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FCPA: DOJ and SEC Guidance (Part 3)

Who is a "Foreign Official"?

Introduction

In this third part of our client alert series on the Foreign Corrupt Practices Act ("FCPA"), we focus on who constitutes a "foreign official" under the FCPA, specifically addressing the circumstances in which an employee of a state-owned or state-controlled commercial entity will be considered a foreign official. As in the first two parts of the series, the presentation is based on "*A Resource Guide to the U.S. Foreign Corrupt Practices Act*" (the "Guide"), recently issued by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC").[1]

"Foreign Official" Defined

The FCPA's anti-bribery provisions prohibit issuers,[2] domestic concerns,[3] and foreign persons and businesses acting while in the territory of the United States, as well as the officers, directors, employees, or agents of such entities, from making, or attempting to make, corrupt payments to *foreign officials* in order to obtain or retain business.[4] While the FCPA broadly defines a "foreign official" to include "*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,"[5] the Guide offers little

[1] CRIM. DIV., U.S. DOJ & ENFORCEMENT DIV., U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012). In Part 1 of our series, we addressed the FCPA's jurisdictional reach as reflected in the Guide. In Part 2, we addressed FCPA liability under principles of parent-subsidiary and successor liability.

[2] "Issuers" refer to U.S. and foreign public companies listed on U.S. stock exchanges or required to file periodic reports with the SEC. See 15 U.S.C. § 78dd-1(a).

[3] "Domestic concerns" refer to U.S. persons and businesses. See 15 U.S.C. § 78dd-2(h)(1).

[4] See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3. Specifically, the FCPA explicitly makes it unlawful for such entities "to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for purposes of—

> (A) (i) influencing any act or decision of such foreign official in his official capacity,
> (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or
> (iii) securing any improper advantage; or
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person."

See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3. Interestingly, the FCPA's anti-bribery provisions contain no prohibitions on payments to foreign *governments*; rather, they prohibit certain payments to foreign *officials*. The Guide notes, however, that even though payments to foreign governments may not violate the anti-bribery provisions of the FCPA, "such payments may violate other U.S. laws, including wire fraud, money laundering, and the FCPA's accounting provisions." Guide, supra note 1, at 20.

[5] See 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (emphasis added). A "public international organization" is "any organization designated as such by Executive Order under the International Organizations Immunities Act, 22 U.S.C. § 288, or any other organization that the President so designates." Guide, supra note 1, at 21. Examples of public international organizations include the World Bank, the International

additional insight into the definition, and provides no hypotheticals that might shed further light on who is a "foreign official."[6]

State-Owned or State-Controlled Entities

The FCPA includes as "foreign officials" officers and employees of a department, agency, or instrumentality of a foreign government.[7] Many foreign governments operate state-owned or state-controlled entities that are commercial in nature. It can be difficult to determine whether such entities constitute government instrumentalities such that their employees would be considered "foreign officials" under the FCPA.

The Guide indicates that the DOJ and SEC view the term "instrumentality" broadly, such that "it can include state-owned or state controlled entities."[8] Determining whether an entity is an instrumentality under the FCPA "requires a fact-specific analysis of an entity's ownership, control, status, and function."[9] The Guide advises that the following non-exclusive factors, which a number of courts have approved in jury instructions, be considered when determining if an entity is an instrumentality:

- the foreign state's extent of ownership of the entity;
- the foreign state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
- the foreign state's characterization of the entity and its employees;
- the circumstances surrounding the entity's creation;
- the purpose of the entity's activities;
- the entity's obligations and privileges under the foreign state's law;
- the exclusive or controlling power vested in the entity to administer its designated functions;
- the level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans);
- the entity's provision of services to the jurisdiction's residents;
- whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- the general perception that the entity is performing official or governmental functions.[10]

The Guide states that while "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."[11] Exceptions exist, however, such that an entity may be considered an instrumentality despite a foreign country's minority ownership.[12] The Guide provides an example in which subsidiaries of Alcatel-Lucent, S.A., pleaded guilty to making corrupt payments to employees of a Malaysian telecommunications

Monetary Fund, and the World Trade Organization. A comprehensive list of such organizations is contained in 22 U.S.C. § 288 and can be found on the U.S. Government Printing Office website at http://www.gpo.gov/fdsys/.

[6] See Mike Koehler, Grading the Foreign Corrupt Practices Act Guidance, White Collar Crime Report, Dec. 14, 2012, at 5-6.

[7] See 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

[8] Guide, supra note 1, at 20.

[9] Id.

[10] Id. (citing Jury Instructions, United States v. Esquenazi, No. 09-cr-21010 (S.D. Fla. Aug. 5, 2011) (reflecting a list of seven of the non-exclusive factors); United States v. Carson, No. SACR 09–00077–JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011) (reflecting a list of seven of the non-exclusive factors); and United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011) (reflecting a list of five of the non-exclusive factors)).

[11] Guide, supra note 1, at 21.

[12] Id.

company that was 43% owned by Malaysia's Ministry of Finance.[13] In that case, the Ministry "held the status of a 'special shareholder,' had veto power over all major expenditures, and controlled important operational decisions."[14] Moreover, most of the company's senior officers were political appointees.[15] Due to the Malaysian government's "substantial control over the company," the DOJ considered the company to be an instrumentality of a foreign government.[16]

"Foreign Official" Is Broadly Interpreted by the DOJ and SEC

The Guide's examples demonstrate the DOJ's and SEC's broad interpretation of "foreign official." First, the FCPA prohibits corrupt payments to *any* officer or employee of a foreign government or *any* department, agency, or instrumentality thereof, and the Guide indicates that corrupt payments made to low-ranking employees and high-ranking officials will be treated identically.[17] For example, the DOJ has brought FCPA conspiracy charges against a Swiss freight forwarding corporation that conspired to bribe low ranking customs officials in order, *inter alia*, to expedite customs clearance.[18] And while payments to foreign officials are prohibited regardless of the amount involved, the Guide indicates that the DOJ's and SEC's focus is on large-scale wrong-doing, not on prosecuting people for providing a foreign official a cup of coffee or cab fare.[19]

Second, the Guide provides examples of cases where company employees (e.g., Malaysian telecom employees of unidentified seniority) who received payments were deemed "foreign officials" even though they appeared to be acting in a largely commercial manner.[20]

The Guide does not cite the DOJ's Opinion Procedure Release 12-01, dated September 18, 2012, which discussed whether payments to a royal family member as part of a business transaction violated the FCPA.[21] A U.S. lobbying firm ("Lobbyist") had requested an opinion from the DOJ regarding its plan to secure the representation of a foreign country in lobbying efforts in the United States. To win the lobbying engagement, the Lobbyist intended to contract with a third-party consulting company, one of whose three partners was a member of the foreign country's royal family.[22]

The Lobbyist requested an opinion from the DOJ about whether this conduct would conform to DOJ policy regarding the anti-bribery provisions of the FCPA. In analyzing whether the royal family member was a "foreign official" under the FCPA, the DOJ, relying on district court decisions regarding the meaning of "instrumentality,"[23] stated that a

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[13] Id. (citing Criminal Information, United States v. Alcatel-Lucent France, S.A., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/12-27-10alcatel-et-al-info.pdf.
[14] Guide, supra note 1, at 21.
[15] Id.
[16] Id. Since the charges against the subsidiaries resulted in plea agreements, the DOJ's position that the company was an instrumentality of the Malaysian government, despite the government's minority ownership, was not tested at trial or reviewed on appeal.
[17] Id. at 19-20.
[18] See Information, United States v. Panalpina World Transport (Holding) Ltd., No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-info.pdf.
[19] See Guide, supra note 1, at 15.
[20] Guide, supra note 1, at 21; see also Criminal Information, United States v. Alcatel-Lucent France, S.A., supra note 13.
[21] See U.S. Dept. of Justice, FCPA Op. Release 12-01 (Sept. 18, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf.
[22] See id. at 1-3.
[23] In particular, the DOJ relied on United States v. Carson, No. SACR 09–00077–JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011) – a case in which the court articulated a

"person's mere membership in the royal family of the Foreign Country, by itself, does not automatically qualify that person as a 'foreign official.'"[24] Instead, the question requires a fact-intensive, case-by-case determination.[25] The DOJ enumerated a number of factors it considered, but concluded that the key issues were: "(i) how much control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (ii) whether a foreign government characterizes an individual or entity as having governmental power; and (iii) whether and under what circumstances an individual (or entity) may act on behalf of, or bind, a government."[26]

Corrupt Payments in the Private Sector

It is important to note that a corrupt payment to an employee of an entity that is not a department, agency, or instrumentality of a foreign government could also violate one or more criminal laws. The Guide reminds companies and individuals that "commercial (i.e., private-to-private) bribery may still violate the FCPA's accounting provisions, the Travel Act,[27] anti-money laundering laws, and other federal or foreign laws."[28] Thus, companies should maintain effective anti-corruption policies and procedures designed to prevent corrupt payments to any party, governmental or otherwise.

Conclusion

The Guide indicates that the government will take FCPA enforcement action against companies or individuals who bribe "foreign officials" – a term that encompasses employees of instrumentalities of foreign governments. Determining whether a foreign entity is an "instrumentality" – a term the government interprets broadly – under the FCPA requires a fact-specific analysis of the entity's:

- ownership;
- control;
- status; and
- function.

In conducting a fact-specific analysis, companies are advised to consider all of the non-exclusive factors reflected in the Guide.[29] U.S. prosecutors and regulators, however, appear to place the greatest weight on whether an entity is controlled by a foreign government, regardless of whether the entity is majority-owned by that government.[30]

Consideration of the Guide's "instrumentality" factors should allow companies to better evaluate the risk of FCPA violations and better design effective FCPA compliance programs. Compliance programs should broadly preclude the bribery of "foreign officials," as well as persons in the private sector.

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fact-based analysis that involved consideration of a number of the same factors that the Guide advises be considered when determining whether an entity is an "instrumentality." See FCPA Op. Release 12-01, supra note 20, at 6; see also supra pp. 2.

[24] FCPA Op. Release 12-01, supra note 20, at 5.

[25] See id.

[26] See id. at 6-7.

[27] The Travel Act "prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of any unlawful activity or to promote, manage, establish, or carry on any unlawful activity." Guide, supra note 1, at 48; see also 18 U.S.C. § 1952. "Unlawful activity" includes violations of both the FCPA and state commercial bribery laws. Guide, supra note 1, at 48. Thus, paying bribes to employees of a private company may result in a violation of the Travel Act. See id.

[28] Guide, supra note 1, at 21.

[29] See Guide, supra note 1, at 20; see also supra p. 2.

[30] See Guide, supra note 1, at 21; see also Criminal Information, United States v. Alcatel-Lucent France, S.A., supra note 13.

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