Eleventh Circuit Finds FCPA Covers Bribes to State-Owned Enterprise

By Jessie K. Liu, Robert R. Stauffer and Michael W. Khoo

The United States Court of Appeals for the Eleventh Circuit handed down a significant decision on the scope of the Foreign Corrupt Practices Act (FCPA or the Act) on May 16, 2014, becoming the first federal appellate court to hold that the phrase "foreign government . . . instrumentality" is broad enough to include state-owned enterprises that provide commercial services, such as telephone services, as part of a public function. The Court largely approved the government's reading of the statute while rejecting the arguments of two defendants convicted for bribing officials of Haiti's government-owned telecommunications company.

I. BACKGROUND

The FCPA is directed at corrupt payments to foreign government officials rather than bribery of private individuals; however, the Act expressly reaches officials of an "instrumentality" of a foreign government. While the Act does not define the term "instrumentality," the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have long taken the position that the term is broad enough to encompass state-owned enterprises. The Eleventh Circuit's opinion vindicates that approach and paves the way for future enforcement actions concerning corrupt payments to officials at a wide array of state-owned entities, which could include such a wide variety of businesses as utilities, air carriers, hospitals, and resource extraction companies.

Defendants Joel Esquenazi and Carlos Rodriguez, were owners of Terra Telecommunications (Terra), a Florida-based company. In August 2011, Esquenazi and Rodriguez were convicted of seven substantive FCPA counts along with related money-laundering and conspiracy counts. The charges stemmed from a scheme to channel more than $800,000 through a series of shell companies to be ultimately paid over to officials at Telecommunications D'Haiti, S.A.M. (Teleco). In return, the Teleco officials improperly shaved more than $2 million off of Teleco's bills to Terra.

At trial and on appeal, Esquenazi argued that Teleco did not qualify as a foreign government instrumentality because it did not perform a traditional government functional "similar to a political subdivision."[1] Rodriguez took an even harder position, arguing that an "instrumentality of foreign government" must be "part of the foreign government itself."[2]

II. DEFINING "INSTRUMENTALITY"

The Eleventh Circuit, however, rejected the defendants' positions, holding that "[a]n 'instrumentality' under . . . the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[3] According to this formulation, there are two critical components: government control and public function.

A. Control

The Court held that assessing control is a fact-bound inquiry. However, the Court offered a non-exhaustive set of factors to guide the analysis: (1) the foreign government's formal designation of the entity; (2) whether the government has a majority ownership interest; (3) the government's authority to appoint and remove the entity's principals; (4) the extent to which the entity's profits are returned to the public fisc; (5) whether the

government supports an entity that is otherwise performing at a loss; and (6) the length of time these indicia have existed.[4]

With respect to these factors, the Court noted that Haiti's national bank owned 97 percent of Teleco and that the Haitian president appointed Teleco's director general and all members of its board of directors. This was sufficient evidence for a jury to find Teleco was controlled by the Haitian government.[5]

B. Public Function

As with control, the Eleventh Circuit also provided a list of potential factors to weigh in determining whether a state-owned enterprise performs a public function: (1) whether the entity has a monopoly over its functions; (2) whether the government subsidizes the entity; (3) whether the entity performs services for the public at large; and (4) whether the public and the government generally perceive the entity to be performing a governmental function.[6]

Again, the Court found the evidence was sufficient to establish that the provision of telecommunications services was a public function. In particular, Teleco was granted a monopoly over its functions and received numerous tax advantages that were not generally available to other commercial actors. In addition, an expert testified that Teleco was widely considered a "public administration" by the Haitian government and public.[7]

The Court expressly held that Teleco's provision of a commercial service—in this case, telecommunications services—"does not automatically mean it is not an instrumentality." In this respect, the opinion noted that the FCPA allows certain facilitating payments for routine administrative action and that the Act specifically identifies "providing phone service" as a routine governmental action.[8] Furthermore, the fact that certain goods or services are typically provided in the private market in the United States is not dispositive: "[T]o decide in a given case whether a foreign entity . . . is an instrumentality of that foreign government, we ought to look to whether that foreign government considers the entity to be performing a governmental function. And the most objective way to make that decision is to examine the foreign sovereign's own actions, namely, whether it *treats* the function the foreign entity performs as its own."[9]

III. COMPARISON WITH PAST DOJ AND SEC PRACTICE

The *Esquenazi* opinion closely tracks the government's past approach to bringing enforcement actions. The factors cited as evidence of "control" or "public function" substantially overlap with—and are often identical to—factors cited in the DOJ and SEC's joint *Resource Guide to the U.S. Foreign Corrupt Practices Act* (*Resource Guide*).[10]

The *Resource Guide* reflects the U.S. enforcement agencies' position that many governments "operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation."[11] Consistent with this view, the government has not been shy about bringing actions involving corrupt payments to doctors in state-owned hospitals,[12] officials of electric utility companies,[13] and employees of oil exploration companies.[14]

The Eleventh Circuit's opinion is therefore not likely to significantly change the nature of government enforcement actions. Its main effect will be to cement the government's position and perhaps embolden it to bring similar actions in the future. For companies that may have previously questioned whether the government's approach was too broad, the ruling also sets down a marker legitimating that approach and bolstering the factors DOJ and SEC have previously relied in assessing what entities constitute foreign government instrumentalities. Companies conducting business abroad should familiarize themselves with the *Resource Guide*'s discussion of state-owned enterprises in conjunction with studying the *Esquenazi* opinion.

IV. INTERPRETATION OF U.S. TREATY OBLIGATIONS

A final noteworthy point about the Eleventh Circuit's opinion is its frequent reliance on international treaty obligations in interpreting the FCPA. In 1998, the United States ratified the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). The same year, Congress amended the FCPA to bring it in line with the United States' obligations under the convention.

Based on this history, the Court reasoned that the Act should be construed to be compliant with the OECD Convention's prohibition of bribes paid to officials of "public enterprises." The commentaries to the OECD Convention explain that "[a] 'public enterprise' is any enterprise, regardless of its legal form, over which a government , or governments, may, directly or indirectly, exercise a dominant influence."[15] Although the 1998 amendments to the FCPA did not alter the definition of "instrumentality," the Court reasoned that Congress must have understood the term to sweep broadly enough to conform with the scope of the OECD Convention mandate: "We are thus constrained to interpret 'instrumentality' under the FCPA so as to reach the types of officials the United States agreed to stop domestic interests from bribing when it ratified the OECD Convention."[16]

As the Eleventh Circuit noted, it is not the first court of appeals to rely on the OECD Convention in interpreting the FCPA. The Fifth Circuit used a similar analysis in *United States v. Kay*[17] when it concluded that the Act's prohibition of bribery for the purpose of "obtaining or retaining business" should be read broadly in conformance with the OECD Convention's ban on bribes offered in return for any "improper advantage." Thus, the *Kay* Court reasoned the FCPA reached more than bribes paid in order to obtain a contract; it also outlawed efforts to evade customs duties or other taxes.

Given the lack of reported decisions construing the FCPA, the *Kay* and *Esquenazi* decisions suggest that the OECD Convention is a potentially important source of authority for resolving ambiguities in the Act. Companies may be well advised therefore to familiarize themselves with the convention and the United States' obligations thereunder.

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[1] Br. of Appellant Esquenazi at 32 (May 9, 2012).

[2] Br. of Appellant Rodriguez at 39 (May 9, 2012).

[3] *United States v. Esquenazi*, No. 11-15331-C at 20 (11th Cir. May 16, 2014).

[4] *Id.* at 21.

[5] *Id.* at 27-28.

[6] *Id.* at 23.

[7] *Id.* at 27-28.

[8] *Id.* at 14.

[9] *Id.* at 19 (emphasis original).

[10] Criminal Div., U.S. Dep't of Justice, and Enforcement Div., Sec. & Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 20 (Nov. 14, 2012).

[11] *Id.*

[12] Criminal Information, *United States v. AGA Medical Corp.*, No 08-cr-00172 (D. Minn. June 3, 2008).

[13] *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

[14] Order, *United States v. Carson*, No. 8:09-cr-000777, 2011 WL 5101701 (C.D. Cal. May 18, 2011).

[15] OECD Convention art 1.4, cmt. 14.

[16] *United States v. Esquenazi*, No. 11-15331-C at 18 (11th Cir. May 16, 2014).

[17] 359 F.3d 738, 753-55 (5th Cir. 2004).

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