

## **Federal Judge Upholds DOJ's Expansive Application Of FCPA**

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On April 20, 2011, in a prosecution brought against Lindsey Manufacturing Company (“Lindsey”) and several of its officers and employees, a U.S. Federal District Court Judge ruled that the term “instrumentalities” applies to foreign state-owned enterprises under the Foreign Corrupt Practices Act (“FCPA”). Under this broad ruling, any employee or officer of a foreign state-owned enterprise would be considered a “foreign official” under the FCPA.

By way of background, the FCPA prohibits paying, promising, or authorizing the giving of anything of value to any foreign official in order to obtain or retain business or an improper benefit. Under the FCPA, the term “foreign official” is defined as “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 or department, agency or instrumentality. . .” [15 U.S.C. § 78dd-2\(h\)\(2\)\(A\)](#).

The U.S. Department of Justice (“DOJ”) has traditionally maintained an expansive interpretation of the term “instrumentality,” arguing that any state-owned, state-controlled, or state-operated company could be an “instrumentality” of a foreign government. On this basis, the DOJ has pursued FCPA prosecutions in cases where bribes were allegedly promised or paid to employees of state-owned hospitals, utilities, natural resource exploration companies, and other enterprises. Until the Lindsey case, however, the DOJ’s broad interpretation had not been the subject of a court decision.

In the Lindsey matter, DOJ alleged that Lindsey and several of its officers and employees paid bribes to two high-ranking employees of the Comisión Federal de Electricidad (“CFE”), an electric utility company wholly-owned by the Government of Mexico. See [DOJ Press Release on Lindsey Indictment](#). The Lindsey Defendants moved to dismiss the case, arguing that CFE did not qualify as an instrumentality of the Mexican Government because the term “instrumentality” did not cover any entity beyond government agencies or departments. See [Lindsey Motion to Dismiss](#). Accordingly, the Lindsey Defendants argued, employees of CFE could not be considered foreign officials under the FCPA.

The Lindsey Court disagreed. The Court held that “if an instrumentality must share all of its characteristics with both a department and an agency . . . the term ‘instrumentality’ would be robbed of independent meaning. Canons of statutory construction counsel against this outcome, which would turn ‘instrumentality’ into surplusage.” See [Ruling on Motion to Dismiss](#). The Lindsey Court ruled that “a state-owned corporation having the attributes of CFE may be an ‘instrumentality’ of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation . . . may therefore be “foreign officials” within the meaning of the FCPA.”

The ruling is ultimately relatively narrow, as it applies to only one element of an FCPA violation – the “foreign official.” Nor is the ruling a surprise to any practitioner that has appeared in front of the DOJ or heard DOJ officials speak about the FCPA at conferences or in other venues. What makes the ruling notable is that, in an environment where virtually all FCPA matters settle before proceeding to trial, the DOJ now has case law on the side of its expansive interpretation of “foreign official.” U.S. companies and individuals should take note and ensure their compliance policies and procedures reflect this expansive interpretation.

Post Scripts: On May 10, 2011, the jury in the Lindsey case returned a guilty verdict on all counts on which they deliberated against all defendants: Lindsey Manufacturing, its CEO Dr. Keith Lindsey, CFO Steven K. Lee, and Angela Aguilar, the wife of Lindsey's Mexican sales representative. The jury deliberated for one day.

Two other FCPA prosecutions, *U.S. v. Carson, et. al.* and *U.S. v. O'Shea*, in two different federal district courts, also involve defendants asserting that a state-owned company should not be covered by the term "instrumentality" under the FCPA. We are closely watching those cases and will provide updates as they develop.

Authored by:

[Thaddeus McBride](#)  
202) 469-4976  
[tmcbride@sheppardmullin.com](mailto:tmcbride@sheppardmullin.com)

and

[Reid Whitten](#)  
(202) 469-4968  
[rwhitten@sheppardmullin.com](mailto:rwhitten@sheppardmullin.com)