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www.BlankRome.com June 2011 No. 2

Foreign Corrupt Practices Act "Foreign Official" Defense Challenges Denied By California Federal Judges

In the past two months, judges in the Central District of California denied defendants' pre-trial motions to dismiss counts in indictments charging defendants with violations of the Foreign Corrupt Practices Act ("FCPA") in two separate cases. The motions stated that the indictments failed to state an offense because the alleged corrupt payments were not paid to "foreign officials" for purposes of FCPA criminal liability. Nevertheless, the rulings clearly indicate that the issue of whether an officer or an employee of a state-owned corporation can be considered a "foreign official" under the FCPA requires a case-by-case analysis of the facts. FCPA "foreign official" challenges therefore remain a viable defense for defendants facing trial—at least for now.

The anti-bribery provisions of the FCPA prohibit any domestic individual or business entity from making payments to a "foreign official" for the purpose of obtaining or retaining business. 15 U.S.C. § 78dd-2(a)(1). In relevant part, "foreign official" is defined as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." 15 U.S.C. § 78dd-2(h)(2)(A). "Instrumentality" is not defined in the FCPA, and thus, in the wake of increased FCPA enforcement by the DOJ and SEC, individual and corporate defendants facing trial for FCPA violations have challenged whether a state-owned corporation can be considered an "instrumentality" of a foreign government under the FCPA.

On May 18, 2011, in the case of *United States v. Carson, et al.,* No. 8:09-cr-00077- JVS, ECF No. 373 (C.D. Cal. May 18, 2011), Judge Selna ruled that "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact," which cannot be entirely segregated from the evidence to be presented at trial. In that case, which is scheduled for trial on October 4, 2011, former executives of Controlled Components Inc. ("CCI") have been charged with paying $4.9 million in bribes to officers and employees of state-owned energy companies in China, Korea, Malaysia, and United Arab Emirates between 2003 and 2007. CCI manufactures and sells control valves for use in the nuclear, oil and gas, and power-generation industries worldwide.[1] In considering the defendants' argument that employees of state-owned companies can *never* be "foreign officials" under the FCPA, Judge Selna concluded that case law, the clear statutory language of the FCPA, and its coherent and consistent statutory scheme supported the opposite conclusion—that employees of state-owned companies *could be* "foreign officials" within meaning of the FCPA.

In arriving at his decision, Judge Selna noted that state ownership of a company is merely one factor for a court to consider in determining whether a state-owned company constitutes an "instrumentality" under the FCPA. "Admittedly, a mere monetary investment in a business entity by the

government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives that business entity would qualify as a government instrumentality." *Id.* at 7. Some of the factors that warrant consideration, according to Judge Selna, are (i) the foreign state's characterization of the entity and its employees, (ii) the foreign state's degree of control over and extent of ownership of the company, (iii) the purpose of the entity's activities, and (iv) the company's obligations and privileges under the foreign state's law. At trial, the government will thus bear the burden of proving that the companies, whose employees received the alleged bribes, were in fact instrumentalities of the government, thereby qualifying the employees as "foreign officials" within the meaning of the FCPA.

Judge Selna cited a prior recent decision by another California federal district judge as support for his conclusion that some business entities may be considered an "instrumentality" under the FCPA. Further, he noted that the defendants in the prior case, discussed below, made identical arguments to the defendants in the CCI case. *Id.* at 12.

In April 2011, in the case of *United States v. Aguilar, et al.,* No. 2:10-cr-01031-AHM, ECF No. 474 (C.D. Cal. Apr. 20, 2011), Judge Matz also rejected the defendants' arguments that state-owned corporations are excluded from the proper statutory construction of "instrumentality." In that case, Lindsey Manufacturing Company, which manufactures emergency restoration systems and other equipment used by electrical utility companies, and two of its senior executives, were charged with paying bribes to two high-ranking employees of an electric utility company wholly-owned by the Mexican government.[2] Notably, the defendants in the Lindsey Manufacturing case did not dispute any of the specific facts regarding the Comisión Federal de Electricidad ("CFE"), which were set forth in the government's opposition to their motion to dismiss. Rather, the Lindsey defendants argued that, as a matter of law, no state-owned corporation is an "instrumentality" and therefore, no employee of CFE is a "foreign official" under the FCPA. Judge Matz concluded otherwise, finding that "a state-owned corporation having the attributes of CFE may be an 'instrumentality' of a foreign government with the meaning of the FCPA, and officers of such a state-owned corporation . . . may therefore be 'foreign officials' within the meaning of the FCPA." Id. at 2.

Judge Matz noted that CFE's governing Board is comprised of various high-ranking government officials and it performs a function – the supply of electricity to most of Mexico – that the Mexican Constitution recognizes as an exclusive government function. Other characteristics which Judge Matz noted in finding that CFE is an "instrumentality" of the Mexican government under the FCPA is that it was created by statute as a decentralized public entity and the CFE described itself as a governmental agency on its website.

Thus, it is clear that the issue of whether an employee of a state-owned corporation qualifies as a "foreign official" within the ambit of the FCPA is one that hinges on the specific facts regarding the nature and characteristics of the business entity that allegedly received the bribes in a given case.

1. CCI and two of its former executives previously pleaded guilty in 2009 to conspiring to bribe officers and employees of foreign state-owned companies on behalf of the valve company.
2. The Lindsey defendants were subsequently convicted on all counts in a federal jury trial and now face imprisonment.

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