

National Electric Company Covered by the FCPA

On April 20, 2011 the District Court released its written decision on the defendant's Motion to Dismiss in the Lindsey Manufacturing case. The FCPA Professor reported on the decision last week and discussed the seemingly unusual request made by the Department of Justice. This request was that the DOJ asked the Court to take judicial notice that the Mexican entity "CFE is a decentralized public entity, not a corporation." The trial court termed this request "astounding" and declined this request.

Our focus will be on the trial court's finding that the Mexican entity CFE was an "instrumentality" as defined under the Foreign Corrupt Practices Act (FCPA). The trial court rejected the defendants' contention that an "instrumentality" under the FCPA must share all the characteristics of a foreign government department or agency. The trial court further rejected the defendants' contention that "instrumentality" must be defined as to what consistent with department and agency. The trial court held that since "instrumentality" is a different word; it is logical to assume that it means something other than department or agency.

The trial court did provide a non-exclusive list of factors which could determine if an entity is an "instrumentality" under the FCPA. They are:

- The entity provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- 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, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (i.e., governmental) functions.

After listing out these factors the trial court found that CFE had all of these characteristics. CFE was created by Mexican statute as a "decentralized public entity". The governing Board is comprised of high level Mexican government officials. CFE describes itself as a governmental agency. CFE performs a function, the supply of electricity, which is enshrined in the Mexican Constitution as "exclusively a function of the general nation".

The trial court's ruling does seem logical. Although the District Court in the Lindsey Manufacturing case is the first to rule on this issue, the CCI case was the first case where a similar Motion to Dismiss was filed. As the state owned entities in the CCI case are not the CFE there may be a different District Court ruling. We eagerly await the outcome of that Motion to Dismiss.

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