What You Should Know About “Foreign Officials” Under the Foreign Corrupt Practices Act
Introduction

The Foreign Corrupt Practices Act (“FCPA”) prohibits the bribery of foreign government officials. While the contours of the FCPA are complex and nuanced, few provisions have generated more confusion than the definition of “foreign official.” Minimizing this confusion is critical for companies that do business in countries where the line between a “foreign official” and a private citizen is often quite murky. In this white paper, TRACE has created guidance to assist companies with this analysis so they can make informed decisions when conducting business abroad.

Who exactly qualifies as a foreign official for purposes of the FCPA? The statute’s definition is deceptively simple:

The term “foreign official” means 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.

Despite the simplicity of this definition, the U.S. government’s interpretation of “foreign official” is actually quite broad. In many instances, the analysis will be fairly straightforward. Identifying government departments and agencies, for example, is an uncomplicated task in most countries. And if an individual is an officer or employee of a foreign government department or agency, he or she will undoubtedly qualify as a foreign official. However, under certain circumstances the analysis may be more challenging. Specifically, when does an entity qualify as an “instrumentality” of a foreign government? And when is a person acting “in an official capacity for or on behalf” of a foreign government department, agency or instrumentality? These critical questions will be addressed in turn below.

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1. The FCPA also prohibits the bribery of foreign political parties or their officials, candidates for foreign political office, or “any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of these three categories.” See Section 30A(a)(1)-(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(1)-(3), 15 U.S.C. §§ 78dd-2(a)(1)-(3), 78dd-3(a)(1)-(3). However, the FCPA makes clear that its prohibitions do not extend to the employees or agents of purely commercial entities. Moreover, payments to foreign governments as such are not prohibited, but the U.S. Department of Justice (“DOJ”) has warned “companies contemplating contributions or donations to foreign governments . . . [to] take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials.” A Resource Guide to the U.S. Foreign Corrupt Practices Act at 20, available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf
3. Companies should also take note of the inclusion of “public international organizations” in the definition of “foreign official.” This means that the prohibitions extend not only to the employees and officers of traditional government entities, but to the employees and officers of public international organizations as well (i.e., World Bank, Red Cross, International Monetary Fund).
When is an Organization an “Instrumentality” of a Foreign Government?

Few aspects of the FCPA have generated more attention (or litigation) than the definition of “instrumentality” of a foreign government. Similar to other provisions in the FCPA, the U.S. government has interpreted this term quite broadly, determining that an expansive range of organizations qualify under this standard. The most common application of this term has been to “state-owned enterprises” (“SOEs”), or “any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership.”

Companies may encounter SOEs in industries such as “aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation.”

In some instances, an SOE’s status as an instrumentality under the FCPA may be straightforward. However, when government ownership is not clear or the services provided by an entity do not appear inherently governmental in nature, companies may struggle to determine whether the entity falls within the purview of the FCPA. For instance, a common example of an SOE may be found in China, where state-owned hospitals have become a compliance challenge for unwary companies that assume the entities are privately owned. Many companies have faced stiff fines and penalties from the U.S. government for the gifts, hospitality, and payments made to Chinese doctors, nurses, pharmacists, or hospital administrators in order to influence the purchase of their goods and services. While the gifts and hospitality provided to these employees may be permissible in private hospitals, as employees of state-owned hospitals, such doctors, nurses, pharmacists, and hospital administrators are considered to be “foreign officials” under the FCPA.

In recent years, several companies have litigated the “instrumentality” issue, which has enhanced the guidance available to companies that must undertake this challenging analysis. In the leading case that addresses this issue, the U.S. Court of Appeals for the Eleventh Circuit affirmed the conviction of two individuals who had bribed officials of a Haitian telecommunications company. The telecommunications company was the sole provider of landline telephone service in Haiti, it was 97% owned by the National Bank of Haiti (which is owned by the Haitian government), and the Haitian President appointed all of the company’s board members.

It was not, however, designated as a government entity by law. The defendants claimed that the telecommunications company was not an “instrumentality” of the Haitian government because it did not perform traditional, core government functions. The Eleventh Circuit rejected the defendant’s limited interpretation of “instrumentality,” preferring a fact-based approach to determining an entity’s status. Using the multi-factor approach outlined below, the Court found that the telecommunications company was an “instrumentality” of the Haitian government, and the officials were “foreign officials” under the FCPA.

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6 See United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014).
7 Id. at 928–29.
8 Id.
9 Id. at 924.
10 Id. at 925.
The Eleventh Circuit first defined an “instrumentality” as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”\textsuperscript{11} The Court then went on to outline a non-exhaustive list of relevant factors that could help determine what constitutes “control” and what constitutes a “function the government treats as its own.”\textsuperscript{12}

To determine whether a government “controls” an entity, the following factors may be considered:

- The foreign government’s formal designation of that entity;
- Whether the government has a majority interest in the entity;
- The government’s ability to hire and fire the entity’s principals;
- The extent to which the entity’s profits, if any, go directly into the governmental fisc; and
- The extent to which the government funds the entity if it fails to break even.\textsuperscript{13}

To determine whether the entity performs a “function” that the government treats as its own, the following factors may be considered:

- Whether the entity has a monopoly over the function it exists to carry out;
- Whether the government subsidizes the costs associated with the entity providing services;
- Whether the entity provides services to the public at large in the foreign country; and
- Whether the public and the government of that foreign country generally perceive the entity to be performing a government function.\textsuperscript{14}

This issue has been addressed in other cases, providing additional, non-exclusive factors that may be considered when making this determination.\textsuperscript{15} The factors include:

- The purposes of the entity’s activities;
- The entity’s obligations and privileges under the foreign country’s laws;
- The circumstances surrounding the entity’s creation;
- The level of financial support from the government (through, e.g., subsidies, special tax treatment, loans, or financing from government-mandated taxes, licenses, fees or royalties).

While the Eleventh Circuit’s guidance provides a framework for determining whether an entity constitutes an “instrumentality” under the FCPA, it necessitates a fact-intensive inquiry when encountering a new foreign entity. Thus any company seeking to determine whether it is dealing with an employee or official of an instrumentality must conduct an inquiry that enables it to address the factors outlined by the courts.

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 925-27.
\textsuperscript{13} Id. at 925.
\textsuperscript{14} Id. at 926.
When is a person acting “in an official capacity for or on behalf” of a foreign government department, agency or instrumentality?

Once a company has determined that it is dealing with a government agency, department or instrumentality, an individual’s status as a “foreign official” is generally a foregone conclusion. In certain instances, however, an individual’s status or relationship to an entity may not be very clear. Even if an individual is not an official or employee of an entity, he or she may still be working “for or on behalf” of a foreign government department, agency or instrumentality.

For example, a company may wish to retain a foreign consultant or agent that has strong ties to the foreign government of a country in which the company plans to do business. Or a company seeking to expand business opportunities in a foreign country may be considering doing business with a third party who has done work or is currently doing work for the same government. In one FCPA enforcement action, a company settled FCPA allegations involving improper payments made to an “advisor to the Iranian Oil Minister” whose family controlled all oil and gas contract awards in Iran.\(^{16}\) Although this individual was not employed by the Iranian government, given the influence he had with respect to government decisions, the government deemed him a “foreign official” under the FCPA.

Because the line between private citizen and foreign official can be murky, the DOJ has addressed this issue in written guidance to various companies.\(^ {17}\) For example, in 2010, a company sought DOJ guidance regarding its initiative with a foreign government.\(^ {18}\) The company planned to retain a consultant that had extensive contacts in the government of the foreign country, and that held contracts to represent the foreign government and act on its behalf. In its review of the proposed relationship, the DOJ noted that because the consultant was an agent of the foreign government, the consultant had and would continue to act on behalf of the foreign government—rendering the consultant and its employees “foreign officials” under the FCPA. However, in this instance, the company took affirmative steps to ensure that the consultant and its owner would not act on behalf of the foreign government under the proposed consulting agreement and would therefore not be considered foreign officials for purposes of the company inquiry. Specifically, the DOJ pointed to the “walling off” of employees working for the company from those continuing to work for the government, the full disclosure of the relationship to relevant parties, the permissibility of the relationships under local law, and contractual obligations to limit further representation of the foreign government by the consultant.\(^ {19}\)

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19 Id. at 4.
Although many companies may be nervous at the prospect of hiring a third party that has acted and continues to act on behalf of a foreign government, in its guidance the DOJ made it clear that payments to foreign officials are not always prohibited by the FCPA:

[T]he FCPA does not per se prohibit business relationships with, or payments to, foreign officials. In such cases, the Department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal.\(^\text{20}\)

In 2012, the DOJ provided additional guidance regarding when an individual is acting on behalf of a foreign government. In this instance, a company sought guidance regarding its proposed contractual arrangement with a consulting company, which included a member of the royal family of a foreign government as a partner.\(^\text{21}\) Although the royal family member held no position in the government, the company wanted the DOJ’s opinion regarding the royal family member’s status as a foreign official under the FCPA. While noting that it did not consider the royal family member to be a “foreign official” in this instance, the DOJ provided an outline of the factors companies should consider when determining a royal family member’s status under the FCPA.\(^\text{22}\) The DOJ noted that “mere membership” in a royal family would not automatically qualify an individual as a foreign official, further explaining that this determination requires a “fact-intensive, case-by-case determination” of the following non-exhaustive list of factors:

> The structure and distribution of power within a country’s government;
> A royal family’s current and historical legal status and powers;
> The individual’s position within the royal family;
> An individual’s present and past positions within the government;
> The mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as, for example, royal succession);
> The likelihood that an individual would come to hold such a position; and
> An individual’s ability, directly or indirectly, to affect governmental decision-making.

While the preceding examples involve different scenarios, both make clear that the “foreign official” inquiry is a fact-intensive process that depends heavily on context. The DOJ has provided a useful framework for conducting this analysis, but it is up to companies to take affirmative steps to ensure they are in compliance with the FCPA.

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\(^{20}\) Id. at 3.
\(^{22}\) Id. at 5.
A company seeking to determine whether an individual is a foreign official under the FCPA should take the following steps before proceeding with an engagement or transaction:

All foreign official determinations share a common theme: they are fact-intensive, context-heavy inquiries. Whether a company is determining if an entity qualifies as an instrumentality or an individual is acting on behalf of a foreign government, the process is the same. The company must gather all the facts necessary to address the multifactored tests outlined by the DOJ and courts. In addition, the company must document its due diligence process, including a written analysis demonstrating the steps it has undertaken to determine whether the individual qualifies as a foreign official under the FCPA.

Contractual provisions are a critical component of the compliance process. For example, to ensure a third party will not be considered a “foreign official,” a company may seek representations from the individual that he or she is not a foreign official, has no official role in the foreign government’s decision-making processes that could influence business opportunities for the company, and is not working for or on behalf of the foreign government.

If a company intends to retain a third party that does work for or on behalf of a foreign government, extra precautions will be necessary. Specifically, employees of the entity performing work for or on behalf of the government must be walled-off from the employees working for the company. The “walling-off” process must be formalized in writing and employees must agree, in writing, that they will abide by these preventative measures.

When an entity’s status as an SOE or individual’s relationship with a foreign government is in question, it is wise to obtain a local legal opinion to ensure these questions are answered. It may also be feasible to obtain a letter from the foreign government, attesting to its status as an SOE or relationship with a particular individual.
Although this step may not be necessary in every instance, the DOJ has expressed approval of arrangements under which the company has disclosed sensitive relationships to the foreign government. For example, when a company retained a consultant that frequently acted for or on behalf of a foreign government, the DOJ acknowledged that the company’s disclosure of the relationship to the foreign government was a factor that influenced its approval of the arrangement.

It is critical that employees and third parties receive training regarding who qualifies as a foreign official under the FCPA. Although training employees is an important first step, in most instances third parties (consultants, agents, brokers) will interact with the potential foreign official. Because the “foreign official” analysis is so fact-intensive, it is critical that employees and third parties have more than a passing understanding of this issue. Consequently, robust training for third parties is necessary.

Given the risks associated with providing gifts, hospitality or even payments to potential foreign officials, companies should integrate the multi-factored “foreign official analyses” into their compliance programs. Because the risks may be heightened in certain countries and industries, transaction monitoring and the testing of internal controls and compliance procedures is also critical.

Companies should take notice of the guidance provided by the courts and government and integrate the “foreign official analysis” into their compliance programs. This is particularly important for companies that do business with SOEs in high-risk jurisdictions. Because these multi-factored analyses can be complicated, companies should strongly consider handling them in consultation with legal counsel.

For additional guidance on this issue, please contact TRACE at info@TRACEinternational.org.

About TRACE

TRACE International and TRACE Incorporated are two distinct entities with a common mission to advance commercial transparency worldwide by supporting the compliance efforts of multinational companies and their third party intermediaries. TRACE International is a non-profit business association that pools resources to provide members with anti-bribery compliance support while TRACE Incorporated offers both members and non-members customizable risk based due diligence, anti-bribery training and advisory services. Working alongside one another, TRACE International and TRACE Incorporated offer an end-to-end, cost-effective and innovative solution for anti-bribery and third party compliance.

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