

FCPA Enforcement After Lindsey

DOJ's Aggressive FCPA Pursuits Make Robust Compliance Policies Essential

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A recent landmark jury verdict out of the Central District of California significantly broadens the scope of the Foreign Corrupt Practices Act, making corporate compliance with the Act more essential now than ever before. The Department of Justice has taken notice of the decision, and now corporations must as well. After a month long trial in *United States v. Lindsey Manufacturing*,¹ a jury deliberated for just a single day and found the manufacturing company and two of its executives guilty on all counts for their alleged roles in a scheme to pay bribes to Mexican government officials of a state-owned utility company.

The court found that the state-owned electric utility company was an “instrumentality” of a foreign government within the meaning of the FCPA. The *Lindsey* Court also established a list of non-exclusive factors broadening that definition of a state instrumentality under the FCPA. These factors include whether: (1) the entity provides a service to the citizens; (2) the key officers and directors of the entity are, or are appointed by, government officials; (3) the entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; (4) the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and (5) the entity is widely perceived and understood to be performing official (governmental) functions.

While *Lindsey* is the first ever jury conviction against a corporation in an FCPA case, with an increased budget and a new found confidence, the Criminal Division of the Department of Justice is ensuring the victory does not represent a onetime occurrence. In fact, after the conviction, Assistant Attorney General Lanny Breuer stated, “Lindsey Manufacturing is the first company to be tried and convicted on FCPA violations, but it will not be the last.”

As the Justice Department becomes more successful in securing both plea deals and now jury verdicts, criminal fines leveled on corporations also continue to grow significantly. In a speech to the World Bank, Lanny Breuer again praised his department's recent successes: “[O]ver the two-plus years of this Administration, we

have dramatically increased our enforcement of the FCPA. The numbers speak for themselves. In 2004, the Justice Department charged two individuals under the Act and collected around \$11 million in criminal fines. In 2005, we charged five individuals and collected around \$16½ million. By contrast, in 2009 and 2010 combined, we charged over 50 individuals and collected nearly \$2 billion.”²

Encouraged by a growth in Justice Department collections, companies must remain vigilant in the implementation of robust FCPA compliance programs in this new era of enforcement. However, it is not just multi-national, multi-billion dollar corporations that need to take a serious look at compliance programs in today’s economy. The reality of the global marketplace places pressure on smaller corporations to begin implementing compliance programs when in the past such programs were not as crucial.

Now more than ever it is important for company executives to become vigilant of FCPA compliance. A key proactive measure is the design and implementation of an effective corporate compliance program that will not only deter criminal activity, but could help avoid or mitigate associated civil and regulatory liability. A strong corporate compliance program should include written and clearly defined policies addressing the FCPA; procedures to disseminate and communicate these policies from the top down; and guidance regarding engaging third-party relationships, including a protocol for gifts, entertainment, travel, political contributions, charitable donations, and due diligence investigations.

The above list is certainly not exhaustive, but corporations must become as vigilant in ensuring compliance as the Justice Department is in pursuing and convicting FCPA violators. While most FCPA actions lead to costly plea agreements before entering the courtroom, *Lindsey* establishes that the Department has the capability of winning at the trial level. With *Lindsey* as support, the Department will certainly continue to pursue perceived violations against individuals and companies of all sizes aggressively. In this new era of enforcement, companies with international dealings cannot wait until the Department of Justice knocks on the front door, - - rather, developing a well-devised, airtight compliance policy remains the best course.

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(1) *United States v. Aguilar*, 2011 WL 1792564 (C.D. Cal. Apr. 20, 2011).

(2) Lanny A. Breuer, Assistant Attorney General of the Criminal Division, Speech at the Franz-Hermann Brüner Memorial Lecture at the World Bank (May 25, 2011).