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Antibribery/FCPA Alert

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Supreme Court Declines to Review Definition of a "Foreign Official" Under the Foreign Corrupt Practices Act: 11th Circuit's Definition Stands

On October 6, 2014, the Supreme Court declined to review the 11th Circuit's decision in *U.S. v. Esquenazi, et. al.*, leaving standing the appellate court's expansive definition of "foreign official" under the Foreign Corrupt Practices Act (FCPA). The 11th Circuit's May 16, 2014 decision defined the term "instrumentality of a foreign government"—a term included in the FCPA's definition of "foreign official," but left undefined by the statute.

The appropriate definition of the term arose as a key issue at trial in the context of the definition that would be included in jury instructions. The defendants argued for a narrow reading of the term that would apply only to non-state owned entities that "exist for the sole and exclusive purpose of performing a public function traditionally carried out by the government" and are thus "similar to political subdivisions." The prosecution contended that this narrow reading of the term would render it superfluous by encompassing only entities captured by other prongs of the FCPA's definition of a "foreign official." Instead, the prosecution argued that the term "instrumentality" should be interpreted to include both state-owned and non-state owned entities that perform functions on behalf of the government, beyond just entities that are akin to state agencies.

In affirming the defendants' convictions for violations of the FCPA, the 11th Circuit adopted a more expansive definition consistent with the prosecution's position, holding that the FCPA's bribery prohibition extends to payments offered or made to officers or employees of entities "controlled by the government of a foreign country that performs a function the controlling government treats as its own."

With the Supreme Court's denial of the defendants' writ of certiorari, the 11th Circuit's reading of "instrumentality" under the FCPA stands. The 11th Circuit's decision is consistent with several prior U.S. district court decisions addressing the meaning of "foreign official" under the FCPA, and, in the wake of the Supreme Court's denial of certiorari, now serves as the most authoritative opinion on the topic.

Case Background

Defendants Joel Esquenazi and Carlos Rodriguez were convicted on August 5, 2011 of violations of the FCPA, conspiracy to violate the FCPA and money laundering. Esquenazi and Rodriguez were officers and principal owners of Terra Telecommunications Corp. ("Terra"), a Florida-based company that sold phone minutes purchased from foreign vendors to U.S. customers. Esquenazi and Rodriguez were convicted of paying approximately $75,000 in bribes to officers of Telecommunications D'Haiti, S.A.M. ("Teleco"), one of their primary vendors, in exchange for savings of more than $2 million on Terra's purchases of phone minutes from Teleco.

During trial, both parties offered a host of competing documentary, testimonial and expert evidence to address the question of whether Teleco functioned as an instrumentality of the Haitian government. The prosecution presented evidence that Teleco was owned and controlled by the Haitian government at the time of the defendants' bribery payments, pointing to tax advantages and monopoly power afforded to Teleco by the Haitian government, as well as an insurance policy acquired by the defendants that was only available for contracts with foreign governments. The defendants presented evidence to argue that although the Haitian government partially owned Teleco and appointed its directors and officers, Teleco was not an "instrumentality" of the Haitian government because it was not operating as "a department or agency of the Haitian government." To support this argument, the defendants cited the absence of any formal recognition of Teleco as a public company in either public laws or the company's by-laws.

Based on the evidence presented, the jury found that Teleco constituted an "instrumentality" of the Haitian government, and therefore Esquenazi and Rodriguez's illicit payments to Teleco officials constituted bribes paid to foreign officials in violation of the FCPA. The trial court denied the defendants' motion for a new trial based on declarations from the Haitian government provided after the conclusion of the trial.

Following trial, Esquenazi and Rodriguez challenged their convictions, arguing, in part, that the FCPA's definition of "foreign official" is unconstitutionally vague. The defendants also challenged the definition of "instrumentality of a foreign government" under which the trial court instructed the jury it could consider factors including ownership and management of Teleco, the nature and recipients of services provided by the entity and the Haitian legal status of the entity.

11th Circuit's Definition of a "Foreign Official" Under the FCPA

The FCPA prohibits the payment of bribes to any foreign official, defined as "any officer or employee of a foreign government, or any department, agency or *instrumentality thereof*." 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis added).

Prior to the 11th Circuit's opinion, several U.S. district courts addressed the scope and meaning of "instrumentality" within the FCPA's definition of a foreign official. In *U.S. v. Noriega* and *U.S. v. Shea*, federal judges in the Central District of California and the Southern District of Texas, respectively, held that the term "instrumentality" for purposes of the FCPA does not exclude state-owned entities. In *U.S. v. Carson*, a Central District of California case, the court further developed the definition of "instrumentality," holding that the term's applicability is a question of fact, and identifying several factors relevant to the analysis, including state ownership and control, as well as whether the entity is one "through which a government achieves an end or purpose or carries out the functions or policies of the government."

In the *Esquenazi* case, the 11th Circuit became the first federal appellate court to address the question of what the phrase "instrumentality of a foreign government" means for purposes of the FCPA's definition of a foreign official. The 11th Circuit's analysis paralleled that of the district court in *U.S. v. Carson*, drawing guidance from a variety of sources, including the plain meaning of the term "instrumentality," the legislative history of the FCPA, and the Organization for Economic Cooperation and Development's

(OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Bribery Convention"), entered into force under U.S. law on February 15, 1999.

Relying on these sources, the 11th Circuit defined an "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court explained that the inquiry is fact-based, and offered a set of instructive factors for consideration.

To determine whether a foreign government "controls" an entity, the 11th Circuit instructed courts and juries to consider the following factors:

- the foreign government's formal designation of the entity
- whether the foreign government has a majority interest in the entity
- the foreign government's ability to hire and fire the entity's principles
- the extent to which the entity's profits, if any, go directly to the governmental fisc
- the extent to which the government funds the entity if it fails to break even
- the length of time these indicia have existed.

To determine whether an entity performs a function the government treats as its own, the court instructed that the following factors should be considered:

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

Esquenazi and Rodriguez's Convictions Affirmed

Applying this newly-minted definition to Esquenazi and Rodriguez's case, the appellate court found the facts to be clear, despite the competing evidence presented at trial, and commented that "Teleco would qualify as a Haitian instrumentality under almost any definition we could craft." In reaching this conclusion, the court referenced several key pieces of evidence offered by the prosecution at trial, including expert testimony demonstrating that Teleco was 97 percent owned by Haiti's national bank at the time of the bribery payments, proof that Teleco's director and board members were chosen by members of the Haitian government, and a 2008 Haitian anti-corruption law citing Teleco as a public administration.

The 11th Circuit also affirmed the trial court's jury instruction, rejecting the defendants' contention that the instruction allowed the jury to find Teleco to be an instrumentality of the Haitian government because it was government-owned, without determining whether Teleco performs a government function.

The 11th Circuit affirmed Esquenazi and Rodriguez's sentences under the FCPA. Esquenazi was sentenced to serve 180 months in prison and Rodriguez was sentenced to serve 84 months. Both were ordered to pay more than $2 million in restitution. Esquenazi's sentence remains the longest prison sentence levied under the FCPA.

Take-Aways

The 11th Circuit's definition of an "instrumentality of a foreign government" sets out a test demanding a fact-intensive inquiry under factors ranging from an entity's highest level organization and intended function to its daily operations. Litigation in which a critical issue is whether an entity meets the "instrumentality" definition will require extensive factual discovery and proof in order to meet the demands of the test.

From a compliance perspective, the 11th Circuit's definition likely means more exacting due diligence. The fact-specific analysis called for under the definition relates to both high-level organizational and management questions as well as basic daily operations. Companies will be required to conduct increasingly detailed due diligence in order to understand and assess the nuances of ownership, management, legal, functional and daily operations of any entity with foreign government connections with which they do business to ensure that they are effectively assessing and mitigating risks in their compliance programs and business dealings.

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