

Federal Appellate Court Issues Broad Interpretation of Term “Instrumentality” Under FCPA

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On Friday, May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit issued a significant ruling addressing the definition of the term “instrumentality” as used in the Foreign Corrupt Practices Act of 1977 (the “FCPA”). *United States v. Joel Esquenazi and Carlos Rodriguez*^[1], involved a Miami telecommunications company, Terra Telecommunications (“Terra”), which re-sells international long distance telephone call time. The case also involved Terra co-owners, Joel Esquenazi and Carlos Rodriguez, who allegedly participated in a scheme to bribe executives of Telecommunications D’Haiti, S.A.M. (“Teleco”), which provides telecommunications services in Haiti, to relieve debts Terra had incurred against Teleco. Esquenazi and Rodriguez were charged with FCPA violations, conspiracy to violate the FCPA and other crimes.

In their defense, Esquenazi and Rodriguez argued that Teleco executives involved in the scheme were not “foreign officials” under the FCPA because Teleco was not part of a foreign government and, as a commercial enterprise, Teleco did not qualify as an “instrumentality” of a foreign government under the FCPA.

The government presented evidence to support that Teleco was an instrumentality of the Haitian government, including that: the Haitian government owned Teleco; at Teleco’s inception, it was given a monopoly on telecommunications services in Haiti; Teleco received significant tax advantages; the Haitian government appointed members of Teleco’s board; and Esquenazi and Rodriguez sought political risk insurance.

FCPA Prior to Esquenazi

The FCPA makes it unlawful to, among other things, “make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity . . . in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”

The FCPA defines “foreign official” as any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.” The FCPA does not, however, define the term “instrumentality.”

Definition of “Instrumentality”

Esquenazi and Rodriguez argued that state-owned entities like Teleco were not intended to be covered by the FCPA as an “instrumentality.” They further argued that, if state-owned entities could be covered by the FCPA, entities like Teleco, which engage in wholly commercial enterprises, did not fall within the meaning of the term “instrumentality.”

The court, however, held that an “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. The court explained that its analysis was guided by the question of whether the foreign government “considers the entity to be performing a governmental function.” The court’s analysis emphasized two elements: whether the government “controls” the entity; and whether the entity is performing a function that the foreign government “treats as its own.” For each of these elements, the court set forth a non-exhaustive list of factors to consider.

In determining whether a government “controls” an entity, the court offered the following factors:

- the foreign government’s formal designation of their 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 to the government and 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 determining whether the entity at issue “performs a function the government treats as its own,” the court offered the following 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.

Ultimately, the court rejected the defendants’ invitation to limit the term only to entities that perform traditional, core government functions. The court found that: Teleco was an instrumentality of the Haitian government; it was controlled by the Haitian government; and in providing nationalized telecommunication services, performed a function the Haitian government treated as its own.

Implications

Unfortunately, the Eleventh Circuit’s fact-bound approach to defining instrumentality, will leave companies doing business overseas struggling with the question of whether their business counterparts abroad will be considered “foreign officials” under the FCPA. Prudent companies should consider treating any entity owned or controlled by a foreign government, even in part, as a foreign governmental “instrumentality” for purposes of FCPA compliance.

[1] No. 11 11 15331 (11th Cir. May 16, 2014)