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US Department Of Justice Interpretation Of "Foreign Official" Under The Foreign Corrupt Practices Act Affirmed By California District Court

Mayer Brown JSM

While there is no debate that the act of bribing an employee or agent of a foreign governmental agency or department would fall within the ambit of the Foreign Corrupt Practices Act, it is not so clear whether the statute's definition of a "foreign official" encompasses officers or employees of state-owned corporations. Nor, until recently, has there been any authoritative case law on this issue, Mayer Brown JSM reports.

While there is no debate that the act of bribing an employee or agent of a foreign governmental agency or department, such as Mexico's Department of Taxation and Revenue, would fall within the ambit of the Foreign Corrupt Practices Act (FCPA), it is not so clear whether the statute's definition of a "foreign official" encompasses officers or employees of state-owned corporations. Nor, until recently, has there been any authoritative case law on this issue.

Taking advantage of this interpretative vacuum, the US Department of Justice (DOJ) has espoused the position that officials and employees of such entities do indeed fall within the ambit of the FCPA, and as a result, has aggressively prosecuted companies and executives for bribing employees or agents of foreign state-owned corporations to secure or retain business. Until recently, defendants rarely tested the DOJ's theory in court. In the past month, however, three separate defendants, in three separate matters, have challenged the DOJ's definition of "foreign official."

On April 1, 2011, US District Judge Howard Matz, of the Central District of California, held that officials of Mexico's state-owned utility company qualify as foreign officials for purposes of the FCPA. The ruling is a clear victory for the DOJ's interpretation of the definition of "foreign officials." Judge Matz's ruling, which comes in the case of *U.S. v. Noriega*, No. 2:10-cr-01031, could have far-reaching implications for how other courts interpret the definition of a "foreign official" and for how the DOJ prosecutes FCPA cases going forward.

Judge Matz's Ruling and its Implication for Future FCPA Cases

In *Noriega*, the Lindsey Manufacturing Company (LMC), along with its president and chief financial officer, were charged by the DOJ with violating the FCPA by conspiring to bribe officials of Mexico's Comisión Federal de Electricidad (CFE). According to the first superseding indictment, the CFE is "an electric utility company owned by the government of Mexico." The CFE officials are alleged to have held senior level positions at CFE and, thus, in the eyes of the DOJ, are considered "foreign officials" under the FCPA.

The defendants moved to dismiss the indictment, principally arguing that officers and employees of state-owned corporations, like the CFE, do not fall within the FCPA's definition of "foreign official." The statute provides that foreign officials include "officer[s] or employee[s] of a foreign government or any department, agency, or instrumentality thereof[.]"[1] The defendants noted that the DOJ was likely hanging its hat on the term "instrumentality," as the plain meaning of "department" and "agency" would not encompass a corporation even if owned by the state. The defendants contended, among other things, that Congress did not intend the word "instrumentality"—which is not defined in the FCPA—to cover state-owned corporations.

In support of their position, the defendants cited a 144-page declaration by Mike Koehler, Associate Professor of Business Law at Butler University and author of the well-known "FCPA Professor" blog, surveying the legislative history of the FCPA. Relying on Keohler's declaration, the defendants argued that, at the time the FCPA was being considered, Congress was aware of state-owned corporations, had included such entities within the definition of "instrumentalities" in a prior statute (the Foreign Sovereign Immunities Act), but ultimately did not do so in the FCPA itself. This, according to the defendants, clearly showed that Congress intended the FCPA to reach traditional governmental bodies only.

Judge Matz, however, disagreed. In a ruling from the bench, he declined the defendants' invitation to delve into the FCPA's legislative history and, instead, relied on certain undisputed facts plus a reading of Mexican law. Judge Matz noted there was no dispute that the CFE supplies electricity to all of Mexico except for Mexico City, that the CFE's governing board is composed of Mexican government officials, that its Director General is appointed by the President of Mexico, and that the CFE's English language website described it as an agency of the Mexican Federal Government. The CFE's status under Mexican law was equally critical to his decision. Specifically, the Mexican Constitution provides that the supply of electricity in Mexico is solely a government function and Mexican statutory law defines the CFE as a "decentralised public entity with legal personality and its own patrimony." In light of these factors, Judge Matz found that the CFE officials identified in the indictment were "foreign officials" under the FCPA.

The decision in *Noriega* could have a domino effect, as defendants in other FCPA cases have recently raised identical issues. In both *U.S. v. O'Shea*, No. 09-cr-629, pending in the Southern District of Texas, and *U.S. v. Carson*, No. 09-cr-00077, pending in the Central District of California, the defendants have moved to dismiss their respective indictments, claiming that the term "instrumentality" does not cover state-owned corporations and, thus, officials and employees of such entities cannot be considered "foreign officials" under the FCPA. Given the lack of judicial authority in this area, these courts will likely have to grapple with the *Noriega* decision.

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[1] 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

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