

Corporate and M&A Law

Bribery of Foreign Officials [FCPA]

Reflections on 2011 FCPA
Enforcement Trends: The
Expanding Role of Foreign Law
in Defining “Foreign Officials”



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- The DOJ and SEC take a broad view of the FCPA terms “foreign official” and “instrumentality” of a foreign government.
- U.S. courts consider foreign law to determine whether an entity may be an instrumentality of a foreign government.
- Determination of a foreign court whether an individual is a government official could have a dispositive effect on an FCPA investigation.

Answering calls for clarification that reached back to the time of the Foreign Corrupt Practices Act’s (FCPA) enactment in 1977, within the last year, three decisions¹ were issued that provide much-needed insight into the definition of a “foreign official” under the FCPA. Importantly, each of these decisions, described below, was in part reached through the careful application and analysis of foreign law and rulings. For both prosecution and defense attorneys alike, this raises two crucial questions going forward: Are U.S. courts required to include foreign statutes and rulings in their analysis of the FCPA? And, if included, how much weight should such foreign statutes and rulings be afforded and by whom?

Recent Application of Foreign Statutes and Rulings

At its core, the FCPA prohibits the bribery of foreign government officials to assist in obtaining or retaining business.² “Foreign official” is defined under the statute as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”³ Historically, the U.S. Securities and Exchange Commission and U.S. Department of Justice, who share FCPA enforcement responsibilities, have liberally interpreted the language of this statute to mean that any entity owned by the state is a government “instrumentality” and that employees thereof are “foreign officials.” Since an overwhelming majority of cases end in settlement, there were very few court challenges to the SEC and DOJ’s expansive view of who is a foreign official. Against this backdrop, the recent rise in “foreign official” challenges and related decisions is highly significant and likely to play a pivotal role in future FCPA cases.

Earlier this year, in *United States v. Noriega*,⁴ the defendants challenged whether employees working at the Comision Federal

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de Electricidad (CFE), an entity wholly owned by the Mexican government, are “government officials” for the purposes of the FCPA. They lost this challenge, and U.S. District Judge for the Central District of California A. Howard Matz ruled that state-owned entities, which share many characteristics with government agencies, can be “instrumentalities” under the FCPA.⁵ In reaching that conclusion, Judge Matz considered the following: (i) whether the entity provides services to the citizens of the country; (ii) whether the entity’s leaders are appointed by the government; (iii) whether the entity is funded by the government; (iv) whether the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and (v) whether the entity engages in functions that are traditionally performed by the government.

Judge Matz made clear that he turned to the laws of Mexico as an integral part of his analysis. For example, in support of his conclusion that CFE was a government instrumentality, Judge Matz observed that it “performs a function that the Mexican nation has described as a quintessential government function. . . . Indeed, the Mexican Constitution recognizes the supply of electric power as ‘exclusively a function of the general nation.’”⁶

Just one month after Judge Matz’s decision, in *United States v. Carson*, Judge James V. Selna of the same California district court also addressed the “foreign official” issue in an order denying a motion to dismiss certain indictment counts.⁷ Notably, Judge Selna concluded that “the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact,” and as such should be left to the jury.⁸ His order provided a list of non-exclusive factors that bear on whether a business entity constitutes a government instrumentality. Among Judge Selna’s six factors, he expressly included: (i) “[t]he foreign state’s characterization of the entity and its employees;” and (ii) “[t]he entity’s obligations and privileges under the foreign state’s law.”⁹ Both of these factors, when applied by a court (or jury), will undoubtedly involve the interpretation and analysis of foreign “characterization” and law.



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While both the *Noriega* and *Carson* factors were presented in rulings on motions, importantly, in *United States v. Esquenazi*, we find foreign law and rulings prominently featured in Judge Jose

Martinez’s instructions to the jury¹⁰ and in a decision related to those instructions.¹¹ During the *Esquenazi* trial, the government was permitted to call Gary Lissade, Haiti’s former Minister of Justice, as an expert to testify regarding Haitian public institutions and laws, including Haitian modernization and bribery laws. Judge Martinez’s jury instructions provided a non-exclusive list of factors to be used by the jury to “determine whether [Telecommunications D’Haiti (Teleco)] is an instrumentality of a foreign government.”¹² Notably, included among the five factors listed were “Teleco’s obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions.”¹³ Judge Martinez’s decision, like Judge Matz and Judge Selna’s decisions above, strongly supports the proposition that foreign law interpreting what is a government official is an important factor.

Looking Forward: Defense through Foreign Law

We anticipate more courtroom battles over what makes a foreign official. As prosecutions and investigations increase, many individuals potentially at issue may not be officials in the classic sense of the word. In the pharmaceutical industry for example, much less obvious players such as doctors, pharmacists, and technicians that are employed by state-owned hospitals and research centers have been targeted by the DOJ and SEC. While the FCPA enforcers may wish to include these employees within

the definition of “foreign official” and have done so in the past, it is not so clear that the governments that own those entities would agree.

We witnessed this very situation arise while defending the founder and Chairman of the Board in the Syncor International Corporation case¹⁴ that took place a few years ago. Syncor, a U.S. corporation, discovered that there may have been improper payments made by one of its subsidiaries to doctors employed by Taiwanese government-owned hospitals. The company self-reported and the DOJ proceeded to investigate it for FCPA violations. As the U.S. government was moving forward with its investigation, a case also was brought in a Taiwanese court. The Taiwanese court specifically ruled on the issue of whether the doctors were government officials and issued a formal opinion holding that they were not. This had a direct negative impact on the government’s FCPA case in the United States.

In light of these decisions, going forward, it will be more important than ever for defendants investigated for or charged with FCPA violations to have adept counsel that have experience with relevant foreign statutes or rulings as a defense tool.

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¹ The authors recognize that the "foreign official" issue has also been a focus in other active cases, such as *United States v. O'Shea*, No. 09-cr-00629 (S.D. Tex. filed Nov. 16, 2009). For the sake of brevity, this article only touches upon three decisions.

² See 15 U.S.C. §§ 78dd-1, *et seq.*

³ See 15 U.S.C. § 78dd-3(f)(2)(A).

⁴ It should be noted that in December 2011, Judge Matz dismissed with prejudice the indictment against four defendants in *Noriega*: Lindsey Manufacturing Co., Keith Lindsey, Steve K. Lee, and Angela Maria Gomez Aguilar. See *U.S. v. Noriega*, No. 10-cr-01031, Order Granting Motion to Dismiss (C.D. Cal. filed Dec. 1, 2011) and Order Granting Application for Order on Stipulation re Defendant Angela Maria Gomez Aguilar (C.D. Cal. filed Dec. 13, 2011). The dismissal was based on government misconduct, including the provision of false information to obtain a search warrant, making unauthorized searches, and providing incorrect testimony to a grand jury.

⁵ See *Noriega*, Criminal Minutes – General (filed Apr. 20, 2011).

⁶ See *id.* at 10.

⁷ See *U.S. v. Carson*, No. 09-cr-00077, Criminal Minutes – General (C.D. Cal. filed May 18, 2011).

⁸ See *id.* at 5.

⁹ See *id.*

¹⁰ See *U.S. v. Esquenazi*, No. 09-cr-21010, Court's Final Instructions to Jury (S.D. Fla. filed Aug. 5, 2011). Notably, both *Esquenazi* and *Carson* may have important precedential value for parties looking to move the "foreign official" issue in front of the jury.

¹¹ See *Esquenazi*, Order Denying Defendants' Motion for Judgment of Acquittal or New Trial (filed Oct. 14, 2011).

¹² See *Esquenazi*, Court's Final Instructions to Jury, *supra* n.10.

¹³ See *id.*

¹⁴ See *U.S. v. Syncor Taiwan, Inc.*, No. 02-cr-01244 (C.D. Cal. filed Dec. 5, 2002); see also *SEC v. Syncor Int'l Corp.*, No. 02-cv-02421 (D.D.C. filed Dec. 10, 2002).