IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff,	§ § §	
v.	§	CRIMINAL NO. Cr-H-09-629
JOHN JOSEPH O'SHEA, Defendant.	§ § §	

DEFENDANT O'SHEA'S OPPOSED MOTION TO DISMISS COUNTS ONE THROUGH SEVENTEEN OF THE INDICTMENT

I. INTRODUCTION

The Indictment in this Foreign Corrupt Practices Act (FCPA) case against Mr. O'Shea is a classic example of unchecked prosecutorial discretion and must be dismissed as void for vagueness. The Indictment fails to allege that Mr. O'Shea bribed a "foreign official" because it alleges only that Mr. O'Shea bribed persons employed by the Comisión Federal de Electricidad (CFE), a business that the United States avers is a Mexican state-owned entity. Assuming for purposes of this Motion only that CFE is a state-owned entity, the persons employed by CFE are not on such basis foreign officials or instrumentalities of foreign officials under the FCPA's definition.

II. LEGAL STANDARD FOR MOTION TO DISMISS

"The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling." Fed. R. Crim. P. 12(d). In a motion to dismiss, a defendant must raise "a defect in the Indictment." Fed. R. Crim. P. 12(b)(3)(B). In this case, the indictment is defective because the substantive FCPA counts (Counts Two through Thirteen) rest entirely on an incorrect legal conclusion that a state-owned entity is a "department, agency and instrumentality of a foreign government," and that its officers and employees are "'foreign officials' within the

meaning of the FCPA." Indictment, ¶¶ 5-6. Further, Count One, alleging conspiracy, and Counts Fourteen through Eighteen, alleging money laundering, all require an underlying FCPA violation.[1] State-owned enterprises fall beyond the scope of the FCPA's definition of "instrumentality," and therefore, their officers and employees are not "foreign officials" under the FCPA. Because these counts of the Indictment are premised on an incorrect interpretation of the FCPA, this Court must dismiss them. *See, e.g., United States v. Emmons*, 410 U.S. 396, 410-12 (1973). Mr. O'Shea must raise, by pretrial motion, "a defect in the indictment." Fed. R. Crim. P. 12(b)(3)(B).

III. ARGUMENT

A. Officers and Employees of State-Owned Entities Are Not "Foreign Officials."

To violate the anti-bribery provisions of the FCPA as alleged in this case, a corrupt payment must be directed to a "foreign official." The FCPA defines a "foreign official" as:

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

15 U.S.C. § 78dd-2(h)(2)(A). The government has improperly expanded this definition to include all employees of state-owned enterprises—regardless of rank, position, or duties. Employees of a state-owned entity are not "officials" of a foreign government just because the government has termed certain CFE employees as "CFE Officials" in the Indictment without explaining how a state-owned entity's employees are "foreign officials" merely on this basis under the FCPA. Indictment, ¶ 6; *United States v. Blondek*, 741 F. Supp. 116, 120 (N.D. Tex. 1990) (referring to "foreign officials" as a "small class of persons" and a "well-defined group").

[1] If the Court grants this motion to dismiss, the only remaining count to try against Mr. O'Shea would be Count 18, Falsification of Records in a Federal Investigation. This count is not among those currently set for trial.

And this provision has been and continues to be challenged in federal courts across the country.[2]

1. "Instrumentalities" Are Bureaus, Commissions, and Miscellaneous Governmental Bodies Functioning Similarly to Departments and Agencies

The government has exploited the absence of a definition in the FCPA for the term "instrumentality" appearing in the definition of "foreign official." If a statute does not define a term, the Court should start with a term's ordinary meaning. Courts often look to dictionaries for guidance on a term's ordinary meaning, but the dictionary definition of "instrumentality" is unhelpful here, because the potentially pertinent portions of the definitions found in the major dictionaries are so broad. A typical example is "a means, an agency." American Heritage Dictionary 908 (4th ed. 2000); *see United States v. Santos*, 553 U.S. 507, 511 (2008); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

Also important in determining a term's "ordinary meaning" is the examination of the term in the context of the statute rather than in isolation. *Santos*, 553 U.S. at 512. Under the statutory-construction doctrine of *noscitur a sociis*, the meaning of "instrumentality" should be derived from its context and the words grouped with it in the "foreign official" definition. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("words grouped in a list should be given related meaning"); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps."); *see, e.g., Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 804 (5th Cir. 2010) (applying the canon of construction *noscitur a sociis*).

Applying that canon, within the FCPA's definition of "foreign official," the term "instrumentality" appears in two lists: (1) "foreign government or any department, agency, or

[2] *See, e.g.*, Ex. A, Mot. to Dismiss, *United States v. Carson*, 8:09-cr-00077-JVS (C.D. Ca. Feb. 21, 2011) ("Carson Mot. to Dismiss") (hearing to be held Mar. 21, 2011); Ex. B, Mot. to Dismiss, *United States v. Aguilar*, No. 10-1031 (C.D. Ca. Feb. 28, 2011) (hearing to be held Mar. 21, 2011); Ex. C, Order, *United States* v. *Nguyen*, No. 08-00522 (E.D. Pa. Dec. 30, 2009) (denying the motion to dismiss in a one-sentence order without analysis); Ex. D, Mot. to Dismiss, *Nguyen*, No. 08-00522 (E.D. Pa. Nov. 9, 2009); Ex. E, Order, *United States v. Esquenazi*, No. 09-21010 (S.D. Fla. Nov. 19, 2010) (denying the motion to dismiss in three pages without substantive analysis); Ex. F, Mot. to Dismiss, *Esquenazi*, No. 09-21010 (S.D. Fla. Nov. 10, 2010).

instrumentality thereof" and (2) "any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality." 15 U.S.C. § 78dd-2(h)(2)(A). "Departments" and "agencies," such as the Department of Education and the Central Intelligence Agency, are subdivisions or units of the United States government that perform government functions. The United States Government and foreign governments also encompass a myriad of bureaus, boards, administrations, and commissions; including such miscellaneous governmental bodies in the definition would be a logical reason to include the term "instrumentality" in addition to "department and "agency" because the missions of such bodies are similarly governmental A business entity owned by the Mexican government, on the contrary, should not be deemed an "instrumentality" because it has little in common with the rest of the series: unlike departments and agencies, it carries out commercial, not governmental, functions.

Moreover, if Congress wants to define "instrumentality" to include state-owned entities, it knows how to do so. In certain other statutes, Congress has specifically defined "instrumentality." *See, e.g.,* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b);[3] Economic Espionage Act of 1996, 18 U.S.C. § 1839(1).[4] In not defining "instrumentality" in the FCPA, Congress likely expressed its intent to give the term its ordinary and most natural reading in context, which would encompass bureaus and other miscellaneous governmental bodies. *See* Ex. A, Carson Mot. to Dismiss at 30-33.

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[3] Section 1603(b) provides:

> 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, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

[4] Section 1839(1) provides:

> [T]he term "foreign instrumentality" means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.

2. Congress Did Not Intend Employees of State-Owned Entities to Be "Foreign Officials."

Where the meaning of statutory text is clear, there is no need to resort to legislative history to discern the text's meaning. Where the statutory text is ambiguous, however, courts often look to legislative history to clarify the meaning of the statute. *See, e.g.*, *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Liparota v. United States*, 471 U.S. 419, 424 (1985). Here, if the meaning of "instrumentality" is deemed ambiguous, a review of the FCPA's legislative history confirms that Congress did not intend the statute to encompass payments made to employees of state-owned business enterprises. *See* Ex. A, Carson Mot. to Dismiss at 21-29; Ex. G, Declaration of Professor Michael J. Koehler in Support of Defendants' Motion To Dismiss Counts One Through Ten of the Indictment filed in *United States v. Carson*, 8:09-cr-00077-JVS (C.D. Ca. Feb. 21, 2011) ("Koehler Decl.") at 4-8 (providing an overview of his comprehensive discussion of the FCPA's legislative history).

The legislative history reveals that Congress intended "instrumentality" to have a narrower scope. First, the legislative history of the FCPA lacks any express statement by Congress to support the government's overreaching position that the definition of "foreign official" includes state-owned entities. *See* Ex. A, Carson Mot. to Dismiss at 22; Ex. G, Koehler Decl. at ¶¶ 16-18. Second, as reflected in House and Senate Reports, Congress enacted the FCPA in 1977 in response to scandals involving direct bribes paid by corporations such as Lockheed Martin to high-ranking governmental officials such as the Prime Minister of Japan, Prince Bernhardt (the Inspector General of the Dutch Armed Forces), and Italy's President, Prime Minister, and defense ministers. *See* Ex. A, Carson Mot. to Dismiss at 22-23; Ex. G, Koehler Decl. at ¶¶ 140, 222, 243. Corrupt payments to the very officials with whom the United States had ongoing diplomatic ties through which it was attempting to forward its own foreign

policy goals caused specific, "severe foreign policy problems"; such problems, which do not arise in the same way where bribes are paid to corporate employees, were those that Congress sought to remedy with the FCPA. *See* Ex. A, Carson Mot. to Dismiss at 22-25.

3. The Government's Proposed Interpretation Leads to Absurd Results.

The government's expansive reading of "foreign official" leads to countless absurd results. *See United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994); *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope."). First, the FCPA's "grease payment" exception specifically allows "facilitating or expediting payment[s] to a foreign official . . . to expedite or to secure the performance of routine *governmental* action by a foreign official, political party, or party official." 15 U.S.C. § 78dd-2(b) (emphasis added). If "instrumentality" encompasses state-owned entities, then grease payments to employees of miscellaneous bureaus and state-owned companies are illegal under the FCPA, while grease payments to traditional foreign officials performing *governmental* actions are permitted. There can be no logical reason for such a result.

As another example, the government's reading converts certain United States citizens living and working in the United States into "foreign officials." For example, under the government's view, the Texas-based company CITGO, a wholly-owned subsidiary of a Venezuelan-state-owned oil corporation, Petróleos de Venezuela S.A., would be an "instrumentality" of Venezuela, and all of its Houston-based officers and employees are therefore "foreign officials" of Venezuela. Ex. A, Carson Mot. to Dismiss at 20.

As another example, under the government's overly-expansive reading, which would

make foreign officials out of employees of even partially state-owned businesses,[5] every time a state takes an ownership interest in a commercial enterprise during a "bail out," as the United States did for General Motors and AIG, that company becomes an "instrumentality" of the United States government as a result. Ex. A, Carson Mot. to Dismiss at 21. This is where the "logic" of the government's position leads.

B. The Rule of Lenity Requires Dismissal of Counts One Through Seventeen.

Under the rule of lenity, the government must prove that its position is "*unambiguously correct*" in order for the charges against Defendants to stand. *See United States v. Granderson*, 511 U.S. 39, 54 (1994). And to the extent that the term "instrumentality" is ambiguous, the rule of lenity requires that the ambiguity be resolved in Defendants' favor. *See id*. ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct," the court must "apply the rule of lenity and resolve the ambiguity in the defendant's favor."); *Skilling v. United States*, 130 S. Ct. 2896, 2905-06 (2010) (invoking the "principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (citation and internal quotation marks omitted); *see also* Ex. A, Carson Mot. to Dismiss at 35-38. Because "instrumentality" is not defined, the Government cannot prove that its position as to the scope of the term "instrumentality" is "unambiguously correct."

C. The FCPA Is Unconstitutionally Vague.

Alternatively, if the Government is correct that employees of state-owned business enterprises constitute "foreign officials," then the FCPA as applied here is unconstitutional for using "terms so vague that men of common intelligence must necessarily guess at its meaning

[5] *See* Ex. A, Carson Mot. to Dismiss at 8-9 (citing *United States v. Kellogg Brown & Root LLC*, Crim. No. H-09-071 (S.D. Tex.) & *SEC v. Halliburton Co. & KBR Inc.*, Civ. No. 4:09-399 (S.D. Tex.) in which the government alleged that officers and employees of Nigeria LNG, an entity 49% owned by Nigeria's state-owned oil company, were foreign officials). If the United States were to take a contrary position now limiting "instrumentality" to corporations that are 100% state-owned, or that are controlled by the state, such a meaning would not be "unambiguously correct" and therefore would be subject to the rule of lenity as discussed in the following section.

and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (citation omitted); *accord United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). A criminal statute provides due process if the criminal offense has sufficient definiteness that ordinary people can understand its meaning and defines the offense in a manner that does not encourage arbitrary and discriminatory enforcement. *Skilling*, 130 S. Ct. at 2927-28. If a statute does not meet these requirements, an indictment under that statute is void for vagueness. *Id.*; *see* Ex. A, Carson Mot. to Dismiss at 33-34, 39-48. If applied to encompass companies partially or wholly owned by a foreign nation, the vague "foreign official" provision in the FCPA fails to provide Mr. O'Shea with due process and the Indictment should be dismissed.

IV. CONCLUSION

The government has grossly misinterpreted and misapplied the FCPA in the Indictment against Mr. O'Shea. The government's position is without support and should be rejected by this Court. Defendant respectfully requests that the Court dismiss Counts One through Seventeen of the Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 7, 2011, a true and correct copy of the foregoing document was served on counsel electronically through the CM/ECF System.

/s/ Sarah M. Frazier