Tell Me, Are You Sure You're Not a Foreign Official?

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As most of us know, the United States' Foreign Corrupt Practices Act ("FCPA") prohibits corrupt payments to ***foreign officials*** made for the purpose of ***obtaining or retaining business***. Most business people understand this to mean, for example, you can't pay off the President of a country in exchange for a lucrative government logging concession in his country's forests.

But what about a small backhander to the Deputy Manager of one of that country's trade groups whose job it is to promote the country's lumber exports. On first glance, that might seem OK. But what if that country's government ***owns a slice of that trade group***, a big enough slice that might be deemed to be a controlling interest? That's a tougher question, because that would make the trade group a "***state-owned enterprise***," often referred to as an "**SOE**."

What difference does it make if the trade group is an SOE? The difference is the FCPA defines a "foreign official" (aka someone you can't bribe) as "an officer or employee of a foreign government *or any department*, agency, or ***instrumentality*** thereof."

So the crucial question becomes: ***Is an SOE necessarily an instrumentality of the government?*** In the view of the U.S. Department of Justice (DoJ), **it is**. In the view of a small California company that has been fighting the DoJ over this question - one that has never been decided by a court before - **it isn't**.

Last month, a Federal Court in California, in a threshold oral ruling at the outset, sided with the DoJ, and trial commenced in *United States v. Lindsey Manufacturing Co.* What had Lindsey done?

Lindsey was in the business of selling emergency power system products, and it was seeking contracts for those products in Mexico. It hired a Mexican sales agent ("Agent") to contact potential Mexican purchasers. One of those potential purchasers was the Mexican *Comisión Federal de Electricidad ("CFE")*, a utilities company partially-owned and controlled by the Mexican government. That made CFE ***an SOE***, but not necessarily ***a government instrumentality***. In its meetings with CFE, according to the DoJ, the Agent allocated some of the commission money it would be receiving from Lindsey to "bribe" one or more *CFE officials* into giving Lindsey contracts for Lindsey's emergency power systems - and it got caught.

When the DoJ indicted Lindsey for its Agent's bribery, Lindsey declared that its principal defense was going to be the DoJ ***was only assuming*** that officers and employees of an SOE were "foreign officials." To support its argument, Lindsey pointed out two things:

1. the language of the FCPA doesn't explicitly say employees of an SOE are "foreign officials," and

2. the legislative history of the FCPA doesn't support the DoJ's theory.

The Court, however, nimbly sidestepped Lindsey's legislative history argument. It simply cited the Mexican government's descriptions of the role of *CFE* in the government hierarchy and noted that in *CFE's* own (English language) website it identified itself as a government agency (and by implication, therefore, a government instrumentality). The Court said its ruling was based on "simple statutory construction" and that its finding on the status of *CFE* was an issue of law, not of fact, and wouldn't be subject to further evidence on that question during trial.

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Two other proceedings similar to *Lindsey* are currently pending on this question, but until and unless they're decided differently, U.S. companies doing business overseas must take great care in dealing with *any* agency, however minor, of a foreign governments that might be found by a court to be an ***instrumentality of that government***.

In cases involving other countries (China for instance), courts have found that any enterprise "*controlled by a government*" is an instrumentality of that government, even if its employees are not considered government officials under local law. With this approach, all of the relevant facts are considered in deciding whether the government has "*control*," including the degree of government ownership, the government's participation on the board or in management, and whatever other means the government may possess to impose its view on key issues. So in dealing with a "***state-owned enterprise***," perhaps your watchwords should be "Tell me, are you *really* sure you're not a foreign official," and then consider whatever answer you get in light of the skeptical attitude of the DoJ.

For further information on FCPA issues in Mexico (and other countries), you may contact John W. Brooks, Senior International Counsel in Luce Forward's San Diego office. For information about business transactions in Mexico, please contact John McNeece or Laura Nava. John is a Partner and head of the firm's Mexico Practice, and Laura is a Mexican attorney and Certified Foreign Legal Consultant (Mexican Law), both in Luce Forward's San Diego office.