Ask yourself this: Are you dealing with a 'foreign official,' according to the FCPA?

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The Foreign Corrupt Practices Act (FCPA) in recent years has become one of the U.S. Department of Justice's (DOJ) main regulatory-enforcement priorities, but confusion remains in determining just who constitutes a "foreign official" subject to the act's anti-corruption prohibitions.

The DOJ's prosecution of individuals who violate the FCPA is at its highest ever, and the protections and potential rewards that the Dodd-Frank Act currently provides whistleblowers are sure to increase the number of investigations and prosecutions under the act in 2012. But since the courts have not had the opportunity to evaluate and determine who constitutes a "foreign official" under the FCPA, questions linger as to just whom it is meant to rein in.

This is because the overwhelming majority of investigations and prosecutions do not proceed to trial and result in settlements or deferred prosecution agreements instead, judicial interpretation of the FCPA's anti-bribery provisions is sparse. The answer to the question of who is a "foreign official" is especially significant for entities and individuals who conduct business in nations where the majority of business enterprises, such as utility companies, telecommunications companies and hospitals are state-owned or state-controlled.

While there is no debate that the act of bribing an employee or agent of a foreign governmental agency or department, such as a foreign government's department of taxation and revenue, would fall within the ambit of the FCPA, on its face, it is not so clear whether the statute's definition of a "foreign official" encompasses officers or employees of state-owned or state-controlled corporations. The FCPA explicitly defines a "foreign official" 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.

15 U.S.C. § 78dd-1(f)(1)(A). Nor, until recently, has there been any authoritative case law on this issue.

Over the last year, a battle has ensued between the DOJ and defendants as to the scope of the definition of a "foreign

official" under the FCPA. On the one hand, the DOJ has sought a broad interpretation that would encompass any entities that are owned, even in part, or controlled by a foreign government. According to the DOJ, the term "foreign official" should be 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.

An "instrumentality" of a foreign government includes state-owned or state-controlled companies.

It is the latter portion of the DOJ's definition of a "foreign official" -- purporting to define what constitutes an "instrumentality" of a foreign government -- that is causing serious debate.

On the other hand, defendants in at least four criminal prosecutions have argued, without much success, that the DOJ has adopted too broad a definition of a "foreign official" that includes anyone working for a state-owned or state-controlled enterprise. Instead, defendants argued, courts should apply a narrow interpretation of the term that would limit "foreign officials" to the government officials explicitly listed in the statute, thereby excluding officials employed by entities owned or controlled by a foreign government, since they are not explicitly listed in the statute, or to officials of a business enterprise that is part of the foreign government itself.

For example, in the 2011 Central District of California case, U.S v. Noriega, defendants moved to dismiss the DOJ's superseding indictment on the basis that under no circumstances can a state-owned corporation be a department, agency or instrumentality of a foreign government. Likewise, in the 2011 Southern District of Texas case, *U.S. v. O'Shea* the defendant argued that "'[s]tate-owned enterprises fall beyond the scope of the FCPA's definition of 'instrumentality,' and therefore, their officers and employees are not 'foreign officials' under the FCPA."

O'Shea also argued that the DOJ "has improperly expanded this definition to include all employees of state-owned enterprises—regardless of rank, position, or duties." Id. In July of last year, the defendants in a 2009 case brought in the Southern District of Florida, *U.S. v. Esquenazi*, requested that the court instruct the jury "that a state owned enterprise is not a foreign governmental instrumentality within the meaning of the [FCPA], and officers and employees of a state owned enterprise therefore are not 'foreign officials' under the [FCPA]."

Finally, the defendants in the 2009 Central District of California case, *U.S. v. Carson*, took a different approach and sought an instruction to jurors "that to conclude that a business enterprise is an 'instrumentality' of a foreign government, [jurors] must conclude . . . that the business enterprise is part of the foreign government itself," which could be established only if the DOJ demonstrates that all of the following elements exist:

- "the foreign government itself directly owns at least a majority of the business enterprise's shares";

- "the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors. . .; the hiring and firing of employees. . .";
- "the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government"; and
- "employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country."

All four courts disagreed with the defendants' interpretation of who is an "instrumentality" of a foreign government. The courts, however, did not adopt the DOJ's interpretation and refused to construe the definition of an "instrumentality" of a foreign government so broadly that it would encompass all state-owned or state-controlled entities. Rather, the courts held that under certain instances an instrumentality of a foreign government can include state-owned or state-controlled entities.

Moreover, these courts held that whether a state-owned or state-controlled entity is an instrumentality of a foreign government depends on the following non-exclusive factors:

- "The entity provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction."
- "The key officers and directors of the entity are, or are appointed by, government officials."
- "The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park."
- "The entity is vested with and exercises exclusive or controlling power to administer its designated functions."
- "The entity is widely perceived and understood to be performing official (i.e., governmental) functions."

In *U.S. v. Noriega*, the court was confronted with the question of whether Mexico's Comisión Federal de Electricidad (CFE), an electric-utility company owned by the government of Mexico, was an instrumentality of the Mexican government. The court noted that there was no dispute that the CFE supplies electricity to all of Mexico, except for Mexico City, that the CFE's governing board is composed of Mexican government officials, that its Director General is appointed by the President of Mexico and that the CFE's English-language website described it as an agency of the Mexican Federal Government.

The CFE's status under Mexican law was equally critical to the court's decision. Specifically, the Mexican Constitution provides that the supply of electricity in Mexico is solely a government function and Mexican statutory law defines the CFE as a "decentralized public entity with legal personality and its own patrimony." In light of these factors, the court found that the CFE officials identified in the indictment were "foreign officials" under the FCPA. The jury agreed and convicted defendants for violating the FCPA as a result of their participation in a scheme to bribe Mexican government officials at the CFE.

In *U.S. v. Esquenazi*, the most recent of the prosecutions, the court similarly rejected defendant's contention that the

Republic of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti (Haiti Teleco), was not an instrumentality of the Republic of Haiti. The jury also agreed and convicted Joel Esquenazi and Carlos Rodriguez, the former president and vice president of Terra Telecommunications Corp. (Terra), for their role in Terra's scheme to bribe officials of Haiti Teleco to obtain various business advantages from the Haitian officials, including issuing preferred telecommunications rates, reducing the number of minutes for which payment was owed, and giving a variety of credits toward sums owed, as well as to defraud the Republic of Haiti of revenue.

The determination that the Haiti Teleco employees were officials of the Republic of Haiti had severe consequences for the defendants. Mr. Esquenazi was sentenced to 15years in prison -- the longest sentence handed down to date in a conviction for violating the FCPA -- and Mr. Rodriguez was sentenced to seven years in prison. Defendants, however, have recently informed the trial court of their intention to appeal their convictions; one of the grounds for their appeal will be that the court instructed the jury incorrectly as to who is an "intermediary" of a foreign government.

Although FCPA jurisprudence has come a long way in the last year -- at least there is now a set of factors that can be used to determine whether an entity is an instrumentality of a foreign government -- the state of the law may change drastically in the near future. The appeal in *U.S. v. Esquenazi* would be the first time that an appellate court reviews the issue of whether business enterprises can constitute instrumentalities of a foreign government. Congress, pressured by the U.S. Chamber of Commerce and organizations like the New York State Bar Association, may decide to define statutorily what is an instrumentality of a foreign government.

Regardless of which occurs first -- the federal appellate court ruling in *U.S. v. Esquenazi* or a legislative amendment to the definition of a "foreign official," either will certainly have a widespread impact on cross-border deals and the DOJ's ability to prosecute individuals and entities that provide bribes to instrumentalities of a foreign government.

Until then, individuals involved in cross-border transactions should proceed with caution and diligence to ensure that their dealings with a foreign counterpart do not violate the FCPA.

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