



Key Developments in FCPA Law – Courts Consider Meaning of “Foreign Official”

By: Stacy Williams and Erin Kolodny

Over the last several months, defendants in three separate criminal cases have been waging parallel battles against the Justice Department’s interpretation of the term “foreign official,” as it is used in the Foreign Corrupt Practices Act (“FCPA”). The outcomes of these battles have the potential to resolve long-standing questions about the scope of FCPA enforcement.

Background

The FCPA makes it a crime to give payments or gifts to foreign officials for the purpose of influencing the official or securing an improper advantage. “Foreign official” is defined as:

Any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

The Department of Justice (“DOJ”) maintains that this definition includes employees of state-owned or state-controlled enterprises, such as governmentally-operated utilities and national oil companies, and has indicted numerous individuals and entities under the FCPA based on alleged improper payments to such employees. Specifically, DOJ points to the word “instrumentality” in the definition of “foreign official” as authority for this broad interpretation, arguing that, at the very least, state-owned and state-controlled enterprises are instrumentalities of foreign governments.

Challenges

The first case to seek a ruling on the scope of the term “foreign official” under the FCPA was *United States v. Carson*, Cause No. 8:09-cr-00077, in the United States District Court for the Central District of California. On February 21, 2011, the defendants in *Carson* filed a motion to dismiss the counts of the indictment that charged the defendants with FCPA violations based on alleged corrupt payments made to officers and employees of foreign state-owned companies.

On February 28, 2011, defendants in another FCPA case, *United States v. Noriega*, Cause No. 2:10-cr-01031, in the United States District Court for the Central District of California, filed a motion to dismiss their indictments on substantially similar grounds to those argued in *Carson*.

One week later, on March 7, 2011, a third challenge to the DOJ’s interpretation of “foreign official” was filed by the defendant in *United States v. O’Shea*, Cause No. 4:09-cr-00629, in the United States District Court for the Southern District of Texas. This challenge, too, moved the Court to dismiss the counts of the indictment related to FCPA violations, which alleged improper payments to officials of a Mexican state-owned utility company, on the grounds that employees of a state-owned company are not “foreign officials” under the FCPA.



Defendants' Arguments

The challenges focus on two main arguments: 1) the correct interpretation of the word "instrumentality," and 2) legislative intent.

The defendants in all three cases argue that including officers and employees of state-owned or state-controlled enterprises within the meaning of "foreign official" creates vagueness in the statutory language and implicates potentially absurd results, such as situations in which a U.S. citizen, working overseas, could fall under the definition of "foreign official."

Additionally, the defendants invoke the lengthy and detailed legislative history of the FCPA and argue that Congress' failure to explicitly include officers and employees of state-owned or state-controlled enterprises in the language of the statute evidences an intentional exclusion of those individuals from the prohibited activity. The defendants in *Carson* also point out that Congress has enacted other laws that specifically include state-owned enterprises in the definition of "instrumentality," such as the Foreign Sovereign Immunities Act and Economic Espionage Act. This, the defendants argue, shows that Congress does not intend the word "instrumentality" to include state-owned enterprises unless expressly stated.

Rulings

As of May 3, 2011, a ruling has been issued in only one of the three challenges to the meaning of "foreign official." On April 1, 2011, the Court in *Noriega* issued an oral ruling denying the defendants' motion, followed several weeks later by an eighteen page written decision explaining the Court's reasoning, and revealing that the ruling was ultimately swayed not by the strength of the DOJ's position, but by the defendants' "all or nothing approach" which claimed that no state-owned enterprise could ever be an instrumentality of a foreign government for the purposes of the FCPA. Rejecting this argument, the Court identified some characteristics of a government agency (which is clearly a "foreign official" under the FCPA) and, finding that the state-owned enterprise at issue in *Noriega* shared these characteristics, held that specific enterprise an "instrumentality."

Based on this determination, the Court acknowledged that it did not need to reach the question of legislative intent, but remarked in dicta that the legislative history of the FCPA is inconclusive on the issue.

Conclusion

Limiting the scope of the term "foreign official" from the DOJ's current broad interpretation would have a significant impact on many FCPA prosecutions. Long disputed, the challenges recently brought by defendants in federal courts around the nation are a step toward more consistent enforcement and greater clarity for corporations and individuals subject to the FCPA. With the narrow ruling issued in *Noriega*, the corporate compliance community waits with bated breath for word from *Carson* and *O'Shea*.

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For more information on the matters discussed in the *Locke Lord QuickStudy*, please contact the authors:

Stacy Williams | T: 713-226-1297 | swilliams@lockelord.com
Erin Kolodny | T: 713- 226-1341 | ekolodny@lockelord.com