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"Foreign Officials" Under the Foreign Corrupt Practices Act: It means what the DOJ says it means

On April 1, 2011, in a rare judicial ruling on the reach of the Foreign Corrupt Practices Act (FCPA), a US District Court in California confirmed that employees of state-owned or state-controlled entities (SOE) can be included in the term "foreign official." The Court agreed with the US Department of Justice (DOJ) that SOEs may be "instrumentalities" of foreign governments. Accordingly, payments to officers and employees of SOEs, like traditional government agencies and officials, for the purpose of obtaining or retaining business, constitute bribery prohibited by the FCPA.

Definition of Foreign Official

The FCPA prohibits payments to, or offers to pay, foreign officials for the purpose of obtaining or retaining business. "Foreign officials" are defined as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or 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.

While it may be clear who is an officer or employee of a government department or agency, the FCPA does not define "instrumentality." The DOJ and the Securities and Exchange Commission (SEC) have interpreted it broadly to include state-owned or -controlled enterprises, and have included employees of such enterprises as "foreign officials." In their prior filings, they have set forth such determining factors as the foreign state's characterization of the enterprise and its employees, the purpose of the enterprise, and the degree of control exercised by the foreign government.

Challenge to the Definition

Lindsey Manufacturing Company (LMC), the first company in many years to challenge FCPA charges in court, and two of its executives and two intermediaries were indicted for allegedly conspiring to pay bribes to Mexican government officials at the Comisión Federal de Electricidad (CFE), a state-owned utility. According to the indictment, from approximately February 2002 through March 2009, LMC engaged the intermediary sales representatives with close ties to CFE and agreed to pay them a thirty percent commission on all sales to CFE. The intermediaries, in turn, allegedly used all or a portion of the thirty percent commission to pay bribes to executives at CFE in exchange for contracts. The indictment further charges that LMC also falsified invoices in order to conceal this arrangement.

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In response to the indictment, the defendants filed a motion to dismiss, arguing that executives of CFE should not be considered "foreign officials" because the term "instrumentality" as used in the FCPA's definition of "foreign official" excludes SOEs and the legislative history shows Congress' intent to exclude SOEs from the FCPA's ambit. The DOJ opposed the motions, arguing that a foreign public official is any person exercising a public function for a foreign country.

Confirmation of the Broad Definition

The trial Judge ruled orally at a hearing on April 1, 2011, that SOEs are included in the FCPA's definition of "foreign officials," in certain circumstances. Although the Judge has not yet issued a written decision denying defendants' motions, he explained that the CFE is an instrumentality of a foreign government because the functions it performs – the exploitation of natural resources and delivery of electricity – were described in the Mexican Constitution as solely a government function. Other factors cited by the Judge included a reference to CFE in Mexican statutory law as a decentralized public entity, the presence of government officials on its governing board, and the role of the President of Mexico in appointing the Director General.

Implications

In addition to the written decision in this case, there are motions to dismiss based on similar grounds in two other pending cases, so additional oversight and guidance will be provided on this issue by the judiciary rather than the enforcement agencies. Although the factors cited by the Judge would seem to exclude companies in which a government has a purely commercial interest, at this time, the *Lindsey* ruling confirms the far-reaching scope of the FCPA and should serve as a warning to those companies operating in countries where state-owned entities are commonplace. Companies should continue to be vigilant in their dealings with state-owned entities, ensuring that their interactions with any employees of state-owned entities are in full compliance with the FCPA.