Dinsmore & Shohl LLP
ATTORNEYS

Cases to Test Who is a "Foreign Official" for the Purposes of the FCPA

March 29, 2011

Harvey Jay Cohen , Jacob A. Manning , Frank Schuckmann , Peter A. Draugelis

U.S. citizens and companies that contract with foreign entities should, of course, be aware of and always cognizant of the Foreign Corrupt Practices Act. Dinsmore & Shohl's D. Michael Crites has previously provided a general background to the FCPA HERE and D&S encourages any individual or entity that does business internationally to familiarize themselves with the requirements of the FCPA.

Of note, though, three cases pending in the United States have the potential to influence how the FCPA is applied in the future. In those cases, individuals and companies are subjects of criminal prosecution when the "foreign officials" alleged to have been bribed are employees of state-owned entities. The individuals were allegedly employees of various state-owned entities in a number of Asian countries as well as the Comisión Federal de Electricidad (CFE), a Mexican-owned utility company. The defendants involved in those cases have argued that the FCPA was not intended to apply to employees of these entities and that extending the FCPA to those employees would make the statute unnecessarily broad, particularly in those countries where state-owned entities are more prevalent. Meanwhile, the Government has argued that the broader definition is necessary to allow the U.S. to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of which the U.S. is a signatory.

Any individual or entity governed by the FCPA should always be careful that its payments are not being used as bribes for future business. But those who do business with state-owned entities in other countries may want to pay particular attention to these cases, given their potential to significantly broaden the scope of the FCPA. The cases are: U.S. v. Stuart Carson, et al. (C.D. Cal.), U.S. v. John Joseph O'Shea (S.D. Tex.), and U.S. v. Enrique Faustino Aguilar Noriega, et al (C.D. Cal.).