# US combats corruption

Robert L Soza, Jr, *Partner, Jackson Walker, looks at new US guidance on whether national oil companies are to be considered an 'agency' or 'instrumentality' under the US Foreign Corrupt Practices Act (FCPA).*

*The resource guide to the US Foreign Corrupt Practices Act (FCPA)* by the US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) in November 2012 (the 'Resource Guide') has been described as a good collection of the historical positions that the US government has taken regarding its enforcement of the FCPA, but it lacks what many hoped would be new guidance.

However, one area where there is, arguably, new guidance is in the FCPA's definition of '*…[an] agency, or instrumentality, [of a foreign government]*' (see 15 USC § 78dd-1(f)(1)(A), 15 USC § 78dd-2(h)(2)(A)). This language has been used to charge individuals and companies for violations of the FCPA when employees of governmentally-owned companies are bribed. Nowhere in the FCPA is the phrase 'agency or instrumentality' defined. This issue is particularly relevant to the oil and gas industry as most national oil companies (NOCs) and their subsidiaries are multinationals and, increasingly, many are investing and working in the US market.

Because there has been little guidance in the past on whether employees of government-owned commercial enterprises fall within the scope of the FCPA, in an abundance of caution, FCPA corporate policies and procedures treat all NOCs and their subsidiaries as agencies or instrumentalities of a foreign government. Typically, these policies require all marketing to NOCs to comply with stringent pre-approval and documentation requirements to ensure compliance with the 'marketing exception' of the FCPA.[1] The marketing exception allows companies to entertain agencies or instrumentalities of a foreign government as long as the entertainment expenses are bona fide expenditures directly related to the promotion, demonstration or explanation of products or services. With new guidance from the Resource Guide, companies who extensively market NOCs or their subsidiaries[2] should re-think whether some NOCs can be treated like other privately-owned entities to which the FCPA does not apply. Governments take minority shareholder ownership in many NOC subsidiaries, so each entity should be analysed in evaluating whether they should be treated as an agency or instrumentality of a foreign government.

The Resource Guide states *(on p21): '[w]hile no one factor is dispositive or necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares. However, there are circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership…'*

The circumstances that would cover NOCs that are less that 50% owned by a government relate to whether the NOC is controlled, in other ways, by the government or whether it provides citizens essential official governmental functions or services like electricity, or other utilities. This guidance is a significant departure from the utter lack of guidance on this issue provided by the DOJ and the SEC in the past. In fact, the SEC and DOJ have alleged FCPA instrumentality liability when a government did not own more than 50% of the outstanding shares of the alleged enterprise.

In two cases, the US government charged individuals with violations of the FCPA for allegedly bribing employees of companies in which governments had a minority interest in the outstanding stock of the company. In *Securities and Exchange Commission vs Steven J Ott and Roger Michael Young,* the SEC alleged that employees of ITXC bribed, among others, Sonatel from 2001 through 2003. As of 1998, the government of Senegal reduced its stock ownership in Sonatel to between one-third and 41%. Similarly, in *United States of America vs Kellogg, Brown, and Root, LLC,* the US government alleged that a company which was 49% owned by an NOC was an 'entity and instrumentality of the government of Nigeria within the meaning of the FCPA'. In both of these cases, the defendants settled and the Court never determined the issue of whether these entities were instrumentalities of a foreign government. It would be interesting to note whether the US government would argue that these two entities would be treated as governmental enterprises under the Resource Guide standard.

While the Resource Guide does not provide a 'safe harbour' it is clear that, absent one of the indicia of governmental instrumentality, studying whether a company may treat an NOC as a private entity in corporate compliance policies and procedures might make sense for companies that extensively market NOCs or their subsidiaries.

*Footnotes*

*1. The marketing exception to the FCPA allows companies and individuals to market to governmental entities without violating the FCPA. See 15 USC §§ 78dd-1(c), 78dd-2(c), and 78dd-3(c).*

*2. Subsidiaries of NOCs may, in some instances, be treated as private parties even if, somewhere in its chain of ownership, a parent or sister company is considered to be an agency or instrumentality of a foreign government*