

CROSS-BORDER LITIGATION SERIES

The First Corporate Guilty Verdict under the Foreign Corrupt Practices Act: Does that mean you have to settle?

Following the first trial and jury conviction of a corporate defendant under the Foreign Corrupt Practices Act, the Department of Justice has another cudgel to beat back challenges to its aggressive enforcement efforts. Alternatively, companies considering raising a defense to FCPA charges may be encouraged by the equally aggressive and credible challenge that was raised by the defense team in the case against Lindsey Manufacturing Company which went to trial in April this year.

The Trial of Lindsey Manufacturing Company

The case against Lindsey Manufacturing, a California manufacturer of electricity transmission equipment, was based on payments and gifts given by a sales representative on the Company's behalf to employees of a Mexican state-owned electrical utility, the Comisión Federal de Electricidad ("CFE"), from approximately 2002 until 2009. According to the evidence at trial, the Company paid a 30 percent sales commission into the brokerage account of the sales representative who used it to cover US\$5.9 million in bribes, which included a US\$297,500 Ferrari, a US\$1.8 million yacht, the payment of US\$170,000 toward a CFE employee's credit card debt, and US\$500,000 to relatives of a CFE official.

Prior to trial, the Company challenged the Department's opinion that CFE employees were "foreign officials" within the meaning of the FCPA. While the challenge was strongly mounted that the CFE was not a government agency, nor an "instrumentality" thereof, and thus, its employees were not "foreign officials," the underlying facts in this particular case were less than compelling. The Judge upheld the Department's position that the CFE was an "instrumentality" of the Mexican government because it was considered a public entity under Mexican law, the function of supplying electricity was a designated government function under the Mexican Constitution, it was supported by public funding, and its Board and officers were appointed by or were government officials. The Judge's fact-based ruling leaves open whether state-owned entities that do not share these characteristics are "instrumentalities of foreign governments" and their employees necessarily "foreign officials." Challenges to the Department's inclusion of employees of state-owned companies within the term "foreign officials" have been mounted in three other pending cases, requiring the Department to continue defending its position.

Having won that battle, the Department then fought a five-week war, surviving challenges to its key witnesses and evidence. The jury took less than a full day of deliberation, returning verdicts on May 10 against the Company and two of its senior executives on one count of conspiracy to violate the FCPA and five substantive violations of the FCPA. The jury also convicted the wife of the sales representative on one count of conspiracy to launder the money used to pay the bribes. Her husband was indicted but never apprehended. As a consequence, he did not stand trial.

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The senior executives, CEO Keith Lindsey and CFO Steve Lee, face five years in jail and fines of US\$250,000 or twice the value of the US\$19 million in contracts allegedly obtained through the bribes, on each of the six counts. In contrast, the sales representative's wife, Angela Aguilar, faces 20 years in jail and fines of US\$500,000 or twice the value of the property involved in the transaction on the one count on which she was convicted. Sentencing for Lindsey and Lee is scheduled for September 16, 2011. Aguilar's sentencing is scheduled for August 12, 2011.

Winning the Battle, Winning the War?

This case was significant because it produced a rare judicial interpretation of the FCPA on the key definition of "foreign official." Companies have been reluctant to challenge the Department's broad interpretation in court, but on better facts, such a challenge may be successful. Second, it is the first time a corporate defendant has been convicted of an FCPA charge at trial. Toward the end of the Department's case, challenges to the evidence and witnesses, as well as charges of prosecutorial misconduct and grand jury abuse, gained some traction such that there was talk that the motions decision was nothing but a pyrrhic victory. But the Department won the definitional battle as well as this particular war.

Whether the verdict confirms the wisdom of other companies' decisions to settle with the Department of Justice, discouraging future challenges, or whether other companies will re-evaluate their own facts in light of the Lindsey Manufacturing evidence and confront the Department with similar arguments remains to be seen. The Department's assumed advantage may be diluted as more challenges are mounted, forcing the Department to defend its broad statutory interpretations with less than pristine evidence. The trial has raised more questions than the verdict has answered.

This client memorandum does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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