)-(2).

1 a. Congress Enacted the FCPA Against a Backdrop  
2 of Concern About Bribery of Officials at  
3 State-Owned Entities.

4 Lost in the defendants' discussion of and references to the  
5 legislative history of the FCPA is the statute's broader  
6 historical context. The FCPA was originally passed as a  
7 comprehensive response to what was seen as a pervasive problem of  
8 foreign bribery. In explaining the need for the legislation,  
9 Congress explained:

10 More than 400 corporations have admitted making  
11 questionable or illegal payments. The companies, most  
12 of them voluntarily, have reported paying out well in  
13 excess of \$300 million in corporate funds to foreign  
14 government officials, politicians, and political  
15 parties. These corporations have included some of the  
16 largest and most widely held public companies in the  
17 United States; over 117 of them rank in the top Fortune  
18 500 industries.

19 . . .  
20 The payment of bribes to influence the acts or  
21 decisions of foreign officials, foreign political  
22 parties or candidates for foreign political office is  
23 unethical. It is counter to the moral expectations and  
24 values of the American public. But not only is it  
25 unethical, it is bad business as well. It erodes  
26 public confidence in the integrity of the free market  
27 system. It short-circuits the marketplace by directing  
28 business to those companies too inefficient to compete  
in terms of price, quality or service, or too lazy to  
engage in honest salesmanship, or too intent upon  
unloading marginal products. In short, it rewards  
corruption instead of efficiency and puts pressure on  
ethical enterprises to lower their standards or risk  
losing business.

23 H. Rep. No. 95-640 (1977) at 4-5. To address this serious  
24 problem, Congress was clear that the legislation was to have  
25 expansive reach. Id. at 7 (explaining that the legislation  
26 "broadly prohibits transactions that are corruptly intended to  
27



1 significant that Congress "chose [a] broad, general term" over an  
 2 enumerated list).

3 A side-by-side comparison of the four versions of bills  
 4 discussed by the defendants is illuminating. (Mot. #220 at 15-  
 5 16).

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 (5) a public international organization. (emphasis added)	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> or (E) a public international organization. (emphasis added)	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 S. 3741 and H.R. 7543 were both bills requiring reporting of  
2 corrupt payments as opposed to prohibition of such payments.<sup>14</sup>  
3 Both were referred to committee, and no further action was taken.  
4 Ultimately, the FCPA of 1977 was an amalgamation of S. 305 and  
5 HR. 3815. With respect to the definition of foreign official,  
6 the Senate receded to the House. H. Conf. Rep. 95-831 (1977).  
7 In comparing what Congress adopted and what Congress rejected,  
8 there is no evidence that Congress was attempting to narrow the  
9 scope of its legislation by choosing the definition in H.R. 3815.  
10 Instead, it chose a general definition over an enumerated list.  
11 If anything, by generalizing the FCPA's reach, Congress should be  
12 seen as evidence of its intent to broaden its scope.

13 5. Summary

14 In sum, the meaning of the term instrumentality in the FCPA  
15 clearly includes state-owned entities. By definition, government  
16 "instrumentality" includes state-owned entities used to achieve a  
17 government's end or purpose. Furthermore, state-owned entities  
18 must be government instrumentalities (1) for all of the text of  
19 the FCPA to have meaning, (2) for the United States to be in  
20 compliance with its treaty obligations, (3) for the FCPA to be  
21 given the broad construction indicated by its text, and (4) for  
22 the term "instrumentality" to be interpreted consistently with  
23 other, similar statutes. This Court should interpret the term  
24 consistently with all other courts that have faced the issue and  
25

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26 <sup>14</sup> These bills can be found as Exhibits 32, 38, 39, and 44  
27 of Mr. Koehler's Declaration in United States v. Carson, et al.,  
09-CR-00077-JVS CR 300.

1 hold that state-owned entities like CFE can be government  
2 instrumentalities.

3 D. The Rule of Lenity Has No Application to the Instant  
4 Case.

5 The defendants, in the alternative, argue that the  
6 rule-of-lenity requires interpreting the FCPA so as not to  
7 include state-owned entities. (Mot. #220 at 28). This argument  
8 is flawed for two reasons. First, their argument seriously  
9 misconceives the rule's meaning and erroneously urges the Court  
10 to dismiss the FSI if "there is any ambiguity" in the statutory  
11 meaning of "foreign official" or "instrumentality." Id.  
12 (emphasis added). In reality, "[t]he simple existence of some  
13 statutory ambiguity . . . is not sufficient to warrant  
14 application of that rule, for most statutes are ambiguous to some  
15 degree." Muscarello v. United States, 524 U.S. 125, 138 (1998).  
16 Indeed, courts have soundly rejected the defendants'  
17 any-ambiguity-is-sufficient formulation, holding instead that  
18 only a "grievous ambiguity or uncertainty in the statute" that  
19 leaves the Court only to "guess as to what Congress intended"  
20 will warrant the rule's application. Barber v. Thomas, 130 S.  
21 Ct. 2499, 2508-09 (2010) (internal quotation omitted).

22 Second, the rule of lenity is applied sparingly, only after  
23 all other interpretive tools have been unsuccessfully exhausted.  
24 See, e.g., Callanan v. United States, 364 US. 587, 596 (1961)  
25 (the rule "only serves as an aid for resolving an ambiguity; it  
26 is not to be used to beget one . . . . The rule comes into  
27

1 operation at the end of the process of construing what Congress  
2 has expressed, not at the beginning as an overriding  
3 consideration of being lenient to wrongdoers. That is not the  
4 function of the judiciary."); see also Barber, 130 S. Ct. at  
5 2508-09 (explaining that "the rule of lenity only applies . . .  
6 after considering [the statute's] text, structure, history, and  
7 purpose"). Critically, neither the existence of an articulable,  
8 narrower construction, nor the statute's use of undefined terms  
9 is enough to require the rule of lenity's application. See,  
10 e.g., Muscarello, 524 U.S. at 138-39 (although term "carry" was  
11 undefined, both parties "vigorously contest[ed] the ordinary  
12 English meaning of the phrase 'carries a firearm,'" and normal  
13 usage equally embraced the disparate meanings urged by the  
14 parties, the court rejected application of the rule of lenity and  
15 chose the meaning that criminalized comparatively more conduct);  
16 United States v. Shabani, 513 U.S. 10, 17 (1994) (noting the  
17 "mere possibility of articulating a narrower construction" is  
18 insufficient to warrant the rule's application) (quoting Smith v.  
19 United States, 508 U.S. 239 (1993)); Chapman v. United States,  
20 500 U.S. 453, 461-64 (1991) (affirming LSD-distribution sentence  
21 and rejecting application of the rule of lenity, even though the  
22 statute failed to define key terms "mixture" and "substance");  
23 Lisbey v. Gonzales, 420 F.3d 930, 933 (9th Cir. 1995) ("Courts  
24 should not deem a statute 'ambiguous' for purposes of lenity  
25 merely because it is possible to articulate a construction more  
26 narrow than that urged by the Government.").

27

28



1 ("Where . . . a statute is challenged as unconstitutionally vague  
2 in a cause of action not involving the First Amendment, we do not  
3 consider whether the statute is unconstitutional on its face.")  
4 (quoting United States v. Purdy, 264 F.3d 809, 811 (9th Cir.  
5 2001)).

6 The defendants' as-applied challenge to the  
7 constitutionality of the FCPA is similarly unavailing. A statute  
8 is void-for-vagueness if it fails to "define the criminal offense  
9 with [1] sufficient definiteness that ordinary people can  
10 understand what conduct is prohibited and [2] in a manner that  
11 does not encourage arbitrary and discriminatory enforcement."  
12 Skilling v. United States, 130 S. Ct. 2896, 2927-28 (2010)  
13 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The  
14 relevant inquiry "is whether the statute, either standing alone  
15 or as construed, made it reasonably clear at the relevant time  
16 that the defendant's conduct was criminal." United States v.  
17 Lanier, 520 U.S. 259, 267 (1997); see United States v. Brumley,  
18 116 F.3d 728, 732 (5th Cir.) (en banc) ("Gauging fair notice  
19 requires an inquiry into the state of the law as a whole, not  
20 merely into the words printed on a single page of the United  
21 States Code."). In assessing void-for-vagueness challenges,  
22 courts are required to "construe, not condemn, Congress'  
23 enactments." Skilling v. United States, 130 S. Ct. 2896, 2928  
24 (2010) (quoting United States v. National Dairy Products Corp.,  
25 372 U.S. 29, 32 (1963) (stressing "[t]he strong presumptive  
26 validity that attaches to an Act of Congress")).

1 In applying these principles, no court has held that the  
2 FCPA is unconstitutionally vague on the basis advanced by  
3 defendants. Indeed, in both recent decisions on similar motions,  
4 discussed above, the district courts rejected defendants' void-  
5 for-vagueness arguments. (Exhibit J) (Order Denying Motion to  
6 Dismiss in United States v. Esquenazi, et al., 09-CR-21010 (S.D.  
7 Fl. 2010)) ("[T]he Court finds that persons of common  
8 intelligence would have fair notice of this statute's  
9 prohibitions"); (Exhibit K) (Order Denying Motion to Dismiss in  
10 United States v. Nguyen, et al., 08-CR-522 (E.D. Pa. 2009)).

11 Moreover, under "the facts of the case at hand," Mazurie,  
12 419 U.S. at 550, defendants cannot meet the heavy burden of  
13 demonstrating that the statute is unconstitutionally vague.  
14 Defendants fail to establish that the FCPA's prohibition of  
15 bribes to foreign officials did not provide clear warning that  
16 their own conduct was proscribed, as applied to the facts alleged  
17 in the FSI. Indeed, defendants do not make any reference to the  
18 facts whatsoever in arguing that the statute is vague as applied,  
19 instead simply urging the court to dismiss the FSI on this basis  
20 if it is not inclined to find the statute unconstitutionally  
21 vague on its face.

22 Finally, the FCPA is not unconstitutionally vague as applied  
23 to defendants because it contains a sufficient mens rea  
24 requirement. It is well established that a mens rea or scienter  
25 requirement may serve to defeat a claim that a defendant is being  
26 punished for conduct he did not know was wrong. See United  
27

1 States v. Jae Gab Kim, 449 F.3d 933 (9th Cir. 2006) (quoting  
2 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455  
3 U.S. 489, 495 n.7 (1982)) (“[A] scienter requirement may mitigate  
4 a law’s vagueness, especially with respect to the adequacy of  
5 notice to the complainant that his conduct is proscribed.”);  
6 Colautti v. Franklin, 439 U.S. 379, 395 (1979) (“This Court has  
7 long recognized that the constitutionality of a vague statutory  
8 standard is closely related to whether that standard incorporates  
9 a requirement of mens rea.”). Section 78dd-2 contains a scienter  
10 requirement sufficient to overcome defendants’ challenge,  
11 requiring defendants “to make use of the mails or any means or  
12 instrumentality of interstate commerce corruptly in furtherance  
13 of an offer, payment, promise to pay, or authorization of the  
14 payment of any money, or offer, gift, promise to give, or  
15 authorization of the giving of value to” any foreign official,  
16 and to any person, to influence any act or decision of such  
17 foreign official in his or her official capacity; and to assist  
18 in obtaining or retaining business. 15 U.S.C. § 78dd-2(a)  
19 (emphasis added). For all these reasons, the defendants’ void-  
20 for-vagueness claim should be denied.

21 **III.**

22 **CONCLUSION**

23  
24 For the reasons set forth above, this Court should deny  
25 the defendants’ Motion to Dismiss the First Superseding  
26 Indictment.