

ADVISORY | Anti-Corruption

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**UNITED STATES V. ESQUENAZI: U.S. COURT OF APPEALS CLARIFIES FCPA'S
"FOREIGN OFFICIAL" STANDARD**

On May 16, 2014, in *United States v. Esquenazi*, the U.S. Court of Appeals for the Eleventh Circuit issued the first appellate opinion considering the scope of the term “foreign official” under the FCPA. In the long-awaited opinion, the Eleventh Circuit affirmed the district court’s conclusion that a foreign state-owned telecommunications company was a government “instrumentality,” and its employees therefore were foreign officials for purposes of the statute. In the process, the court defined a government “instrumentality” under the FCPA’s anti-bribery provisions as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” The court noted that the meaning of “control” and of “a function the government treats as its own” are “fact-bound questions,” but proceeded to offer an illustrative list of factors to be considered in making this fact-specific determination.

The *Esquenazi* factors will guide future courts and enforcement authorities when assessing whether employees of non-U.S. state-owned companies are “foreign officials” under the FCPA. As a practical matter, however, the court’s “instrumentality” definition should have limited practical impact on the day-to-day decisions companies make concerning their efforts to comply with the FCPA and other anti-corruption laws. The Eleventh Circuit’s standard is broadly in keeping with how district courts, enforcement authorities, and practitioners have previously viewed the issue. And, because other anti-bribery laws in the U.S. and other countries apply to private sector bribery as well as public sector corruption, companies increasingly are framing their anti-corruption compliance programs broadly enough to cover commercial bribery as well as bribery of government officials, thus rendering the FCPA “foreign official” analysis less relevant to the practical decision-making that companies exercise in their anti-corruption compliance programs.

THE ESQUENAZI DECISION AND THE MEANING OF “FOREIGN OFFICIAL”***Esquenazi, Rodriguez, and Payments to Haiti Teleco Officials***

Joel Esquenazi and Carlos Rodriguez co-owned Terra Telecommunications Corp., a Florida company that purchased phone time from foreign vendors and resold the minutes to customers in the United States. Esquenazi was Terra’s president, CEO, and majority owner, and Rodriguez was executive vice president and minority owner. Terra frequently purchased phone time from Telecommunications D’Haiti, S.A.M., known as “Haiti Teleco,” a Haitian company that from its formation had a monopoly on phone service in Haiti. By the 1970s, Haiti Teleco was 97% owned by the Haitian government, which appointed all of its board members.

As of 2001, Terra owed Haiti Teleco over \$400,000, and certain officials at Haiti Teleco agreed to Esquenazi’s offer to make side payments in exchange for easing the debt. Over time, Esquenazi and Rodriguez paid more than \$890,000 in bribes to employees of Haiti Teleco in exchange for various favors, including preferred rates and continued business with Terra.

District Court Finds Defendants Guilty, Issues Longest Prison Sentence in FCPA History

In August 2011, Esquenazi and Rodriguez were convicted on FCPA, money laundering, and conspiracy charges in connection with their payments to Haiti Teleco officials. In October 2011, the district court sentenced Esquenazi to a fifteen-year prison term, which remains the longest individual sentence in FCPA history. Rodriguez was sentenced to seven years.

The defendants appealed to the Eleventh Circuit Court of Appeals, arguing that the FCPA's statutory term "instrumentality" includes at most only foreign, state-owned entities performing functions similar to government departments or agencies. Relying on the FCPA's legislative history, they pointed to draft bills that Congress considered, but ultimately rejected, in which state-owned or state-controlled entities were specifically included as "instrumentalities."

Eleventh Circuit Affirms, Concluding Haiti Teleco Is a Government "Instrumentality"

On May 16, 2014, the Eleventh Circuit affirmed the convictions. The court began by looking to the plain language of the term "instrumentality," concluding that "dictionary definitions foreclose Mr. Rodriguez's contention that only an actual part of the government would qualify as an instrumentality." The court also rejected the defendants' argument that the court should follow the Eleventh Circuit's narrow interpretation of the term "instrumentality" in the Americans with Disabilities Act, emphasizing the different contexts of the term in each statute.

The court next turned to the 1998 amendments to the FCPA, intended to implement the then-recently-ratified OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The court noted that the OECD Convention covers "enterprise[s] . . . over which a government . . . exercise[s] a dominant influence" that perform a "public function." Because Congress did not include in its 1998 amendment any related change to the definition of "foreign official," the court concluded that Congress must have already considered the statutory definition to cover officials of such enterprises, of which Haiti Teleco certainly is one. The court further noted that construing the "instrumentality" definition to cover Haiti Teleco avoids tension with the United States' international law obligations under the OECD Convention.

The court then proceeded to define "instrumentality" under the FCPA as "an entity [i] controlled by the government of a foreign country [ii] that performs a function the controlling government treats as its own." The court acknowledged that "what constitutes control and what constitutes a function the government treats as its own are fact-bound questions." Drawing on OECD guidance and U.S. Supreme Court case law, the court offered a non-exclusive list of factors for answering these "fact-bound questions."

In determining government control, the court suggested looking at the following factors:

- the "foreign government's formal designation of that entity;"
- "whether the government has a majority interest;"
- "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 governmental fisc [treasury], and, by the same token, the extent to which the government funds the entity if it fails to break even;" and
- "the length of time these indicia have existed."

In deciding if an entity performs a function the government treats as its own, the court suggested examining:

- “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 country; and
- “whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.”

The Court concluded that the district court’s jury instructions were broadly consistent with this analysis, and rejected the defendants’ various additional challenges.

IMPLICATIONS OF THE *ESQUENAZI* DECISION

The Eleventh Circuit’s decision contained no surprises and likely will have limited practical impact on how companies approach FCPA compliance. The four-prong standard developed by the court is broadly consistent with the views set forth by the several U.S. district courts that have considered similar questions, and by the U.S. Department of Justice and the Securities and Exchange Commission in their written guidance concerning the scope of the FCPA. A number of open questions remain concerning the FCPA “instrumentality” standard – the facts of the *Esquenazi* case presented a particularly strong case for a finding that the Haitian telecommunications entity in question was an “instrumentality” of the Haitian government, given the close control that the Haitian government seems to have had over the entity’s management. It remains unclear from the *Esquenazi* opinion, for instance, whether mere majority ownership by a government, absent more, is sufficient to trigger the FCPA anti-bribery provisions.

Nevertheless, companies are not likely during the normal course of business to undertake the case-by-case instrumentality analysis the *Esquenazi* court propounds, as the question whether an entity constitutes a government “instrumentality” is of decreasing relevance to corporate compliance programs, most of which clearly prohibit both commercial and government bribery. This case will likely have its greatest impact in a handful of criminal cases that come to the attention of the Department of Justice, in which companies and individuals invoke the decision to argue that a particular bribe recipient, employed by a government-owned company, should not be considered a “foreign official” under the FCPA.

The *Esquenazi* ruling, which concerns the FCPA’s anti-bribery provisions, does not affect the FCPA’s accounting provisions, which apply generally to conduct by any company that lists its securities on U.S. exchanges or is otherwise required to file periodic reports to the U.S. Securities and Exchange Commission (together with its controlled affiliates). The accounting provisions present potential risk to companies even in the case of commercial bribery, as frequently commercial bribery in a corporate organization will go hand-in hand with weaknesses in accounting procedures and internal controls, as well as bribery of officials of foreign governments and their instrumentalities. Moreover, many other laws in the U.S. and other countries prohibit commercial bribery. Some of those countries have been aggressively enforcing their commercial bribery laws, making the distinction under the FCPA between “foreign officials” and other counterparties less relevant to anti-corruption compliance.

If you have any questions concerning the material discussed in this client advisory, please contact the following senior members of our Global Anti-Corruption group:

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