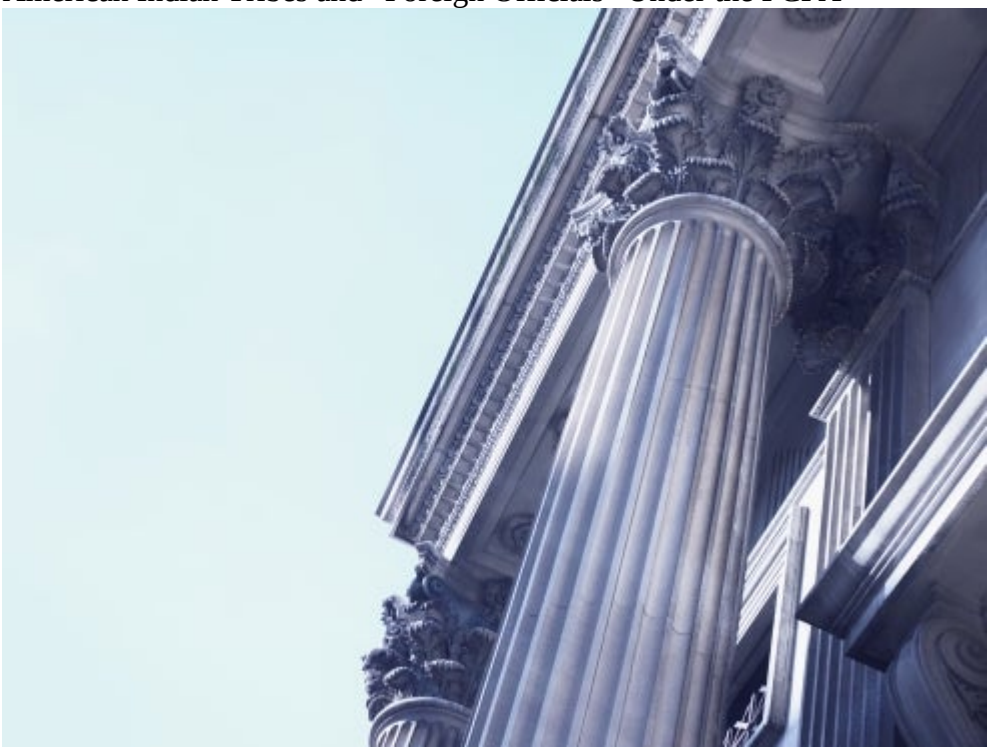
Blogs
August 12, 2019
American Indian Tribes and “Foreign Officials” Under the FCPA



One of the many challenges companies face when assessing their Foreign Corrupt Practices Act ("FCPA") liability is determining whether a potential business partner constitutes a "foreign government official" under the FCPA.

From a definitional perspective, the FCPA is far from a model of clarity on this point. *See* 15 U.S.C. § 78dd-2(h)(2)(A). By way of example, consider the compliance sandbars companies must circumnavigate to determine whether (and when) providing something of value to "traditional authorities" (including First Nations, Métis and Inuit peoples) could impose FCPA liability. This question often arises when U.S.-based companies are asked to make donations to American Indian tribes with whom they interact, or to do favors for individual members of a tribe. For instance, a tribal elder may ask that a company doing business with the tribe employ a certain tribal member, or provide an internship to the chief's son, etc. Under such circumstances, companies might find themselves evaluating the contemplated transaction through the amorphic lens of the FCPA. ***Understanding the Definitional Challenge*** Going back to basics, the FCPA's anti-bribery provisions define a "foreign official" as:

[A]ny 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. 15 U.S.C. § 78dd-2(h)(2)(A).

Do American Indian tribes fit under this definition? While there is little guidance on this analysis outside the United States, there is even less in the context of American Indian tribes, even though they possess much-discussed "sovereign status" in the United States. This is both surprising and concerning. Importantly, the Department of Justice ("DOJ") treats American Indian tribes as "domestic dependent nations" with which it maintains a "government-to-government" relationship. *See*, *Department of Justice Policy on Indian Sovereignty and Government-To-Government Relations with Indian Tribes (1995)*. Moreover, the DOJ recognizes that "Indian tribes as domestic dependent nations retain sovereign powers." *Id.* As such, the DOJ has committed to

strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance," and will "defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems." *Id.* ***No Applicable DOJ Guidance*** These policy positions create a compliance gray zone for American Indian tribes—and those who do business with them. Unfortunately, there is no DOJ guidance on the application of the FCPA in the American Indian context; and the issue has not been addressed by the courts. Of course, it may be that the lack of guidance on the issue reveals the position of the DOJ; namely, that it does not interpret the FCPA to apply to giving things of value to American Indian tribes. And if past practice is of little comfort, one could argue that American Indian tribal governments could not constitute "*foreign* officials" because of the cooperative and intermingled jurisdictional authority shared by the tribal government and federal law (not to mention the description of American Indian tribes as "*domestic* . . . nations"). ***In the Absence of Clear Guidance, Caution is the Order of the Day*** In the interest of caution, it would be wise to consider the traditional, fact-specific framework when considering whether an American Indian tribal member would constitute a "foreign official." This analysis is context- and fact-specific, but companies should assess whether the individual:

- **Government Membership/Agency?** Does the tribal member hold him/herself out as a member of, or agent for, the foreign government, whether at the national, regional, or municipal level?
- **Government-Granted Privileges or Obligations?** What are the tribe's privileges and obligations under applicable local law?
- **Formal/Actual Status?** What is the tribe's formal and *de facto* status?
- **"Employer-Employee" Relationship?** Can the tribal leaders be said to be an employee of a state-owned or controlled entity or otherwise connected to a foreign official?
- **Perform Traditional Governmental Functions?** Do tribal leaders 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 tribe's permission or approval required by law (or in practice) in order to obtain permits, concessions or rights from the U.S. Government?
- **Compensation Provided?** How does the tribe 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?

This list is not exhaustive. As noted, much will depend on the unique circumstances of the interaction. But the companies we have spoken with concerning this issue are right to raise a red flag. In sum, it does not appear likely that the DOJ would bring an FCPA action in relation to activities between American companies and American Indian tribes. While American Indian tribes are treated as "sovereign," they are also largely considered "domestic." They are not treated as a wholly stand-alone foreign government and this significantly reduces the likelihood that there would be any FCPA liability (though it is also possible that a particularly aggressive prosecutor may be willing to attempt this novel application of the Act). Rather than the FCPA, it is other state bribery laws, as well as the US Travel Act, that are much stronger contenders for risk in relation to interactions with American Indian tribes.

Authors

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