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# "Instrumentality" Explained: The Eleventh Circuit Interprets the Scope of the FCPA (Foreign Corrupt Practices Act)

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In light of the Eleventh Circuit's recent Foreign Corrupt Practices Act ("FCPA" or "Act") decision in *U.S. v. Esquenazi*, 2014 U.S. App. LEXIS 9096 (11th Cir. Fla. May 16, 2014), entities doing business abroad should reevaluate their compliance programs to ensure that the full reach of the FCPA is taken into account. Specifically, in *Esquenazi*, the Eleventh Circuit addressed the meaning of the term "instrumentality" of a foreign government under the FCPA and essentially adopted the U.S. Government's broad interpretation of that term. In doing so, the Eleventh Circuit implemented a two-part test to determine whether an entity is an "instrumentality" under the Act, requiring both state control over the entity and the performance of a function the controlling state treats as its own. The Court then outlined a separate, non-exhaustive list of factors for each element of the test to aid in the fact-finder's analysis.

## *United States v. Esquenazi*: Background and Legal Issues

Joel Esquenazi and Carlos Rodriguez, corporate officers and owners of Terra Telecommunications Corp. ("Terra"), a Miami-based company were accused of carrying out a bribery scheme from 2001-2005, whereby Terra paid almost $1 million through shell companies to Haiti Teleco Directors, primarily in exchange for substantial reductions of Terra's debt obligations. The U.S. Government alleged that the scheme violated the FCPA because Haiti Teleco was an "instrumentality" of the Haitian government.

The FCPA, 15 U.S.C. §§ 78-1, *et seq*., prohibits certain classes of persons and entities from making payments to foreign officials to gain improper advantage or retain business. The Act's anti-bribery provisions apply to issuers, domestic concerns (a broad term encompassing U.S. citizens, U.S.-based companies, and permanent residents), and foreign parties that use interstate commerce corruptly in furtherance of such payments. *Id.* The Act imposes both criminal and civil penalties on corrupt payments to foreign officials. While the FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof …," it does not define "instrumentality." *See* 15 U.S.C. §§ 78dd-1-3 (2012).

The *Esquenazi* defendants consistently argued that Haiti Teleco was not an "instrumentality" under the FCPA and that the individuals who received the alleged bribes were therefore not "foreign officials." While Haiti Teleco was majority-owned by the Haitian government and the Haitian

President executed direct control over the appointment of the Directors at Haiti Teleco who received the payments in question, the *Esquenazi* defendants argued that Haiti Teleco was not an "instrumentality" of the Haitian government because it was not "part of" the Haitian government and did not perform traditional, core governmental functions. In support of their argument, five days after the defendants were convicted, the U.S. Government received a declaration by the Haitian Prime Minister stating: "Teleco has never been and until now is not a State enterprise." *Esquenazi*, 2014 U.S. App. LEXIS 9096 at 9.

The District Court rejected defendants' arguments regarding the relationship of Haiti Teleco to the Haitian government, in both pre- and post-trial motions. On August 4, 2011, Esquenazi and Rodriguez were both convicted by a jury on a 21 count indictment, which included FCPA violations, money laundering, conspiracy, and mail and wire fraud charges. Esquenazi received a 15 year sentence, the longest in FCPA enforcement history. Rodriguez received a lesser, but significant, seven year sentence. The court also ordered both Rodriguez and Esquenazi to pay, jointly and severally, $3.09 million in forfeiture. Esquenazi and Rodriquez appealed to the Eleventh Circuit.

## The Eleventh Circuit's Two-Part Test

Before *Esquenazi*, the U.S. Government had successfully asserted that "instrumentalities" under the FCPA can include state-controlled enterprises, and that the FCPA's anti-corruption provisions were meant to apply broadly to include entities that were not traditional governmental bodies and/or did not perform core governmental functions.[1] *Esquenzai* is the first time a federal court of appeals addressed this issue.

The Eleventh Circuit essentially adopted the U.S. Government's position and 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."*Esquenazi*, 2014 App. LEXIS 9096 at 28. The Court acknowledged that this two-part question was necessarily a fact-based determination that required a case-by-case analysis. *Id*. To aid in the analysis, the Eleventh Circuit offered two non-exhaustive lists of factors – one for the first element of "control" and another for the second element of "function." *Id.* at 29-33. When suggesting factors, the Eleventh Circuit relied on the commentary to the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), which was ratified by the United States, and the approach taken by the U.S. Supreme Court in analogous contexts. *Id*.

Under the Eleventh Circuit's test, for the first element of control, fact-finders should consider:

- 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 governmental fisc, 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.

To determine the second element of function, fact-finders should consider:

- 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.

## The Path Forward

For business leaders and owners, the Eleventh Circuit's adoption of the U.S. Government's interpretation of the scope of the FCPA is significant. The Eleventh Circuit's decision potentially sweeps a large number of state-controlled enterprises into the purview of the FCPA's anti-bribery provisions. Notably, however, the Eleventh Circuit did not adopt a bright-line rule; it recognized that the analysis must be case specific and refused to hold that every state-owned entity is an "instrumentality" under the FCPA.

While some may argue this was a missed opportunity to clarify the scope of the FCPA, the Eleventh Circuit's two-prong test and list of factors provides fairly clear guidance for businesses seeking to develop risk-based compliance programs designed to identify and stop corrupt payments to foreign officials. While the weight and impact of each factor was not explicitly discussed by the Eleventh Circuit, companies doing business abroad now have an outline to follow endorsed by a U.S. Court of Appeals to help them determine whether foreign business partners or intermediaries should be considered "instrumentalities" of a foreign government. Accordingly, in light of the *Esquenazi* decision, it is advisable for companies to reexamine their anti-corruption policies and procedures to ensure that "instrumentalities" of foreign governments are correctly identified and flagged for ongoing FCPA compliance. At a minimum, the decision provides an opportunity for businesses to review their FCPA compliance programs to ensure that such programs take into consideration the factors described by the Eleventh Circuit.

A copy of the Eleventh Circuit's Decision in *U.S. v. Esquenazi* can be found at: http://www.ca11.uscourts.gov/opinions/ops/201115331.pdf.

[1] See Order, United States v. Carson, 2011 WL 5101701, *3 (C.D. Cal. May 18, 2011); United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).



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