

Reading a Crystal Ball? Guidance on Instrumentality under the FCPA-Part I

One of the criticisms of the Foreign Corrupt Practices Act (FCPA) is that it provides little guidance as to what constitutes an instrumentality under the Act and attendant question of who is a foreign governmental official. One of the five points raised by the US Chamber of Commerce in its lobbying efforts to amend the FCPA is on this issue. In the Chamber's White Paper, authored by Andrew Wiessmann and Alixandra Smith, entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*", they wrote that this lack of statutory guidance has led US companies to have "no way of knowing whether the FCPA applies" to a transaction because there is allegedly no way to know if a foreign governmental official is involved.

The authors suggest that the definition of an instrumentality and foreign governmental official be more clearly defined to include such information as (1) "the percentage ownership by a foreign government that will qualify a corporation as an "instrumentality"; (2) whether ownership by a foreign official necessarily qualifies a company as an instrumentality and, if so, (3) whether the foreign official must be of a particular rank or the ownership must reach a certain percentage threshold; and (4) to what extent "control" by a foreign government or official will qualify a company as an "instrumentality." At the House Judiciary Committee hearing in June, former Attorney General and current Debevoise & Plimpton partner Michael Mukasey followed this article up by urging a clarification of the definition of instrumentality.

As reported by the FCPA Professor, in a post entitled "*House Hearing-Overview and Observations*", Mukasey stated that the federal district court rulings in the Lindsey Manufacturing and Carson cases did very little to clarify the limits of the "foreign official" issue other than to say that whether an employee of an alleged state-owned or state-controlled enterprise could constitute a "foreign official" varied depending on the circumstances. Mukasey stated that leaving this issue in the hands of a jury in a criminal trial makes it "impossible" for companies to determine in advance who is a "foreign official" thereby increasing uncertainty and barriers to US business. According to Mukasey, "majority ownership is the most plausible threshold" for whether a state-owned or state-controlled enterprise constitutes a foreign government "instrumentality."

In addition to the definitions found in the Lindsey Manufacturing and Carson cases, there has been the district court's jury instruction in the recent trial of Joel Esquenazi and Carlos Rodriguez. This case involved the lengthy saga of the Haitian Telecom matter. In July, both men were found guilty by a Miami jury. In this post we will set out factors the courts have set out to define an instrumentality under the FCPA in these three cases. In our next post we analyze these factors to see what they have in common and what guidance, if any, that they may provide.

a. Lindsey Manufacturing

The court in *Lindsey Manufacturing* pointed to various characteristics of foreign government 'instrumentalities' that would provide coverage under the FCPA. The court listed five non-exclusive factors:

- The entity provides a service to its citizens, in many cases to all the inhabitants of the country.
- The key officers and directors of the entity are government officials 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 functions.

In *Lindsey Manufacturing* the foreign governmental entity at issue was the Mexican national electric company CFE. The trial court found that the entity had all of the characteristics listed in the five non-exclusive factors. It was created as a public entity; its governing Board consisted of high ranking government officials; CFE described itself as a government agency and it performed a function that the Mexican government itself said was a government function, the delivery of electricity.

b. Carson

In the *Carson* case, the court denied the “foreign official” challenge ruling that “the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact.” The court cited the following factual inquiries to determine whether a business entity constitutes a “government instrumentality” including:

- (1) The foreign state’s characterization of the entity and its employees;
- (2) The foreign state’s degree of control over the entity;
- (3) The purpose of the entity’s activities;
- (4) The entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- (5) The circumstances surrounding the entity’s creation; and
- (6) The foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

The Court specifically noted that the factors were non-exclusive and no single factor is dispositive. Later, in its opinion, the court added additional guidance with the following, “Admittedly, a mere monetary investment in a business by the government may not be sufficient to transform the entity into a government instrumentality. But when a monetary investment is combined with additional factors that objectively indicate that the entity is being used as an instrumentality to carry out governmental objectives that business entity would qualify as a governmental instrumentality.” Lastly, as it is a factual inquiry, the question will go to the jury.

c. Esquenazi and Rodriguez

In the Esquenazi and Rodriguez case, the defendants challenged the Department of Justice's (DOJ) foreign official interpretation and the DOJ. However, the district court denied the Motion to Dismiss with a short order which did not set out any factors for analysis. Nevertheless, the court did provide contested jury instructions on the definition. As reported by the FCPA Professor, the jury instructions were as follows.

“An ‘instrumentality’ of a foreign government is a means or agency through which a function of the foreign government is accomplished. State-owned or state-controlled companies that provide services to the public may meet this definition. To decide whether [Haiti Telecom] is an instrumentality of the government of Haiti, you may consider factors including but not limited to:

- (1) whether it provides services to the citizens and inhabitants of Haiti;
- (2) whether its key officers and directors are government officials or are appointed by government officials;
- (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans or revenue from government-mandated fees;
- (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and
- (5) whether Teleco is widely perceived and understood to be performing official or government functions. These factors are not exclusive, and no single factor will determine whether [Teleco] is an instrumentality of a foreign government. In addition, you do not need to find that all the factors listed above weigh in favor of Teleco being an instrumentality in order to find that Teleco is an instrumentality.”

Tomorrow we will compare these factors and attempt to distill a formula which can bring the clarity that the Chamber of Commerce so desires.

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© *Thomas R. Fox, 2011*