

Can a Libyan Rebel Be a Foreign Governmental Official under the FCPA?

What should a company do if it has done, or is on the verge of doing business in Libya? This is not a rare question here in Houston, the self-proclaimed “Energy Capitol of the World.” Many energy companies were faced with this issue beginning in March and continuing through to the present date. While there are perhaps Foreign Corrupt Practices Act (FCPA) issues regarding US entities which conducted business with the Libyan Sovereign Wealth Fund, another potential FCPA issue caught my eye recently. The said issue was published in the July 6, 2011 edition of the Wall Street Journal (WSJ) by reporters Christopher Rhoads and Neneda Salvaterra entitled, “*Prolonged Libya War Puts Defected Diplomats in Limbo*”.

The article discussed some of the travails of Libyan diplomats who either resigned their positions in the Libyan government or have defected since the conflict arose in the country earlier this year. The article reports that some have acted to support the rebels. So I began to wonder, can a person be a Foreign Governmental Official when the persons they are assisting, the Libyan rebels, are not recognized as the national government of a country.

Even if a government is under economic sanctions by almost every country in the world that does not necessarily mean that it is not the government of that country. However, as pointed out in the WSJ article, many of the former Libyan diplomats are carrying on activities which would seem to be governmental in nature. Here in the United States, former diplomats are helping to unfreeze certain Libyan assets and are working on asylum cases for Libyan citizens. Some diplomats are working to obtain diplomatic recognition for rebels, while others are still actively working at the United Nations.

Also what about the oil refineries which are in rebel control? If they were assets of the Libyan National Oil Company before the revolt do they remain State Owned Enterprises, or “instrumentalities thereof” under the FCPA? What about the rebels who may be negotiating to sell some of the oil to finance the revolt, are they foreign governmental employees? So once again, inspired by the FCPA Professor, we pose these questions in light of the two federal district court opinions, from earlier this spring, on whether a State Owned Enterprise is covered by the FCPA? Initially we will review the courts’ opinions to see if they provide any guidance.

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.

It would certainly appear that the Libyan rebels business interests do not fit either definition as set out above. However, it may be that the rebels are simply now the operators of the Libyan National Oil Company. So unlike the FCPA Professor, and Socrates, I do not know the answer, all I have is questions, questions and more questions...

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