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Clearing Up the Murky Waters Surrounding Whether (and When) Aboriginal Community and Other Tribal Leaders Can Create FCPA Liability

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One of the many definitional challenges facing Foreign Corrupt Practices Act practitioners worldwide is whether and under what circumstances traditional authorities, such as aboriginal ''band'' (otherwise referred to as ''tribal'' or ''traditional authority'') leaders, who routinely exercise considerable influence over business matters, qualify as ''foreign officials'' under the FCPA.[1] This is a particularly apt question for companies seeking to pursue mining interests in Canada, where numerous self-governing aboriginal communities (including First Nations, Métis and Inuit peoples) hold rights to mineral-rich areas.

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Lots of Deals With Aboriginal Communities, But No DOJ Guidance

Indeed, since 1974, mining companies have negotiated hundreds upon hundreds of formal—and informal—agreements with aboriginal communities.[2] Unfortunately, the Department of Justice has not helped alleviate confusion regarding the FCPA's application to such circumstances.

While surprisingly little has been said or written on this topic, past analysis has tended to conclude that traditional authorities should by default be treated as ''foreign officials'' even with respect to payments tied to the application of their *ex officio* authority. This cautious advice is familiar to those accustomed to wading the muddy waters of the FCPA.

However, recent developments, including broad Justice Department guidance, persuade us that it is time for a nuanced assessment of this increasingly commonplace challenge.

Wading into the FCPA's Definitional Morass

As at least one court and numerous lawyers have noted, the FCPA is no model of clarity.[3] For example, its anti-bribery provisions define a ''foreign official'' as:

[1] 15 U.S.C. § 78dd-1.

[2] THE MINING ASSOCIATION OF CANADA: ABORIGINAL AFFAIRS, http://mining.ca/our-focus/aboriginal-affairs.

[3] See *United States v. Kay*, 359 F.3d 738, 744 (5th Cir. 2004) (acknowledging the FCPA's ''ambiguity'').

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> 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.[4]

So where do traditional authorities such as tribal leaders fit under this jumbled string of words? Neither the plain language nor the FCPA's legislative history provides a clear answer. Nor have the FCPA's enforcers offered an explanation of the law's reach that might help clarify who qualifies as a foreign official. In the absence of clear language or guidance, courts are left to treat such issues as questions of fact dependent on multiple factors.[5]

Indeed, the DOJ and the Securities and Exchange Commission recently released FCPA guidance that is silent on the issue of the status of traditional authorities, such as tribal leaders. This signals continued reliance on an expansive (some would say largely untethered) definition of ''foreign official.'' According to the FCPA's twin enforcers, ''the [act] broadly applies to corrupt payments to 'any' officer or employee of a foreign government to those acting on the foreign government's behalf,'' which includes ''low-ranking employees and high-level officials alike.''[6] Such a broad proclamation offers scant comfort to practitioners tasked with providing clients practical, reliable guidance regarding the FCPA's application to difficult-to-categorize figures such as tribal leaders.

Teasing Out the Answer To What Brings Aboriginal Leaders Under the FCPA Umbrella

Perhaps the best direction the DOJ has yet offered on this question is found in a Sept. 18, 2012, ''Opinion Release'' concerning the hiring of a member of a royal family of an undisclosed foreign country as a consultant to a U.S. company doing business in that country. The unnamed royal family member, who held no position in his country's government, was hired to, among other things, introduce the U.S. company to the foreign country's embassy, advise the company on cultural-awareness issues in dealing with the country's officials and businesses, and identify business opportunities in the country. The DOJ opined that ''the royal family member does *not* qualify as a foreign official . . . *so long as* the royal family member does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family.''[7]

The DOJ further observed, ''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.' ''[8] Rather, ''the question requires a fact-intensive, case-by-case determination'' turning on a list of explicitly non-exhaustive 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 royal succession);
- the likelihood that an individual would come to hold such a position;
- an individual's ability, directly or indirectly, to affect governmental decision-making; and
- ''numerous'' other factors.[9]

This broad analytical approach suggests how the DOJ is likely to assess the status of traditional authorities in the future. And courts, left with little lawmaker guidance, no doubt will follow suit.

The enforcers can also be expected to look for evidence of connections between a foreign government and a leader's tribe. For example, prosecutors in *United States v. Esquenazi* obtained the conviction on FCPA charges of a defendant who allegedly paid bribes to the employees of a Haitian telecommunications company partially owned and purportedly controlled by the Haitian government in exchange for credits and reduced rates.[10] (In the follow-up trial, the government curiously changed tack and described the defendants as mere ''extortion victims.'') The legal theory underlying the conviction was that the bribed employees equated to ''foreign officials.'' As evidence, prosecutors and the trial court pointed to the Haitian government's undefined ''close relationship'' with the company.

The U.S. Court of Appeals for the Eleventh Circuit subsequently affirmed the conviction. In its ruling, the court endorsed this decidedly aggressive definition of ''foreign official'' while at the same time rejecting the prosecution's notion that ''any'' governmental involvement in an otherwise-private business immediately converts that business into an ''instrumentality of a foreign government'' (which would render all of the business's employees, including the janitor and security guards, ''foreign officials'').[11]

Comparison with U.S. case law regarding bribery of domestic public officials reinforces this position. In *United States v. Boots*, the First Circuit considered the status of officials of American Indian tribes with respect

[4] 15 U.S.C. § 78dd-2(h)(2)(A).

[5] See, e.g., *United States v. Carson*, No. 8:09-cr-00077, 2011 WL 5101701, *3-4 (C.D. Cal. May 18, 2011) (holding that ''the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact,'' and articulating non-exhaustive factors).

[6] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), at 20, available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf. See also 07 WCR 871 (11/16/12).

[7] Opinion Procedure Release No. 12-01 at 1 (emphasis added).

[8] Id. at 5 (emphasis added).

[9] Id.

[10] *United States v. Esquenazi*, No. 1:09-cr-21010 (S.D. Fla. Oct. 25, 2011).

[11] *United States v. Esquenazi*, 752 F.3d 912, 09 WCR 342 (11th Cir. 2014), cert. denied, No. 14-189, 09 WCR 703 (U.S. Oct. 6, 2014). In the interest of full disclosure, co-author Funk was lead appellate counsel representing Joel Esquenazi pro bono before the Eleventh Circuit. Funk, however, was not involved in Esquenazi's trial.

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to domestic bribery statutes.[12] The court held that an official of Maine's Passamaquoddy Tribe qualified as a ''public servant'' under local bribery law because relevant state legislation treated American Indian tribes as the approximate equivalents of municipalities.[13] Thus, each tribe's officials qualified as ''public servants'' to the same extent that would be true of officials of a city or town.[14] Although imperfect, the analogy between tribal leaders under the FCPA and officials of American Indian tribes is apt in the *Boots* case. Whether the enforcers and courts will draw on such an analogy in their efforts to identify ''foreign officials'' under the FCPA remains to be seen. If they do, the result would reinforce a functional approach to assessing whether a tribal leader is operating as a foreign official. This functional approach would pivot on whether the leader exercises authority based on local law, traditional or ceremonial status, or his or her role as a community adviser.

So What Does it Take For an Aboriginal Community Leader To Be a 'Foreign Official' Under the FCPA?

Setting aside the broader systemic and due process question of the government forcing the public to read the legal tea leaves, the above analysis provides some fairly concrete factors to consider in assessing whether a traditional aboriginal community authority, such as the leader of a First Nations band, potentially qualifies as a foreign official under the FCPA:

- **Government Membership/Agency?** Does the traditional authority hold him/herself out as a member of, or agent for, the foreign government, whether at the national, regional, provincial or municipal level?
- **Government-Granted Privileges or Obligations?** What are the traditional authority's privileges and obligations under applicable local law?
- **Formal/Actual Status?** What is the traditional authority's formal and *de facto* status?
- **''Employer-Employee'' Relationship?** Can the traditional authority be said to be an employee of a state-owned or -controlled entity or otherwise connected to a foreign official?
- **Perform Traditional Governmental Functions?** Does the traditional authority perform purely ceremonial functions, or is he or she empowered to perform traditional governmental functions (such as officiating at marriages, adjudicating land and other disputes, etc.)?
- **Granted Discretionary Authority?** Is the traditional authority's permission or approval required by law (or in practice) to obtain permits, concessions or rights from the foreign government?
- **Compensation Provided?** How does the traditional authority earn compensation, and from whom is it received?
- **Tribe Subsidized or Administered by Government?** Does a foreign government subsidize or administer the tribe or other traditional community?

Definitional Certainty Will Continue To Be Elusive, But This Is a Start

Those looking for a bright-line rule allowing for predictable outcomes will be unsatisfied by the foregoing. Regrettably, definitive answers are in short supply. At a minimum, the reader is now armed with relevant questions to ask, the answers to which will help you provide your client with intelligent advice.

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[12] See *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), overruled in part by *Pasquantino v. United States*, 544 U.S. 349 (2005).

[13] Id. at 590-91.

[14] Id.