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FCPA Update: Another Challenge to DOJ's Expansive "Foreign Official" Definition Fails, But Clarifies DOJ's Burden

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In yet another key development in the evolution of Foreign Corrupt Practices Act ("FCPA") case law, a federal court has denied the defendants' motion to dismiss the indictment in the closely watched *United States v. Carson* case.[1] This marks the fourth unsuccessful bid by a defendant to challenge the federal regulators' expansive interpretation of "foreign official" under the FCPA.[2] This decision may nevertheless provide future defendants with some much-needed judicial guidance—and possibly assistance—in fighting FCPA charges.

In *Carson*, the CEO and other executives of Control Components, Inc., a California-based valve manufacturing company, were charged with allegedly paying approximately $4.9 million in corrupt payments to employees of state-owned customers in China, Korea, Malaysia and the United Arab Emirates.[3] The defendants moved to dismiss on the basis that employees of state-owned enterprises ("SOEs") can never be foreign officials under the FCPA.[4] Since a necessary element to prove a violation of the FCPA is that the intended recipient of the corrupt payment be a "foreign official," defendants contended that the indictment was facially insufficient, and that the case should be dismissed.

Defendants argued that a purely legal issue was presented: whether employees of the SOEs qualified as "foreign officials" under the FCPA. The Government argued that defendants' motion was premature because the Government intended to prove at trial that the SOEs involved were agencies or instrumentalities pursuant to the FCPA.[5] *Agreeing with DOJ, the Court denied defendants' motion and concluded that an SOE may be considered an "instrumentality" under the FCPA, but whether it qualifies as such is a question of fact*.[6] In support of its position, the Court relied on three opinions by other district courts "considering this issue" that "have reached similar conclusions."[7]

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[1] *See* Criminal Minutes - Order Denying Motion to Dismiss Counts 1 through 10 of the Indictment, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. May 18, 2011), Docket No. 373.

[2] For a summary of these cases, please refer to our Client Alert, *FCPA: Regulators' Expansive "Foreign Official" Definition Under Attack* (May 20, 2011), http://www.mofo.com/files/Uploads/Images/110520-FCPA-Foreign-Official.pdf.

[3] *See United States v. Carson*, Order Denying Motion to Dismiss, at 2.

[4] *Id.* at 1.

[5] *Id.* at 4.

[6] *Id.* at p.1. The FCPA defines the term "foreign official" as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." 15 U.S.C. § 78dd-2(h)(2).

[7] *Id.* at 12. Please also refer to our May 20, 2011 Client Alert, *supra* note 2.

The court in *Carson* determined that no single factor was dispositive, but rather that there are several factors that "bear on the question of whether a business entity constitutes a government instrumentality…."[8] These factors include: (1) the foreign state's characterization of the SOE and its employees; (2) the degree of control by the foreign state; (3) the purpose of the entity's activities; and (4) the extent of government ownership, including level of financial support.[9] The Court noted that these factors were not exclusive, and their "chief utility is simply to point out that several types of evidence are relevant when determined whether a state-owned company constitutes an 'instrumentality' under the FCPA—with state ownership being only one of several considerations."[10]

The Court acknowledged that the FCPA does not define the term "instrumentality," but declined to adopt defendants' definition that an instrumentality must be "akin to departments and agencies."[11] Rather, the Court concluded that the term was "intended to capture entities that are not 'departments' or 'agencies' of a foreign government, but nevertheless *carry out governmental functions or objectives.*"[12] The Court also found it unnecessary to examine the legislative history of the FCPA given that the "statutory language of the FCPA is clear."[13]

The impact of the *Carson* decision—as well as the other recent cases reaching similar conclusions—on the future scope of FCPA enforcement remains to be seen. *Carson* makes clear, however, that for an SOE to qualify as an "instrumentality," it needs to be more than simply controlled or funded by the foreign state.

For the first time in FCPA enforcement history, there is judicial guidance that the "*nature and characteristics* of the business entity" must be taken into consideration.[14] Therefore, while *Carson* unequivocally rejected defendants' argument that employees of SOEs can never be "foreign officials" under the FCPA, it also suggests the converse: employees of SOEs are not always "foreign officials." *Carson* has thus called into question the expansive application federal regulators have given to the "foreign official" element of the FCPA because, in the case of SOEs, there must now be a showing of more than government ownership or control.

Moreover, by holding that the determination of whether an SOE qualifies as an "instrumentality" is a question of fact, *Carson* places the "substantial evidentiary burden to establish that a business constitutes a government instrumentality…." on the DOJ.[15] Relying on *Carson*, it is possible that future defendants will now challenge FCPA enforcement actions on the grounds that the DOJ failed to meet this burden. In *Carson*, and in other cases, it remains to be seen if the DOJ will be able to meet that burden.[16]

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[8] *United States v. Carson*, Order Denying Motion to Dismiss, at 5.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 7 (citation omitted).

[12] *Id.* (emphasis added).

[13] *Id.* at 11-12.

[14] *Id.* at 12 (emphasis added)

[15] *Id.* at 16.

[16] Order Regarding Briefing Schedule and Hearing Date, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. May 17, 2011), Docket No. 371, setting hearing to address "instrumentality" jury instruction for August 12, 2011.

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