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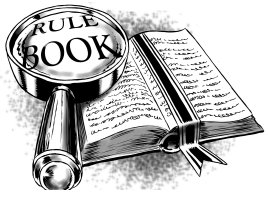

COMPLIANCE CLARIFIED

FCPA: Who Is A Foreign Official?

One of the key concerns for industry professionals working with the Foreign Corrupt Practices Act surrounds which individuals qualify as foreign officials under the law. What may appear to be an easily answered question only bears its true complexity in the crucible of contested litigation. Regulators have not drawn the line at "presidents, prime ministers and princes," as Congress arguably intended. Instead, they have swept far more broadly in their interpretation of the country's overseas bribery statute, encompassing low-level employees of commercial entities owned (in part) by foreign governments. In countries with state investment in many facets of the economy, such as China, this has become a vexing issue for compliance practitioners.

The Issue

The FCPA prohibits corrupt payments to "any foreign official," defined in the statute as including "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." The question for compliance practitioners is whether a state-owned enterprise (SOE) qualifies as an "instrumentality" (a term undefined in the statute) of a foreign government, thereby transforming the SOE's employees into foreign officials.

In the courts, challenges to the **U.S. Department of Justice**'s sweeping view of who constitutes a foreign official have been raised (CR, 7/25), and several rulings have sided, at least preliminarily, with the government's interpretation. In Congress, industry groups have focused on the foreign official issue to demonstrate how, they say, FCPA enforcement practices are rendering U.S. businesses less competitive than their foreign counterparts. A bipartisan effort is underway to hold hearings on the issue and, possibly, amend the law.

Many legitimate and well-accepted business practices common in the commercial context make compliance practitioners nervous when applied to potential foreign officials. Most compliance officials have stories of fielding frantic calls from around the globe from employees demanding concrete guidance on "how much is too much" for symbolic gifts and routine entertainment of customers who may (or may not) be foreign officials. These inquiries can be costly, particularly when the question only comes on the heels of an internal investigation or disclosure to the government. More concerning is when legitimate business opportunities are lost.

The Guidance

The good news is that help is on the way. As noted above, congressional Republicans and Democrats alike have voiced concern that the FCPA is in need of a tune-up, including clarifying the scope of its application to SOEs.

In the interim, the federal courts are beginning to address the question. In two recent cases, the courts have enumerated non-exclusive factors to determine an SOE's status as a foreign government instrumentality (noted in summary):

- The circumstances surrounding the entity's creation.
- Whether the key officers and directors are, or are appointed by, government officials.
- The extent to which the entity is owned by, controlled by, and/or financed by government sources.
- Whether the entity is characterized as or is understood to perform public functions.
- Whether the entity exercises controlling power to administer its designated functions.
- The entity's obligations and privileges under the foreign state's law.

In the **Lindsey Manufacturing** case, the court considered whether employees of a state-owned utility are foreign officials under the FCPA. Finding the legislative history of

the statute on this question "inconclusive," the court ruled that they were—in part because the agency held itself out as a government "agency" on its website. (The defendants are contesting their conviction.) In the **Control Components** case, the court determined that the jury must decide whether an SOE qualifies as an instrumentality under the FCPA because it is a question of fact, shifting the battle to the jury instructions. Instructively, the judge noted that "a mere monetary investment in [an SOE] by the government may not be sufficient to transform that entity into a governmental instrumentality. But when…combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality." (Former Control Components officials who are defendants are contesting charges against them.)

Until more definitive guidance is issued by the courts or Congress, the key message to the compliance community is: know your customer and use the recent case law to evaluate those vexing "how much is too much" questions.

F. Joseph Warin *is a partner and* ***John W.F. Chesley*** *and* ***Jeremy Joseph*** *are associates in the Washington, D.C., office of* ***Gibson, Dunn & Crutcher****.*

Compliance Clarified is a regular feature in which industry professionals explain how to deal with new rules and handle complex compliance issues. For details on making submissions contact **Ben Maiden**, managing editor, at +212 224 3281 or bmaiden@iinews.com.