Who is a Foreign Governmental Official Under the FCPA: The Defense Attacks

As was initially reported by the FCPA Professor, lawyers for four of the individual defendants who are former executives of the Orange County, California-based valve company, Control Components Inc. have filed a Motion to Dismiss the DOJ's case. The basis of this defense, that their actions of participating in a scheme to bribe employees of several state-owned companies in China, Malaysia and the United Arab Emirates to secure contracts, does not fall within the FCPA. This argument is based the definition of foreign official under the FCPA. The DOJ has long taken the position that any employee of a foreign government owned or back enterprise falls within the definition of a foreign governmental official under the omnibus "instrumentality thereof" clause. However, as reported by Joe Palazzolo, in the Wall Street Journal, Federal courts have never squarely considered this issue previously. The defense lawyer have winnowed the case to a single legal question: ***Are state-owned companies instrumentalities of foreign governments?***

The defense has five points, which we set out directly from the defendant's brief below:

First, in the absence of an express definition, the Court must give the term its ordinary meaning as used in the statute. As used in the FCPA, the term "instrumentality" refers to a governmental unit or subdivision that is akin to a "department" or an "agency," the two terms that precede it in the statute. Thus, the term covers governmental boards, bureaus, commissions, and other department-like and agency-like governmental entities. The definition does not extend, however, to entities in which a government merely has a monetary investment (*i.e.*, state-owned business enterprises), because such a definition would make the term fundamentally different than the terms that precede it. This conclusion is bolstered by the statute's use of the term "foreign *official*," which suggests a traditional government employee, as well as by language in other portions of the FCPA.

Second, the Government's proposed interpretation would lead to absurd results. Among other things, if it were adopted, the Government's definition would transform persons no one would consider to be foreign government employees – including but not limited to U.S. citizens working in the United States for companies that have some component of foreign ownership – into "foreign officials." Additionally, in certain countries where state-owned businesses are the norm, the majority of employed individuals would be "foreign officials."

Third, the extensive legislative history of the FCPA makes clear that Congress did not intend the statute to cover payments made to employees of state-owned business enterprises. Rather, the FCPA was aimed at preventing the special harm posed by the bribery of foreign *government* officials.

Fourth, as other statutes and proposed legislation make clear, Congress knows how to define the term "instrumentality" in terms of government ownership of a commercial enterprise where it desires to do so. But it did not do so in the FCPA.

Fifth, in construing statutes, courts should avoid interpretations resulting in unconstitutional vagueness. Adopting the Government's amorphous and expansive interpretation of "instrumentality" here would result in exactly the type of unconstitutional vagueness that must be avoided. The reason is simple: The Government has never explained with any clarity what

constitutes a "state-owned" business in the context of the FCPA. Is a minority investment by a foreign government enough? Is a majority investment required? Must the state direct the majority of voting rights? Is there a required element of control? Does the purpose or type of commercial enterprise matter? Could a subsidiary of a state-owned business qualify? Without a clear demarcation, especially in an era of large-scale government investments and bailouts of traditional private enterprises, the FCPA's reach, under the Government's theory, would be whatever the prosecution says it is in any given case. Accordingly, the Court must construe the CPA's instrumentality provision narrowly to mean traditional government officials, and not employees of a state-owned (whatever that means) commercial business.

Oral argument on the defendant's Motion to Dismiss is set for March 21 and as our colleague Howard Sklar has stated, "***I wish I could go***."

For a copy of the defendant's brief, click ***here***.