

Recent Federal District Court Decisions Support a Broad Interpretation of the Definition of ‘Foreign Official’ Under the FCPA—But For How Long?

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Introduction

How far the jurisdiction of the Foreign Corrupt Practices Act (FCPA or the Act) extends is a hotly contested area for lawyers representing companies and individuals in FCPA investigations and litigation. The breadth of the FCPA, which prohibits bribery of foreign government officials as a way to secure or retain business, has, over the years, largely been construed by the government as a result of companies preferring to settle such charges rather than litigate them through the courts. This trend, however, has changed in recent times, given new law enforcement priorities targeting individuals as well as corporations, which has resulted in more cases going to trial and more courts now weighing in on key provisions of the statute, including who is a “foreign official” under the Act. Looking at two recent federal court decisions that support a broad interpretation of key terms like “instrumentality” and “foreign official,” it is clear that the scope of the FCPA will continue to be debated in trial and appellate courts in the years to come, and will perhaps require additional clarification from Congress as well.

Background

For almost thirty years following its passage in 1977, the FCPA was the “sleepy hollow” of securities enforcement. Cases brought by the U.S. Department of Justice and the U.S. Securities and Exchange Commission were few and far between. However, over the past five years there has been a dramatic upswing in the pace, scope and number of FCPA enforcement cases.

It is not an overstatement to describe the FCPA as one of the most important enforcement priorities of both the DOJ and the SEC. In 2009, Lanny Breuer, Assistant Attorney General for the Criminal Division at the DOJ, declared that the government’s “focus and resolve in the FCPA area will not abate, and we will be intensely focused on rooting out foreign bribery.”¹ Kevin Perkins, Assistant Director of the Federal Bureau of Investigation’s Criminal Investigative Division signaled a similar warning that “[i]nvestigating corruption [in the United States and abroad] at all levels is the number one priority of the FBI’s Criminal Division.”² Indeed, the government’s enhanced focus on FCPA enforcement has appeared to pay huge dividends. Since 2008, the five highest penalties resulting from FCPA enforcement actions against corporate defendants yielded a total recovery of \$2.482 billion

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(over \$1 billion of which was collected in 2010 alone); \$1.732 billion of this total stems from criminal penalties sought by the DOJ, while the SEC's financial sanctions in these cases totaled \$750 million. These numbers are only going to rise as the government continues to emphasize the importance of the FCPA.

Historically, the DOJ and SEC have brought most of their FCPA enforcement actions against companies that are publicly traded on U.S. stock exchanges, including many large, well-known companies. Under the FCPA, if tried and convicted, these companies would face the threat of severe financial penalties and debarment or suspension from doing business with the U.S. government and other development agencies (e.g., World Bank and its affiliates). Given the severity of these punishments, corporations facing criminal FCPA investigations often cooperate early, settle, or even self-report discovered violations to the government before any government investigation is initiated. Such an approach often enables these corporations to pay lower fines, and avoid criminal convictions that would inhibit their ability to enter into future government contracts.

This approach, however, has a downside: corporations' desire to avoid a criminal trial and conviction has left a dearth of case law interpreting the elements of an FCPA violation.³ This lack of case law has largely left the enforcers of the FCPA—namely, the DOJ and SEC—as the FCPA's interpreters. Not surprisingly, without significant guidance from the courts or from the statutory language itself, the DOJ and SEC have read the FCPA expansively. Moreover, the government's broad interpretation of the FCPA's elements has, in effect, created a self-sustaining cycle of expanded enforcement and settlement—namely, the government's use of broad theories of liability to reap huge financial penalties from companies who choose to settle FCPA charges under these theories, which further fuels the enforcement machine, resulting in more charges against more parties using more creative and broad theories of liability, which in turn leads to more settlements.

On the heels of these corporate FCPA successes, the government has begun to place an increased emphasis on investigating and prosecuting the individual officers, directors, employees and agents of companies it has in its sights. In 2009 and 2010, the DOJ and SEC together charged a total of 59 individuals with FCPA offenses. While some of these individual defendants have traveled the same settlement route as their corporate counterparts, 40 of the individual defendants are slated to go to trial within the next year.

The increased potential for being caught in the government's investigative net certainly is a continuing cause for concern, particularly given the real threat of significant jail time and monetary penalties these individuals face. But as more individuals are charged and contest the government's broad statutory interpretation, theories and evidence, there is an increasing prospect that courts, either at the trial or appellate level, will review—and perhaps place checks on—the government's broad interpretation of the FCPA.

A series of recent cases, however, has shown that those contesting the government's FCPA charges face an uphill battle. To date, individual FCPA defendants in criminal trials have been unsuccessful in curtailing the government's broad view of an FCPA offense. For example, courts have rejected arguments challenging the scope of the "obtain or retain business"⁴ and "knowledge"⁵ elements of the Act.

The "Foreign Official" Battleground

Until recently, a remaining FCPA battleground involved determining the scope of the FCPA's "foreign official" element. Under the FCPA, a "foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . ."⁶ "Instrumentality," however, is not defined. Accordingly, individual defendants in two recent cases in the Central District of California, *United States v. Noriega (Lindsey)*,⁷ and *United States v.*

Carson,⁸ utilized two different approaches to argue that foreign companies that employed the alleged bribe recipients were not “instrumentalities” of a foreign government, and as such, the government could not establish the “foreign official” element under the FCPA. The defendants in these cases were not successful in their challenges.

The Lindsey Case

In *Lindsey*, the government brought charges against Lindsey Manufacturing Company (LMC) and four individuals: Dr. Keith Lindsey, CEO of LMC; Steve K. Lee, CFO of LMC; Angela María Gomez Aguilar (Angela), co-owner of Grupo Internacional De Asesores S.A. (Grupo); and Enrique Faustino Aguilar Noriega (Aguilar), Angela’s husband and co-owner of Grupo. The DOJ alleged in its indictment that Lindsey and Lee, on behalf of LMC, arranged for bribes to be paid to two high-ranking employees of the Comisión Federal de Electricidad (CFE), an electric utility company wholly owned by the Mexican government. According to the indictment, LMC, Lindsey, and Lee agreed to pay Aguilar a 30-percent commission on all goods and services LMC sold to CFE, with the knowledge that some or all of that commission would be used to pay bribes to officials at the CFE in exchange for CFE awarding LMC business contracts.

The defendants moved to dismiss the indictment, arguing that, as a matter of law, a state-owned corporation could not be an “instrumentality” under the FCPA and, accordingly, that CFE employees who received things of value from Aguilar could not be deemed “foreign officials” under the Act. To support their position, the defendants raised two principal arguments. First, the defendants argued that state-owned corporations could not be “instrumentalities” under the FCPA because they do not share characteristics of government “departments” and “agencies.” Second, the defendants argued that the FCPA’s legislative history showed Congress’s intent not to target bribes intended to influence state-owned corporations.

Prior to trial, the court denied the motion to dismiss on both grounds. In rejecting the defendants’ first argument, the court created what it deemed “a non-exclusive list” of characteristics of government agencies and departments that would rightly be deemed “instrumentalities,” and indicated that CFE met each of these criteria.⁹ The court also sought interpretive guidance from the law and Constitution of Mexico, which “recognizes the supply of electric power as ‘exclusively a function of the general nation.’”¹⁰ With respect to the defendants’ second argument, the court found the FCPA’s legislative history “inconclusive,” noting that “[a]lthough it does not demonstrate that Congress intended to include *all* state-owned corporations within the ambit of the FCPA, neither does it provide support for Defendants’ insistence that Congress intended to *exclude* all such corporations from the ambit of the FCPA.”¹¹

Notwithstanding its analysis on the purely legal issue, the court determined that any consideration of the “instrumentality” issue should be done by a jury and not the court because it was a matter of fact, not law. Ultimately, after a trial, the jury took one day to deliberate, and found the four defendants guilty on May 10, 2011.¹² The defendants are slated to file motions for judgments of acquittal and a new trial under Rules 29 and 33 of the Federal Rules of Criminal Procedure by July 11, 2011.

United States v. Carson

In *Carson*, six defendants who were officers and/or senior employees of Control Components Inc. (CCI), were charged with multiple counts of conspiracy to pay bribes to officials of foreign state-owned companies for the purpose of obtaining or keeping business for CCI. Some of CCI’s customers included state-owned companies in China, Korea, Malaysia, and the United Arab Emirates. According to the indictment, the six defendants allegedly arranged for officers and employees of these state-owned companies to receive \$4.9 million in bribes between 2003 and 2007.

In *Carson*, as in *Lindsey*, the defendants argued that no state-owned corporation could, as a matter of law, be deemed an “instrumentality” under the FCPA. The *Carson* defendants also argued that, because of this ambiguity in the statute, the rule of lenity (*i.e.*, that statutory ambiguities should be resolved in favor of the defendant)¹³ required dismissal. Finally, the defendants argued that the indictment should be dismissed because, on its face, the FCPA term “foreign official” violates due process by being unconstitutionally vague.

As in *Lindsey*, the *Carson* court rejected the defendants’ statutory interpretation arguments, based in principal part on its conclusion that the term “instrumentality” was not ambiguous because the ordinary meaning of the term indicated that state-owned companies could fall within the ambit of the FCPA.¹⁴ The court also relied significantly on this lack of ambiguity to hold that the rule of lenity did not apply,¹⁵ and to deny defendants’ facial challenge to the term “foreign official.”¹⁶

Although the *Carson* court concluded it would not reach the factual issue of whether CCI was an instrumentality of a foreign government and instead left that question for the jury, it listed a number of different characteristics that bear on whether an entity might be a foreign government instrumentality.¹⁷ It is anticipated that this case will go to trial in 2012.

What Do Lindsey and Carson Mean Moving Forward?

The decisions in *Lindsey* and *Carson* highlight the problems continuing to face FCPA defendants and practitioners. *First*, these two decisions reinforce the conclusion that the deck continues to be stacked significantly against defendants in FCPA cases. Though faced with the same issue in each case, the two courts employed different reasoning in reaching the same conclusion. At the root of this reasoning, however, was the courts’ apparent willingness to follow the government’s lead and

expansively interpret the FCPA’s provisions—at least at the motion to dismiss phase.

Second, these decisions serve as a reminder that juries, not judges, will be the ultimate arbiters in these cases. Indeed, the conclusion that a state-owned company’s status as an instrumentality of a foreign government is a fact-specific inquiry within the purview of the jury and not the court, will likely limit the district courts’ role in providing clarity as to what an “instrumentality” might mean. As district court cases are appealed, there also is the prospect that various circuit courts will make different determinations as to what constitutes an instrumentality of a foreign government or a “foreign official.”

Finally, the *Lindsey* and *Carson* cases show that trial judges, and juries, will decide the issue of “instrumentality” on an ad hoc basis, given that this key term is not defined in the Act. Such an approach does not provide certainty to those seeking to comply with the requirements of the FCPA, and suggests that Congress should provide additional clarity in the language of the Act, particularly with regard to the terms “instrumentality” and “foreign official.” Indeed, the U.S. Chamber of Commerce recently supported this position in a highly publicized white paper critiquing FCPA enforcement by the U.S. government.¹⁸ The Chamber called for reforms to the FCPA, including, among other things, a clear definition of “foreign official” under the Act.¹⁹

Conclusion

As long as the courts continue to interpret the “foreign official” and “instrumentality” elements of the FCPA in an ad hoc manner, publicly traded entities, domestic concerns, and their officers, directors, employees and agents will continue to operate in a challenging international business environment with little clear guidance from the courts. This puts them in a difficult position in terms of assessing the nature of potential FCPA liability, particularly with regard to activities in countries

such as China where most, if not all, customers are companies that are owned, at least in part, by the government.

While individual defendants who have challenged the largely undefined elements of the FCPA have, to date, been unsuccessful at the trial level, the parameters of the FCPA may no longer be left solely to the interpretation of prosecutors and enforcement lawyers at the DOJ and SEC. Appellate courts will weigh in as defendants appeal guilty verdicts. Additionally, those who think that the U.S. government's aggressive FCPA policies hinder U.S. business competitiveness abroad, may look to Congress for additional clarification, if not limitations, on the scope of the FCPA.

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¹ DOJ, Lanny Breuer, Assistant Attorney General for the Criminal Division, *Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum*, Speech (Nov. 12, 2009).

² FBI, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies*

Charged in Foreign Bribery Scheme, Press Release (Jan. 19, 2010).

³ It is unlawful under the FCPA for (1) any entity publicly traded in the U.S., any "domestic concern" (that is, any individual who is a citizen or resident of the U.S. and/or any business entity organized under the laws of the United States, or which has its principal place of business in the United States), or any officer, director, employee, or agent thereof; (2) to use interstate commerce or the mails; (3) to corruptly pay money, or otherwise give, offer, promise, or authorize the provision of anything of value; (4) to any foreign official or person who might directly or indirectly give, offer, promise, or authorize the provision of the thing of value to any foreign official; (5) for the purpose of influencing any official act or decision either by that foreign official or the foreign government; (6) in order to assist the domestic entity to obtain or retain business. See 15 U.S.C. § 78dd-2(a).

⁴ *U.S. v. Kay*, 513 F.3d 432, 440-46 (5th Cir. 2007).

⁵ *U.S. v. Kozeny*, 643 F. Supp. 2d 415, 421 (S.D.N.Y. 2009).

⁶ 15 U.S.C. § 78dd-2(h)(2)(A).

⁷ *U.S. v. Noriega*, No. 10-cr-01031 (C.D. Cal. Sept. 15, 2010).

⁸ *U.S. v. Carson*, No. 09-cr-00077 (C.D. Cal. Apr. 8, 2009).

⁹ Specifically, the *Lindsey* court considered whether: (1) the entity "provides a service to the citizens . . . of the jurisdiction;" (2) "[t]he key officers and directors of the entity are, or are appointed by, government officials;" (3) "[t]he entity is financed, at least in large measure," through taxes or other governmental appropriations; (4) "[t]he entity is vested with and exercises exclusive or controlling power to administer its designated functions;" and (5) "[t]he entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions." *Noriega*, No. 10-cr-1031, Order by Judge A. Howard Matz as to Defendant Angela Maria Gomez Aguilar, Lindsey Manufacturing Company, Keith E Lindsey, Steve K Lee, Dkt. 474, at 9 (filed C.D. Cal. Apr. 20, 2011). Though the court concluded that CFE met these criteria, it was careful to note that there might be times where government ownership alone may not be determinative of whether the entity can be deemed an instrumentality of a foreign government under the FCPA. *Id.* at 9, 14.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 14 (emphasis in original).

¹² Though indicted, Aguilar never was arrested and presently is a fugitive. Accordingly, he was not tried along with his wife and other co-defendants.

¹³ See *McNally v. U.S.*, 483 U.S. 350 (1987).

¹⁴ Unlike the *Lindsey* court, the *Carson* court looked to domestic statutes such as the Foreign Sovereign Immunities Act (which defines “instrumentality” as including state-owned enterprises), and the existence of various domestic state-owned instrumentalities such as the FDIC and the TVA.

¹⁵ The court noted that the rule of lenity applied only in instances of a grievous ambiguity.

¹⁶ In denying the defendants’ constitutional vagueness challenge, the court also looked to the fact that the defendants brought only a facial, not as-applied, constitutional challenge to the term, and reasoned further that arbitrary and discriminatory enforcement of the statute would not result simply because the term “foreign official” was defined broadly.

¹⁷ The *Carson* court listed the following elements when considering this issue: (1) “[t]he foreign state’s characterization of the entity and its employees”; (2) “[t]he foreign state’s degree of control over the entity”; (3) “[t]he purpose of the entity’s activities”; (4) “[t]he entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions”; (5) “[t]he circumstances surrounding the entity’s creation”; and (6) “[t]he foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).” *Carson*, No. 09-cr-00077, Order Denying Defendants’ Motion to Dismiss Counts 1-10 of the Indictment, Dkt. 373, at 5 (filed C.D. Cal. May 18, 2011).

¹⁸ See U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* (Oct. 2010).

¹⁹ The Chamber also sought other FCPA reforms, including limiting a company’s successor liability for prior actions of a firm it has acquired; adding the “adequate procedures” compliance defense recognized by the United Kingdom; adding a “willfulness” requirement for corporate criminal liability; and limiting a company’s liability for the acts of its subsidiary.