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FCPA Update: Eleventh Circuit Defines "Instrumentalities" of Foreign Governments

On May 16, 2014, the Eleventh Circuit issued its decision in *United States v. Esquenazi*, an important ruling that provides guidance as to what types of foreign entities may constitute "instrumentalities" of a foreign government under the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA").[1] Given the paucity of decisional law interpreting the FCPA, the Eleventh Circuit's decision in *Esquenazi* is likely to have substantial influence on other courts addressing the issue.

In affirming two criminal convictions, the Eleventh Circuit defined an instrumentality under the FCPA to be "an entity controlled by the government of a foreign country" that "performs a function the controlling government treats as its own."[2] The Eleventh Circuit identified a list of factors that should be examined by courts or juries when applying this definition.

The Eleventh Circuit's definition of instrumentalities provides useful guidance for practitioners and for companies that do business internationally. The factors identified by the court should be taken into consideration by companies formulating FCPA compliance programs. At the same time, this decision does not represent a major shift in the law, and some degree of uncertainty as to the FCPA's scope remains under the multi-factor analysis adopted by the Court.

Background on "Instrumentalities" Under the FCPA

Companies conducting business abroad have long faced a lack of clarity as to the scope of the FCPA's anti-bribery provisions when doing business with entities that have a connection or relationship with a foreign government but are not departments or agencies of that government. In many countries, certain services are provided by government-owned or government-controlled entities, where those services would be provided by private enterprise in the United States.

The FCPA prohibits the payments of bribes to "foreign officials,"[3] which are defined as "any officer or employee of a foreign government or any department, agency or *instrumentality* thereof."[4] However, the statute does not define the term "instrumentalities," and there is little case law addressing the term.

In its recent FCPA guidance, the U.S. Department of Justice offered a broad definition of instrumentalities, which can include "state-owned" and "state-controlled" entities.[5] The Department of Justice noted that the determination of whether a particular entity constitutes an instrumentality requires a fact-specific analysis of an entity's "ownership, control, status, and function."[6] The Department of Justice provided a non-exclusive list of eleven factors that it recommends considering when evaluating whether an entity is an instrumentality.[7] The federal courts have had few occasions to weigh in on this guidance.

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[1] *United States v. Esquenazi*, No. 11-15331 (11th Cir. May 16, 2014).
[2] *Id.* at 20.
[3] 15 U.S.C. § 78dd-2(a).
[4] *Id.* § 78dd-2(h)(2)(A) (emphasis added).
[5] *See* Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, FCPA: A Resource Guide to the Foreign Corrupt Practices Act, at 20–21 (2012) ("FCPA Guide"), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
[6] *Id.* at 20.
[7] *Id.*

The Eleventh Circuit Defines "Instrumentalities"

In *United States v. Esquenazi*, the Eleventh Circuit defined instrumentalities under the FCPA in the course of affirming the convictions of two individuals for FCPA violations and other crimes.[8] The defendants were co-owners of a Florida company and were accused of providing bribes to officials at Telecommunications D'Haiti, S.A.M. ("Teleco") in Haiti in exchange for reductions in the company's bills. The primary issue on appeal was whether Teleco was an instrumentality of Haiti under the FCPA. The Eleventh Circuit stated that it was mindful of the need for "*ex ante* direction about the definition of instrumentalities" for both corporations and the government.[9]

The Eleventh Circuit defined an instrumentality as having two elements: (1) the entity is "controlled by the government of a foreign country" and (2) the entity "performs a function the controlling government treats as its own."[10] The Eleventh Circuit described each of these determinations as "fact-bound questions," and identified a non-exhaustive list of factors to be considered for each element.[11]

With respect to the first element, the Court identified the following factors as relevant to determining whether a company is "controlled" by a foreign government:

- 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 government fisc;
- The extent to which the government funds the entity if it fails to break even; and
- The length of time these indicia have existed.[12]

On the second element – whether an entity performs a function that a foreign government treats as its own – the Court identified the following relevant factors:

- 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 governmental function.[13]

In formulating these factors, the Eleventh Circuit relied upon the OECD Anti-Bribery Convention and commentaries.[14] The Court found the Convention instructive because Congress amended the FCPA in 1998 to implement the United States' obligations under the Convention and because federal statues should be construed to ensure compliance with the United States' international obligations.[15]

Applying these factors, the Eleventh Circuit ruled that there was sufficient evidence for the jury to find that Teleco was an instrumentality of Haiti.[16] The evidence showed, among other things, that: Teleco had been granted a monopoly over telecommunications service in Haiti; it had received various tax advantages; the company was 97 percent owned by Haiti's national bank; the company's director and board were chosen by the Haitian president; and the company was widely considered to be a public administration by the government and others.[17] The Eleventh Circuit found that

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[8] *Esquenazi*, at 20.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 21.
[13] *Id.* at 22–23.
[14] *Id.* at 21, 23.
[15] *Id.* at 16–18.
[16] *Id.* at 27.
[17] *Id.* at 27–28.

Teleco would qualify as an instrumentality "under almost any definition we could craft."[18] The Court also ruled that the district court had properly instructed the jury regarding the meaning of an instrumentality under the FCPA.[19]

Implications of the Decision

Esquenazi is only binding on courts within the Eleventh Circuit, but due to the rarity of rulings in FCPA cases, particularly at the circuit-court level, this decision is likely to be an influential authority for other courts. The Eleventh Circuit noted in its decision that no other court of appeals has defined instrumentalities under the FCPA.[20]

Many of the relevant factors identified by the Eleventh Circuit overlap with factors previously identified in guidance from the Department of Justice,[21] and thus the *Esquenazi* decision should not lead to a dramatic shift in how companies interpret the law. But companies that do business internationally should take into consideration the factors identified by the Eleventh Circuit when designing compliance programs and evaluating risks of FCPA violations. Notwithstanding the Eleventh Circuit's predictions that it will be "relatively easy" for courts and businesses to apply these factors,[22] this multi-factor analysis does not provide bright-line rules and therefore some ambiguity as to whether an entity is an instrumentality will remain.

Finally, companies conducting business abroad should also remember that even when dealing with private entities that are not an instrumentality of a foreign government, bribery can still constitute a violation of other laws, including the FCPA's accounting provisions, the Travel Act, anti-money laundering laws, and other local laws in the country in which the bribery occurs.[23]

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[18] *Id.* at 20.
[19] *Id.* at 24–26.
[20] *Id.* at 10.
[21] *Cf*. FCPA Guide at 20.
[22] *Esquenazi*, at 19 n.8.
[23] FCPA Guide at 21.

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