

## Federal Judge Rules That Officers of Foreign State-Owned Utilities Are Foreign Officials For Purposes of FCPA Liability

On an issue being closely watched by the white-collar bar, a federal judge in Los Angeles has handed down an important ruling on the definition of “foreign official” within the meaning of the *U.S. Foreign Corrupt Practices Act* (“FCPA”).

In an oral ruling on April 1, 2011, United States District Judge A. Howard Matz held that officers of a state-owned utility could constitute “foreign officials” under the FCPA. The ruling paved the way for the criminal FCPA trial, in the matter of *United States v. Lindsey Manufacturing Co.*, which began on April 5 in the Central District of California. The U.S. Justice Department faces similar challenges to its broad interpretation of the “foreign official” statutory term in two other closely watched cases.

In the Lindsey Manufacturing prosecution, the Government’s case focuses on Lindsey Manufacturing’s retention of Grupo Internacional de Asesores S.A. to serve as its sales representatives in Mexico to obtain contracts from Comisión Federal de Electricidad (“CFE”), Mexico’s state-owned utilities company. Prosecutors allege that Grupo used a portion of Lindsey’s commission to bribe CFE officials in exchange for awarding contracts to Lindsey Manufacturing.

The defendants’ motion to dismiss argued that Congress, in enacting the FCPA, did not intend for the statute to apply to bribes paid to employees of state-owned utilities such as CFE, and that extending the FCPA to such employees would render the Act untenably broad, particularly in nations where state-owned entities are more prevalent. The Government responded that the broader definition is needed to allow the U.S. to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of which the U.S. is a participating member.

In ruling for the Government, the Court held that CFE’s role as a “decentralized public entity” and its performance of an essential government service made it an instrumentality of the government under the FCPA. The antibribery provision of the FCPA prohibits corrupt payments to “any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . or any person acting in an official capacity for or on behalf of any such government, department, agency, or instrumentality.”

In finding that CFE did, in fact, constitute an instrumentality of the government, Judge Matz cited the Mexican Constitution’s provision that supply of electricity is solely a government function and that Mexican law defines the CFE as a “decentralized public entity with legal personality and its own patrimony.” He further observed that the CFE’s English language website identifies it as a government agency, that CFE supplies electricity throughout Mexico (Mexico City excepted), that CFE’s Governing Board consists of government officials, and that the President of Mexico appoints the Board’s Director General.

Judge Matz characterized his ruling as a matter of statutory construction, obviating the Court's need to review FCPA legislative history. He further confirmed that the interpretation of "foreign official" was an issue of law, and that the facts bearing on the issue were undisputed. Accordingly, no facts produced at trial will impact the ruling.

*Lindsey* is one of several recent cases challenging the Government's contention that employees of state-owned or state-controlled enterprises are "foreign officials" under the FCPA. The same argument has been made in other ongoing FCPA prosecutions, including *United States v. Carson* (Central District of California), and *United States v. O'Shea* (Southern District of Texas).

If you would like to learn more about recent FCPA developments, please contact your Ropes & Gray advisor.