

Is a Commercial Enterprise Owned by Foreign Government by Covered by the FCPA?

One of the factors to determine just who is a foreign governmental official under the Foreign Corrupt Practices Act (FCPA), is whether a foreign government is involved. There are currently a triumvirate of pending cases where the defendants have challenged a basic Department of Justice tenet that businesses owned by foreign governments are “instrumentalities thereof” foreign governments and thereby covered under the FCPA. The three cases are the CCI case in Central District of California, the Lindsey Manufacturing case, also in the Central District in California and the John O’Shea case, currently in the Southern District of Texas.

As reported by the FCPA Professor and the FCPA Blog on Wednesday, the Department of Justice was denied the right to file a Declaration from the US State Department in the Lindsey Manufacturing case. As reported by the FCPA Blog the Declaration of Clifton M. Johnson, Assistant Legal Adviser for Law Enforcement and Intelligence in the Legal Adviser's Office said that “the judge should not grant the defendants' motion to dismiss because it would adversely impact U.S. foreign policy. [Johnson] asserted that the FCPA was consistent with the OECD anti-bribery convention and that the "foreign official" and state-owned entity coverage of the FCPA must be maintained.” The FCPA Blog opined that this ruling could be a “key defeat in the battle over who's a "foreign official" under the FCPA”.

We believe however that the point may be much simpler in the Lindsey Manufacturing case. Unlike the CCI case, this case deals with alleged bribery and corruption regarding the Mexican electric utility company, Comisión Federal de Electricidad (CFE). In the CCI case, the defendants are have alleged to violated the FCPA in regards to bribery and corruption of various telecom companies, most generally in Asia. (The O’Shea case also involves allegations of bribery involving CFE.)

The Lindsey case is the first case in which the DOJ has filed any briefing on the issue of who is a foreign governmental official. In its Opposition to the Defendants’ Motion to Dismiss, the DOJ notes that under the Mexican Constitution,

the supply of electricity is solely a government function. Specifically, Article 27 provides: It is exclusively a function of the general Nation to conduct, transform, distribute, and supply electric power which is to be used for public service. No concessions for this purpose will be granted to private persons and the Nation will make use of the property and natural resources which are required for these ends.

The DOJ goes on to point out that the CFE is effectively controlled by the government of Mexico by the appointment of CFE’s Governing Board, as well as the Director General. The DOJ concludes that the “CFE is part of the Mexican government, mandated by its constitution, formed by its laws, owned in its entirety by the people of Mexico” and is constituted to serve the

people of Mexico. It would not seem that you can have a much more clear cut case that whatever legal form the CFE might take, it is a part of the government of Mexico.

The defendants accept the argument that the CFE is a government owned enterprise but claim that this disqualifies the CFE “as an entity properly addressed by [the FCPA].” The defendants response seems to boil down to the following, “*commercial operations of a foreign government that provide power supply are not instrumentalities*” within the meaning of the FCPA. Therefore their employees cannot be foreign officials.

The correct question appears to be precisely before the trial court. A hearing on the defendants’ Motion to Dismiss is currently scheduled for today, at 9:30 AM. If you are attending please tweet away your observations!

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